2024:DHC:4399

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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(C) 15276/2023 and CM APPL. 61207/2023

Reserved on : 24 May 2024
Pronounced on : 28 May 2024

DELHI TAMIL EDUCATION ASSOCIATION ..... Petitioner
Through: Mr. Romy Chacko and Mr. Sachin Singh Dalal, Advs.

Versus

DIRECTOR OF EDUCATION AND ORS ..... Respondents
Through: Mr. Yeeshu Jain, ASC with Ms. Jyoti Tyagi and Mr. Hitanshu Mishra, Advs.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

JUDGMENT

% 28.05.2024

The controversy

1. The petitioner Delhi Tamil Education Association (DTEA) came into existence in 1923 as a vehicle to promote and propagate the Tamil language and the culture and ethos of the Tamils. The DTEA runs seven schools with 6879 students. All the schools are admittedly aided linguistic minority schools.

2. 4 posts of Principal and 108 posts of teacher, out of 374 sanctioned posts in the petitioner's schools, are presently vacant. The petitioner has addressed numerous representations to the respondent

Directorate of Education (DoE) for grant of clearance to fill in the said posts. Various clarifications were sought by the DoE from the petitioner which, too the petitioner provided. On finding that the DoE was still not granting clearance to fill in the vacant posts in the petitioner's schools, the petitioner has instituted the present writ petition. The petitioner seeks issuance of an appropriate writ, either declaring that the petitioner does not require clearance of the DoE to fill up the vacant posts of Principal and teacher or, in the alternative, directing the DoE to provide the necessary clearance post haste.

3. It is submitted that the standard of education in the petitioner's schools is being seriously compromised as a result of the deficit in principals and teachers. Nearly 30% of the sanctioned posts of teachers are lying vacant. Mr. Chacko, learned counsel for the petitioner, submits that the situation has reached alarming proportions and that, if the DoE continues to remain unresponsive and the petitioner is not allowed to fill in the vacancies of Principals and teachers in its schools, the schools themselves would have to be shut down.

4. The present writ petition was first listed before the Court on 28 November 2023, on which date notice was issued to the respondents. Shortly thereafter, on 1 December 2023, the Deputy Director of Education (DDE), in the office of the DoE, rejected the petitioner's proposal for filling up of 52 vacant posts through direct recruitment in the petitioner's schools on the sole ground that there was no Managing Committee in the said schools. In the rejoinder filed by way of

response to the said counter-affidavit, this allegation has been pointedly disputed in the following paragraph:

> "3. The statement in the counter affidavit that the petitioner is running seven DTEA Schools without individual management committee in violation of DSEAR 1973 and Memorandum of Association (MoA) of DTEA is without any merit and hence denied. Each school is having a separate managing committee. True copy of the composition of the managing committee of all seven schools is annexed and marked as **Annexure P13**. The Secretary of the governing body of the petitioner is legally competent to represent all the seven schools."

Annexed, to the rejoinder, is the composition of the Managing Committee of all the seven schools run by the petitioner.

Facts

5. With this backdrop, the relevant facts, which are brief, may be noted thus.

6. As required by order dated 4 February 2021 issued by the DoE, calling on the Managing Committees of aided schools to submit proposals for clearance of vacant posts through direct recruitment, the petitioner, on 10 March 2023, sought clearance to fill up 4 vacancies of Principal, 39 vacancies of Teachers, 2 vacancies of Librarian, 2 vacancies of Lab Assistant, 1 vacancy of Head Clerk and 4 vacancies of UDC in the schools managed by the petitioner.

7. *Vide* noting dated 8 May 2023, the DoE raised the following queries on the petitioner, with respect to its request :

> "File may be returned with following remarks:-
>
> (i) Reservation of PWD has been revised from 3% to 4% in the RPWD Act-2016 notified on 27/12/2016. Also see the RPWD Rules-2017 notified on 15/06/2017 issued by Ministry of Social Justice and Empowerment- Notification revised the PBR accordingly.
>
> (ii) Current post fixation order 2022-23 is not available in the file.
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> (iii) Post of UDC is not a direct recruitment post where as 4 post have been proposed to fill through DPC.
>
> (iv) Vacancy statement with unfilled vacancies of last recruitment made required. (Closure statement)
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> (v) Post fall vacant after last recruitment required.
>
> (vi) Whether vacancies has been recovered after promotion of all eligible staff as per ratio/percentage for promotion mentioned in the RR of respective post. Certificate to the effect required.
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> (vii) Certificate from concerned Principal is required that no eligible teacher/staff duly countersigned by Manager DTEA.
>
> S.O (Zone-19)"

8. The petitioner responded to the aforesaid queries by way of communication dated 12 July 2023.

9. *Vide* file noting dated 9 June 2023, 20 more discrepancies were alleged to have been found, regarding which clarification was sought from the petitioner. The petitioner provided the said clarifications, point-wise, *vide* response dated 26 July 2023.

10. As, despite having thus answered all the queries raised by the DoE, the petitioner was not being granted clearance by the DoE to fill up the existing vacancies of Principals, teachers and other staff in the various schools run by it, the present writ petition came to be instituted.

Rival Submissions

Submissions of Mr Romy Chacko for the petitioner

11. Mr. Romy Chacko, learned Counsel for the petitioner, submits that the real reason for refusing to grant clearance to the petitioner to fill up the vacancies of Principals and teachers in its various schools is to be found in para 12 of the counter-affidavit:

> "12. That there are 7 DTEA schools under the petitioner, and these were running without individual Managing Committee. which is violation of DSEAR 1973 and Memorandum of Association of DTEA also. The Hony. Secretary of Governing body of the petitioner has no legal sanctity to represent all issues on behalf of Manager of all the schools."

12. It is this reason, points out Mr. Chacko, which also figures in the rejection letter dated 1 December 2023 issued on the heels of the notice issued by this Court on 28 November 2023. Having thus sought to justify the rejection of the petitioner's request to fill up the vacancies of Principal and Teacher in the Schools run by the petitioner on the sole ground that the petitioner schools did not have individual Managing Committees, Mr. Chacko submits that, given the position of law enunciated in para 8 of ***Mohinder Singh Gill v. Chief Election Commissioner***[1], the DoE cannot seek to justify the decision to refuse clearance to the petitioner to fill up its vacancies on any other ground. Nor, submits Mr. Chacko, can any other ground be cited either in the counter-affidavit or in oral arguments before this Court.

[1] **(1978) 1 SCC 405**

13. In so far as the sole ground contained in para 12 of the counter-affidavit and in the communication dated 1 December 2023 is concerned, Mr. Chacko submits that it is factually incorrect. He has referred me to para 3 of the rejoinder, already extracted in para 4 (*supra*). He also refers to the annexures filed with the rejoinder, which contain the details of the individual Managing Committees of the various schools run by the petitioner. Even on this sole ground, therefore, Mr. Chacko submits that the present writ petition is entitled to succeed.

14. Mr. Chacko, thereafter, proceeds to address the larger issue of whether the petitioner, as an aided minority school, was at all required to obtain clearance from the DoE before filling up the vacancies of Principals and teachers. He submits that Article 30(1)[2] of the Constitution of India guarantees the petitioner, as a minority institution, absolute right of establishment and administration. There is no dispute about the fact that the petitioner DTEA is a linguistic minority Association and that, therefore, the schools run by it are linguistic minority educational institutions. In view of Article 30(1) of the Constitution, Mr. Chacko submits that the State cannot take any steps which compromise on the autonomy of the petitioner Association to establish and administer its schools. Establishment and administration includes, within it, the right to fill vacancies of teachers, Principals and staff.

[2] **30. Right of minorities to establish and administer educational institutions**. –
(1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

15. This position, he submits also flows from the statutory provisions contained in the Delhi School Education Act, 1973 ("the DSE Act") and the Delhi School Education Rules, 1973 ("the DSE Rules"). He has referred me to Rules 96 and 98 of the DSE Rules. Rule 96(1)[3], he points out excludes its applicability to unaided minority schools. In the case of aided schools, Rule 96(3)(a)[4] deals with recruitment of the Head of the School and Rule 96(3)(b)[5] deals with appointment of teachers. In the case of recruitment of the Head of the School, Rule 96(3)(a)(iii) provides that the Selection Committee shall consist of two educationists nominated by the DoE, of which one is to be a person having experience of school education. In the case of appointment of a teacher, Rule 96(3)(b)(v) provides for certain nominees and representatives of the DoE forming part of the Selection Committee. Rule 96(3-A)[6], however, proceeds to declare that in the

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[3] **96. Recruitment**
(1) Nothing contained in this Chapter shall apply to an unaided minority school.

[4] (3) The Selection Committee shall consist of:—
(a) in the case of recruitment of the head of the school,:-
(i) A the Chairman of the managing committee;
(ii) in the case of an unaided school, an educationist is nominated by the managing committee, and an educationist nominated by the Director;
(iii) in the case of an aided school, two educationists nominated by the Director, out of whom at least one shall be a person having experience of school education;
(iv) a person having experience of the administration of schools, to be nominated, in the case of an unaided school by the managing committee, or in the case of an aided school, by the Director;

[5] (b) in the case of an appointment of a teacher (other than the head 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 school;
(iii) in the case of a primary school, a female educationist having experience of school education;
(iv) in the case of an aided school, one educationist to be nominated by the Director, and one representative of the Director;
(v) in the case of appointment of a teacher for any class in the middle stage or any class in the higher secondary stage, an expert on the subject in relation to which the teacher is proposed to be appointed, to be nominated, in the case of an unaided school by the managing committee, or in the case of an aided school, by the Director.

[6] (3-A) Notwithstanding anything contained in sub-rule (3), in the case of an aided minority school, the educationists nominated under paragraph (iii) of clause (a) of sub-rule (3), persons nominated by the Director under paragraph (iv) of clause (a) of sub-rule (3), educationists nominated under paragraph (iv) of clause (b)

case of an aided minority school, the educationists, to whom the various provisions of Rule 96(3) refer, would act only as advisors and would not have the power to vote or actually control the selection of an employee. As such, points out Mr. Chacko, Rule 96 of the DSE Rules, while absolutely excluding unaided minority schools from its ambit, provides that even in respect of aided minority schools, such as those run by the petitioner, the representatives of the DoE, who are envisaged as being part of the Selection Committee for appointment of Principal or teachers would only be observers, who would have no power to vote or control the selection itself. The autonomy that Article 30(1) of the Constitution provides to aided minority schools, therefore, he submits is tellingly underscored in Rule 96(3-A) of the DSE Rules.

16. This autonomy is again reflected in Rule 98 which deals with the "appointing authority". While Rule 98(1)[7] envisages that the appointment of every employee of a school shall be made by its Managing Committee and Rule 98(2)[8] requires every appointment made by the Managing Committee of an aided school to be provisional and made with the approval of the DoE, the second

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of sub-rule (3), an expert nominated under paragraph (v) of clause (b) of sub-rule (3), a person nominated under paragraph (iii) of clause (c) of sub-rule (3), officers nominated under paragraph (iv) of clause (c) of sub-rule (3), a person nominated under paragraph (iii) of clause (b) of sub-rule (3), shall act only as advisers and will not have the power to vote or actually control the selection of an employee.

[7] **98. Appointing authority –**

(1) The appointment of every employee of a school shall be made by its managing committee.

[8] (2) Every appointment made by the managing committee of an aided school shall, initially, be provisional and shall require the approval of the Director:

Provided that the approval of the Director will be required only where Director's nominee was not present in the Selection Committee/DPC or in case there is difference of opinion among the members of the Selection Committee:—

Provided further that the provision of this sub-rule shall not apply to a minority aided school.

proviso to Rule 98(2) excepts its applicability to aided minority schools.

17. Mr. Chacko also refers to Section 8(2)[9] of the DSE Act in conjunction with Section 12[10] thereof, and the judgment of the Supreme Court in ***Frank Anthony Public School Employees Association v. UOI***[11]. Section 8(2) provides that, subject to any rule made in that behalf, no employee of a recognized private school shall be dismissed, removed, reduced in rank or terminated except with the prior approval of the DoE. Mr. Chacko submits that in ***Frank Anthony Public School Employees Association***, the Supreme Court held that Section 8(2) is not applicable to minority schools, thereby once again emphasising the autonomy to which minority educational institutions are entitled.

18. The right of autonomy of the petitioner to manage the affairs of its educational institutions and, in the process, to appoint the Principal, teachers and staff, he submits, flows from a combined reading of Article 29(1)[12] and Article 30(1) of the Constitution of India. He relies on the judgment of the Supreme Court in ***Ahmedabad St. Xavier's College Society v. State of Gujarat***[13] to submit that the right to establishment and administer includes the right to appoint teachers and

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[9] (2) Subject to any rule that may be made in this behalf, no employee of a recognised private school shall be dismissed, removed or reduced in rank nor shall his service be otherwise terminated except with the prior approval of the Director.

[10] **12. Chapter not to apply to unaided minority school**. – Nothing contained in this Chapter shall apply to an unaided minority school.

[11] **1986 (4) SCC 707**

[12] **29. Protection of interests of minorities**. –
(1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

[13] (**1974) 1 SCC 717**

Heads of the schools. This position, he submits is also reiterated in paras 50 and 123 of the judgment of the 11-judge Constitution Bench of the Supreme Court in ***T.M.A. Pai Foundation v. State of Karnataka***[14].

19. Mr Chacko submits that, following ***Pai***, a question arose as to whether aided minority institutions would have the right to choose their Principal and teachers and as to whether the State could place any restrictions thereon. This issue, which originated in the State of Kerala, travelled to the Supreme Court which, in ***Secretary, Malankara Syrian Catholic College v. T. Jose***[15], after taking into consideration the decisions in ***Pai***, ***State of Kerala v. Very Rev. Mother Provincial***[16], ***Ahmedabad St. Xavier College Society***, ***Frank Anthony Public School Employees Association, N. Ammad v. Manager, Emjay High School***[17], ***Board of Secondary Education & Teaching Training v. Joint Director of Public Instructions***[18], ***In Re. Kerala Education Bill, 1957***[19], ***Rev. Sidhajbhai v. State of Bombay***[20], ***D.A.V. College v. State of Punjab***[21], ***All Saints High School v. Government of A.P.***[22] and ***St. Stephen's College v. University of Delhi***[23], held that aided minority institutions enjoy an absolute and untrammelled right to select their staff including their Principals and teachers, and that no restriction on such right could be placed by the

[14] **(2002) 8 SCC 481**
[15] **(2007) 1 SCC 386**
[16] **(1970) 2 SCC 417**
[17] **1998 (6) SCC 674**
[18] **(1998) 8 SCC 555**
[19] **AIR 1958 SC 956**
[20] **1963 (3) SCR 837**
[21] **1971 (2) SCC 269**
[22] **1980 (2) SCC 478**
[23] **1992 (1) SCC 558**

State, as any such restriction would violate Article 30(1) of the Constitution of India. It was also held, in the said decision, that receipt of aid from the State, irrespective of the extent thereof, could not dilute the fundamental right conferred by Article 30 of the Constitution. Mr. Chacko submits that a minority educational institution, by its very nature, is intended to promote and propagate the culture and tradition of the concerned minority schools and that in selecting its teachers and Principal, the institution would necessarily bear in mind the extent to which the persons so selected subscribed to the ethos and principles of the minority. Relying on para 6 of the decision in ***Manager, Corporate Educational Agency v. James Mathew***[24]**,** Mr. Chacko submits that the Court cannot sit in judicial review over the choice, rationality or propriety of the selection made by a Minority Educational Institution of the person to be appointed as its Head Master, as Article 30 (1) confers, on the minority educational institution, an absolute fundamental right in that regard.

20. To support the above submissions, Mr. Chacko also relies on

(i) paras 18, 20 and 21 of ***Frank Anthony Public School Employees Association***,

(ii) paras 87, 101 to 103, 111 to 115 and 119 of ***Sindhi Education Society v. Govt. of NCT of Delhi***[25],

(iii) paras 8 and 14 of ***Queens Mary School v. UOI***[26],

(iv) paras 43 to 60 of ***Kiran Jain v. GNCTD***[27] and

[24] **(2017) 15 SCC 595**
[25] **(2010) 8 SCC 49**
[26] **185 (2011) DLT 168 (DB)**
[27] **2023 SCC Online Del 6353**

(v) paras 42 to 45 of the judgment of a learned Single Judge of this Court in ***Birpal Singh v. Nutan Marathi Senior Secondary School***[28].

21. Mr. Chacko submits that, in its counter-affidavit, the DoE has placed reliance on a Circular dated 20 January 2021 issued by the Assistant Director of Education (ADE) in the DoE, which conveys the decision of the DoE to deploy guest teachers in aided schools as a temporary measure till vacancies in the said schools are filled in by direct recruitment or promotion. The Circular reads thus:

"F.No.DE .15/38/ASB/2021/103-109 **Dated: 20.01.2021**

Circular

Sub:- Providing **Guest** Teacher **in Govt. Aided Schools.**

It has been decided to deploy Guest Teachers in Government Aided School as a temporary measure till the vacancies in these schools are filled through Direct Recruitment /Promotion. The following terms and conditions has been laid down in this regard.

1. The Management Committee has to submit a formal request for deployment of Guest Teachers in their aided school against the vacant post of the concerned subject.

2. The Management Committee must agree to pay 5% of their share towards payment of salary to the Guest Teachers.

3. A list of subject wise Guest Teachers will be provided by E-V Branch through ASB Branch to the Govt. Aided School as per their requirement.

4. Deployment of Guest Teacher is temporary arrangement till the posts are filled on regular basis in their respective school.

5. Other terms and conditions of deployment of Guest Teacher in Government Aided School shall be same as on the

[28] **2022 SCC Online Del 2720**

terms and conditions of government schools.

This issues with the approval of Director Education.

ADE (ASB)"

22. Further in paras 15 to 17 and 25 of the counter-affidavit, the respondent avers:

> **"**15. That there is a current proposal which is under active consideration of the Answering Respondent for recruitment of all the teaching and non- teaching staff in all the Govt. Aided Schools (including Minority Schools) through a fair process which is completely transparent, objective and the same is to take into consideration the merit besides confirming to the mandatory RRs and other norms .
>
> 16. That a Committee for studying the recruitment process in Govt . Aided School and to suggest the measures to streamline the recruitment process has been constituted by the Hon'ble Lt . Governor of NC I of Delhi vide order dated 10.10 .2023. It is further submitted that the said committee has already submitted its report to the competent authority with the recommendation for recruitment process to be used in Govt. Aided School. The copy of the order dated 10.10.2023 is annexed as Annexure R-4.
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> 17. That the DSEAR, 1973, came into existence in the year 1973 . However, Delhi Subordinate Services Selection Board (in short *" DSSSB ")* was constituted in the year 1997. It is further submitted that the RR' s as applicable in Govt . Schools and the Govt . Aided Schools are same except for the post of Assistant Teacher. Principal and Vice- Principal . That till the said proposal of recruitment through DSSSB is finalized, the process of recruitment was stopped.
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> *****
>
> 25. That keeping in view of the above facts and circumstances, the Answering Respondents have while exercising its powers under the DSEAR, 1973 of being a regulatory body decided to get the recruitment in Aided schools from the DSSSB through open, fair and transparent competition. That as the said proposal is under the active consideration of the Answering Respondents, therefore, recruitment in all the Aided Schools (even minority schools) has been put to a halt till the time such proposal attains finality so that the points as mentioned above regarding the corruption in

recruitment and the other malpractices may be avoided in future."

23. Mr. Chacko submits that the proposal presently under consideration with the DoE, to which the afore-extracted paragraphs in the counter-affidavit refer, cannot apply to a minority school, in view of Article 30(1) of the Constitution.

24. There is, therefore, submits Mr. Chacko, no legally sustainable justification whatsoever for the respondent not permitting the petitioner to fill up the vacant posts of Principal and teachers in its schools.

25. In these circumstances, Mr. Chacko submits that a clear case is made out for grant of the reliefs sought in the writ petition.

Submissions of Mr. Yeeshu Jain in reply

26. Responding to Mr. Chacko's submissions, Mr. Yeeshu Jain, appearing for the DoE, relies on the communication dated 1 December 2023 *supra* whereby the DoE had rejected the petitioner's proposal for filling up 52 vacant seats through direct recruitment as there was no Managing Committee in the DTEA Schools. He placed reliance, in this context, on Rule 59(2)(j) to (l) and (r)[29] of the DSE Rules. These

[29] **59. Scheme of management of recognised schools**

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(2) The scheme of management shall also provide for the following, namely:—

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(j) no employee of an aided school (other than the head of school) shall be appointed as the manager, the head of school may be appointed the manager of a school, whether aided or unaided;

(k) appointment of the manager; the terms and conditions of his appointment; removal of the manager; filling up of casual vacancy in the office of the manager, duties

provisions, he submits, apply equally to all schools including aided and unaided minority schools.

27. Mr. Jain especially emphasizes the objection contained at S. No.18 of the list of objections communicated by the DoE to the petitioner *vide* file noting dated 9 June 2023, in which it was noted that one person by name R. Raju had signed in the capacity of the Manager for all the schools of the Petitioner Association and was also holding the post of Secretary of the Management of the Association, in clear violation of Rule 59(2)(r) of the DSE Rules.

28. The response of the petitioner to this objection, points out Mr. Jain, acknowledged the fact that all seven DTEA schools were being run by a single management with one manager. This, he submits, is directly contrary to Rule 59(2)(r) of the DSE Rules.

29. Apropos Mr. Chacko's submission that, owing to deficit of teachers, schools under the petitioner Association were suffering, Mr. Jain submits that it was precisely for this reason that, by Circulars dated 20 January 2021 and 9 June 2023, the DoE offered to provide guest teachers so that the students would not suffer.

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and responsibilities of the manager;

(l) bills (including bills relating to the salaries and allowances of the teachers and nonteaching staff) shall be jointly signed by the manager and the head of the school; but where the head of the school is also the manager, such bills shall be signed jointly by the head of the school and another member of the managing committee specially authorised by that committee in this behalf;

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(r) manager shall not be at the same time the manager of any other school and a person shall not be at the same time the chairman of the managing committee and the manager,

30. On the extent to which the DoE could regulate the affairs of the aided minority schools in the matter of recruitment of teachers and Heads of the Schools, Mr. Jain places reliance on paras 14 and 30 of the counter-affidavit, which read thus :

> "14. That it is pertinent to mention here that there were malpractices and undue favour being given to some of the candidates being reported in respect of recruitment of staff (teaching as well as non-teaching) in the Aided schools (including Minority schools). The reasons for slopping the recruitment process in Govt. Aided School is mentioned below:
>
> A. It is submitted that it was noticed that the recruitment process which was being followed in Aided Schools was not transparent and the Answering Respondents were receiving complaints wherein it was also alleged that the selection recruitment process is fixed due to collusion between the selection committee of the aided schools and the department.
>
> B. It was also alleged that the screening of the applicants is not transparent as only few applicants are given acknowledgement and all the applicants were not given acknowledgements of applications which are received from all the eligible application.
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> C. It is further submitted that there was no audit of the selection process either during the process of selection or post selection since the file comes only for approval of the candidate(s) who have been selected by the respective school managing committee.
>
> D. It was also alleged by certain candidates that they have not been called for interview though they were in the merit list.
>
> E. It was also alleged that the documents like experience certificate and genuineness of the qualification are compromised .
>
> F . In terms of aided minority schools the condition is much more serious wherein the role of Directors' Nominee is merely advisory and non-binding, in terms of Rule 127 and 128 of DSEAR, 1973."

31. The counter-affidavit proceeds, thereafter, to quote, copiously, from the judgment of the Supreme Court in ***State of Uttar Pradesh v. Principal Abhay Nandan Inter College***[30]. In view of the law laid down in ***Abhay Nandan Inter College***, Mr. Jain submits that the restrictions placed by the DoE on the petitioner cannot be regarded as unconstitutional. He submits that the DoE was acting only in the interest of teachers and the students of the petitioner school and that as 95% aid for running the schools was provided by the DoE, it could not be denied the right to do so.

32. Briefly rejoining to the submissions of Mr. Jain, Mr. Chacko submits that the judgment of the Supreme Court in ***Abhay Nandan Inter College*** dealt with the appointment of teachers to Madrasas in the context of an entirely different statute, which had nothing to do with the DSE Act and the DSE Rules. In so far as the offer of the respondent to provide Guest Faculty is concerned, he submits that the DSE Act and the DSE Rules do not envisage any such Guest Faculty.

Analysis

Scope of the controversy

33. It is necessary to understand the exact scope of the controversy in the present case. We are not concerned, here, with the service conditions of employees, fixation of fees or such other matters. The

[30] **(2021) 15 SCC 600**

petitioner has been compelled to approach this Court only because there is a serious deficit of teachers and Principals in the schools run by the petitioner, which is causing prejudice to the imparting of education. Out of 374 sanctioned posts in the petitioner schools, 4 posts of Principals and 108 posts of teachers are vacant. This works out to almost a third of the strength of the teaching staff in the schools. It is obvious that something has to be done about it.

34. The petitioner approached the DoE on 10 March 2023, seeking clearance to appoint 52 teachers and fill other staff vacancies in its schools. Clarifications were twice sought by the DoE which were furnished by the petitioner on 26 July 2023. Thereafter, on 4 October 2023, the petitioner once again sought clearance to fill 4 posts of Principals. These communications have not elicited any response, whatsoever, from the DoE. The petitioner had no option but to approach this Court.

35. As already noted, something has to be done. Quiescence is not an option. 4 posts of Principal and 108 posts of teachers cannot be allowed to remain unfilled *ad infinitum*. If the DoE is not acting, the Court must act. The posts have to be filled.

36. After the present petition was filed, the DoE has, by its communication dated 1 December 2023, written to the petitioner rejecting the request for filling up all the vacant posts. The sole ground urged in the said communication is that there was no Managing Committee in the petitioner's schools. None of the grounds which find

place in the earlier clarification sought by the DoE from the petitioner, find place in the communication dated 1 December 2023.

37. Re. submission that communication dated 1 December 2023 is not under challenge: Mr. Jain sought to contend that the communication dated 1 December 2023 has not been challenged. It need not be. Having remained silent on the petitioner's representation for years, driving the petitioner to litigate, the DoE cannot now use a belated rejection order as a ground to relegate the petitioner to a fresh round of litigation. In any event, learned Counsel for both sides have advanced detailed arguments regarding all aspects of the case, including the justifiability of the communication dated 1 December 2023, and I propose to decide the issue by this judgment.

38. Respondent restricted to ground urged in communication dated 1 December 2023 – the ***Mohinder Singh Gill*** principle

38.1 Mr. Chacko has contended, and correctly, that once the respondent has restricted the justification for rejecting the petitioner's request to induct 52 teachers to the non-availability of any Managing Committee in the petitioner's schools, no other ground can now be sought by the respondent by way of counter affidavit or any oral argument. This position of law is as old as the hills. It was enunciated for the first time by Vivian Bose, J in ***Commissioner of Police, Bombay v. Gordhandas Bhanji***[31], which was followed by Krishna Iyer, J in ***Mohinder Singh Gill*** in passages which have become part of legal lore:

[31] **AIR 1952 SC 16**

> "8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J. in ***Commr. of Police, Bombay v. Gordhandas Bhanji***:
>
> > "Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."
>
> Orders are not like old wine becoming better as they grow older."

38.2 ***Mohinder Singh Gill*** has thereafter been followed by the Supreme Court any times without number *inter alia* in ***Bahadur Singh Lakhubahi Govil v. Jagdishbhai M Kamalaya***[32]***, Hindustan Petroleum Corporation v. Darius Shapur Chenai***[33]***, Bangalore Development Authority v. R. Hanumaih***[34]***, K.K. Bhalla v. State of MP***[35]***, Ashoka Smokeless Goal Industries Pvt Ltd v. UOI***[36]***, State of Punjab v. Bandeep Singh***[37]***, Haryana Urban Dev. Authority v. Orchid Infrastructure Developers Pvt Ltd***[38]***, Opto Circuit India Ltd v. Axis Bank***[39]***, The Andhra Pradesh Industrial Infrastructure***

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[32] **(2004) 2 SCC 65**
[33] **(2005) 7 SCC 627**
[34] **(2005) 12 SCC 508**
[35] **(2006) 3 SCC 581**
[36] **(2007) 2 SCC 640**
[37] **(2016) 1 SCC 724**
38 (2017) 4 SCC 243
[39] **(2021) 6 SCC 707**

Corporation Limited v. S.N. Raj Kumar[40]***, Pancham Chand v. State of Himachal Pradesh***[41]***, Girish Vyas v. The State of Maharashtra***[42]***, Rashmi Metaliks Ltd. v. Kolkata Metropolitan Development Authority*** [43] and ***United Air Travel Services v. U.O.I.***[44].

38.3 The respondent is, therefore, bound, insofar as its attempt to justify its decision to reject the petitioner's request for inducting 52 teaching and non-teaching staff against the posts which are lying vacant, by the sole ground urged in the communication dated 1 December 2023.

39. Re. decision dated 1 December 2023

39.1 Mr. Chacko has demonstrated that on facts, that the ground for rejection, as contained in the communication dated 1 December 2023, is erroneous. Inasmuch as the rejection order dated 1 December 2023 has been issued after the present writ petition was filed, the traversal thereof has is to be found in para 3 of the rejoinder filed by the petitioner which stands reproduced in para 4 *supra*. In the said paragraph, the petitioner has clearly stated that each school run by the petitioner had a separate Managing Committee. The decisions of the said Managing Committees have also been provided with the rejoinder. The sole ground on which the petitioner's request for permission to appoint 52 teaching and non-teaching staff was rejected,

[40] **(2018) 6 SCC 410**
41 (2008) 7 SCC 117
[42] **(2012) 3 SCC 619**
[43] **(2013) 10 SCC 95**
[44] **(2018) 8 SCC 141**

therefore, falls to the ground.

40. Mr. Jain sought to contend that one Mr. Raju was working as a common Manager in all the petitioner schools, which according to him, is violative of Rule 59(2)(r) of the DSE Rules. No such ground having been urged by the respondent either in its counter affidavit or in the rejection communication dated 1 December 2023, the respondent cannot, strictly speaking, be permitted to urge such a ground. Nonetheless, I would be dealing with this ground hereinafter.

41. The question which survives – As the sole ground on which the petitioner's request to fill up the vacancies of teachers in its schools is, for this reason, unsustainable, the petitioner is entitled to fill the said vacancies. The only question that would survive is, therefore, whether the clearance of the DoE is at all needed to fill the vacancies of teachers and Principals or whether the petitioner can proceed to fill vacancies without clearance from the DoE.

42. Of course, in the facts of the present case, this discussion may be somewhat academic, as the petitioner in fact sought clearance from the DoE and the DoE rejected the request on a ground which has already been found to be unsustainable. Nonetheless, detailed arguments were advanced by the learned counsel on both sides on the petitioner's entitlement as an aided minority institution to fill up vacancies of teachers and Principals in its schools without having to seek prior approval of the DoE. I deem it appropriate, therefore, to deal with the issue.

43. Re. DoE Circular dated 20 January 2021

43.1 Before adverting to this aspect, I may refer to the Circular dated 20 January 2021 issued by the DoE, conveying the decision to deploy guest teachers in government aided schools as a temporary measure, till vacancies in the schools were filled by direct recruitment.

43.2 It is a matter of regret that this communication has been issued as far back as in 2021 and, though we are more than three years since that date, this communication is being urged by the DoE as a ground to justify its stand. Assuming, *arguendo*, that the DoE could appoint guest teachers in schools under its jurisdiction, that cannot be a permanent measure. Guest teachers, it is well known, are no substitute for regular teachers. They are not part of the regular sanctioned strength of the institutions in which they teach. They are guests. They teach at their convenience. Even if they are paid by the institution concerned, there is no employer-employee relationship between them. Their relationship with the institution is, if at all, essentially contractual. They do not constitute part of the staff strength of the institution, and owe no regular allegiance to it. The imparting of education to students in educational institutions cannot, therefore, be left to guest teachers, irrespective of their quality, or even eminence.

43.3 Mr. Chacko has sought to contend that there is, in fact, no provision in the DSE Act or the DSE Rules, which provides for appointing of guest teachers. I do not deem it necessary to enter into

this controversy. Even if appointing of guest teachers were to be permitted, that cannot be used by the DoE as a substitute for appointment of regular teachers. The proposal to provide guest teachers cannot, therefore, constitute any justification for the decision not to permit filling up of regular vacancies of teachers hanging fire for four years since 2021.

43.4 The Circular dated 20 January 2021, therefore, is no panacea to the institutions which are languishing for want of regular staff.

44. Mr. Chacko has pointed out that, even without referring to Article 30 (1) of the Constitution, the DSE Act and Rules themselves permit the petitioner, as an aided minority institution, to fill up the vacancies of principal and teachers in its schools without prior approval of the DoE. He has referred, in this context, to Rule 96 (3-A) and 98(2) of the DSE Rules and to Section 8 (2) of the DSE Act read with Section 12 thereof in the light of the judgment of the Supreme Court in ***Frank Anthony Public School Employees Association***. The reliance is well placed.

45. Rule 96 and 96(3-A) of the DSE Rules

45.1 Rule 96 of the DSE Rules deals with recruitment to teachers in schools. Sub-rule (1) thereof excludes its application to unaided minority schools. The said provision would not apply to the petitioner as it is an aided minority institution.

45.2 In the case of aided minority institutions, recruitment to the post of Head of the school is governed by Rule 96(3)(a) and recruitment to the post of teacher is governed by Rule 96(3)(b). Though these provisions envisage inclusion, in the selection committee which makes such appointments, of nominees of the DoE, Rule 96(3-A) states that DoE nominees would merely be advisors, who would have no power to vote or actually control the selection of the employee. They are, therefore, members of the selection committee merely in form, not in substance. They cannot play any part in the selection of either of the teachers or of the principal in the schools run by the aided minority institution. Effectively, therefore, the DoE has no control over the appointment of teachers or principals in the aided minority schools run by as the petitioner.

46. Rule 98(2) of the DSE Rules

46.1 This position is underscored even more tellingly, as Mr. Chacko correctly points out, by Rule 98(2) read with the second proviso thereto. Rule 98(2) provides that every appointment by a managing committee of an aided school would require the approval of the Director. In the case of minority institutions, however, the second proviso excepts the applicability of Rule 98(2). Statutorily, therefore, the appointment of any employee in an aided minority school, by the managing committee of the school, does not require the approval of the DoE.

46.2 There is, therefore, absolute autonomy, with the managing committee of any aided minority school, to appoint employees thereto.

47. The sequitur

47.1 These provisions, even by themselves, would conclude the issue in controversy. The statutory position that emerges from Rule 98(2) read with the proviso thereto, juxtaposed with Rule 96 of the DSE Rules, is that the vacant posts of principal and teachers in the schools run by the petitioner association can be filled by the managing committee of the petitioner association without prior approval of the Director. Even if the selection committee, which selects the employees for appointment to the said posts, is required to include certain nominees of the DoE, those nominees perform a mere advisory role and do not participate in the actual exercise of selection of the persons to be appointed.

47.2 Even on the basis of the afore-noted provisions of the DSE Act and DSE Rules, therefore, there can be no embargo on the petitioner filling up the vacant posts of principal and teachers in the schools run by it. No prior approval of the DoE is needed. At the highest, all that can be said is that the selection committee which makes such appointments would require the participation of nominees of the DoE in accordance with the Rule 96(3)(a) and 96(3)(b) of the DSE Rules. Needless to say, the DoE would necessarily have to nominate persons as part of the selection committee, so that these posts can be filled.

47.3 The writ petition is, therefore, entitled to succeed even on this score.

48. Section 8(2) and 12 of the DSE Act and the judgment in ***Frank Anthony Public School Employees Association***

48.1 The reference to Section 8(2) in conjunction with Section 12 of the DSE Act and the judgment of the Supreme Court in ***Frank Anthony Public School Employees Association*** is also, to my mind, apt.

48.2 ***Frank Anthony Public School Employees Association***

48.2.1 This was an appeal preferred by the association of the employee of Frank Anthony Public School Employees Association (FAPS), seeking equalisation of their pay-scales and conditions of service with teachers and employees of government schools.

48.2.2 FAPS was an unaided minority school. Sections 8 to 11 of the DSE Act equalised the pay-scales and conditions of service of teachers and employees in private schools with those of teachers and employees in government schools. The FAPS Employees' Association (FAPSEA) was aggrieved by Section 12 of the DSE Act, which stated that nothing contained in Chapter IV, which included Sections 8 to 11, would apply to an unaided minority school. The result was that the members of the FAPSEA, as employees of an unaided minority school, were excluded from the benefit of Sections 8 to 11. Their pay-scales and service of conditions were not, therefore, equalised with

those of the employees of government schools and continued to compare unfavourably with them. The FAPSEA, therefore, challenged Section 12 of the DSE Act before the High Court under Article 226 of the Constitution of India.

48.2.3 The Union of India, as well as the FAPS itself, sought to justify Section 12 of the DSE Act on the anvil of Article 30(1) of the Constitution of India. It was sought to be contended that, owing to the fundamental right of FAPS, as an unaided minority institution, to autonomy in establishment and administration, the provisions of Section 8 to 11 of the DSE Act could not be made applicable to the FAPS. If they were so made applicable, it was contended that it would entrench on the fundamental right of FAPS as guaranteed by Article 30(1) of the Constitution of India.

48.2.4 Needless to say, the FAPSEA contended, *per contra*, that Section 12 did not, in any manner, contravene or infract Article 30(1) of the Constitution of India.

48.2.5 The Supreme Court took note of the earlier decisions in ***Kerala Education Bill***, ***Rev. Sidhajbhai Sabhai, Very Rev. Mother Provincial, Ahmedabad St. Xaviers College Society*** and ***All Saints High School*** and proceeded to hold thus:

> "13. *Thus, there now appears to be a general and broad consensus about the content and dimension of the Fundamental Right guaranteed by Article 30(1) of the Constitution.* The right guaranteed to religious and linguistic minorities by Article 30(1) is twofold, to establish and to administer educational institutions of their choice. *The key to the article lies in the words "of their own choice". These words indicate that the extent of the right is to be*

determined, not with reference to any concept of State necessity and general societal interest but with reference to the educational institutions themselves, that is, with reference to the goal of making the institutions "effective vehicles of education for the minority community or other persons who resort to them". It follows that regulatory measures which are designed towards the achievement of the goal of making the minority educational institutions effective instruments for imparting education cannot be considered to impinge upon the right guaranteed by Article 30(1) of the Constitution. The question in each case is whether the particular measure is, in the ultimate analysis, designed to achieve such goal, without of course nullifying any part of the right of management in substantial measure. The provisions embodied in Sections 8 to 11 of the Delhi School Education Act may now be measured alongside the Fundamental Right guaranteed by Article 30(1) of the Constitution to determine whether any of them impinges on that fundamental right. Some like or analogous provisions have been considered in the cases to which we have referred. Where a provision has been considered by the nine-Judge Bench in ***Ahmedabad St. Xaviers College*** we will naturally adopt what has been said therein and where the nine-Judge Bench is silent we will have recourse to the other decisions.

14. *The principal controversy between the parties centred around Section 10 which requires that "the scales of pay and allowances, medical facilities, pension, gratuity, provident fund, and other prescribed benefits of the employees of the recognised private school shall not be less than those of the corresponding status run by the appropriate authority". The submission on behalf of the respondents was that the right to appoint members of staff being an undoubted right of the management and the right to stipulate their salaries and allowances etc. being part of their right to appoint, such right could not be taken away from the management of a minority institution.* The learned Additional Solicitor-General very fairly stated before us that there was no case in which it had been held that the right to pay whatever salaries and allowances they liked and stipulate whatever conditions they liked was part of the right to administer the minority institutions under Article 30(1) of the Constitution. On the other hand as we shall immediately point out there are observations to the contrary.

15. In the *Nine-Judge Bench case* Ray, C.J. and Palekar, J. as we have already seen, expressed the view that *the conditions of employment of teachers was a regulatory measure conducive to uniformity, efficiency and excellence in educational courses and did not violate the fundamental right of the minority institutions under Article 30.* Jaganmohan Reddy, J. and Alagiriswami, J. who

agreed with the conclusions of Ray, C.J. did not say anything expressly about salary, allowances and other conditions of employment of teachers. Khanna, J. expressed the view that to a certain extent the State may also regulate the conditions of employment of teachers and added that it would be permissible to make regulations for ensuring the regular payment of salaries before a particular date of the month. The latter statement of Khanna, J., it was contended for the respondents, limited the extent of the right of the State to regulate the conditions of employment of teachers. We cannot agree with this contention. The statement that the State may make regulations for ensuring the regular payment of salaries before a particular date of the month was in addition to what was said earlier that to a certain extent the State may also regulate the conditions of employment of teachers. In fact, while dealing with the question of disciplinary control, Khanna, J. also said that provisions calculated to safeguard the interest of teachers would result in security of the tenure and that would inevitably attract competent persons for the posts of teachers. The same thing may be said about better scales of pay and decent conditions of service. Mathew, J. with whom Chandrachud, J. agreed also indicated that economic regulations, social welfare legislation, wage and hour legislation and similar measures, where the burden was the same as that borne by others would not be considered on abridgement of the right guaranteed by Article 30(1). Thus, we see that *most of the learned Judges who constituted the nine-Judge Bench were inclined to the view that prescription of conditions of service which would have the effect of attracting better and competent teachers would not be considered violative of the fundamental right guaranteed by Article 30(1) of the Constitution. That would rightly be so because the mere prescription of scales of pay and other conditions of service would not jeopardise the right of the management of minority institutions to appoint teachers of their choice.*

16. *The excellence of the instruction provided by an institution would depend directly on the excellence of the teaching staff, and in turn, that would depend on the quality and the contentment of the teachers. Conditions of service pertaining to minimum qualifications of teachers, their salaries, allowances and other conditions of service which ensure security, contentment and decent living standards to teachers and which will consequently enable them to render better service to the institution and the pupils cannot surely be said to be violative of the fundamental right guaranteed by Article 30(1) of the Constitution.* The management of a minority Educational Institution cannot be permitted under the guise of the fundamental right guaranteed by Article 30(1) of the Constitution, to oppress or exploit its employees any more than any

other private employee. Oppression or exploitation of the teaching staff of an educational institution is bound to lead, inevitably, to discontent and deterioration of the standard of instruction imparted in the institution affecting adversely the object of making the institution an effective vehicle of education for the minority community or other persons who resort to it. *The management of minority institution cannot complain of invasion of the fundamental right to administer the institution when it denies the members of its staff the opportunity to achieve the very object of Article 30(1) which is to make the institution an effective vehicle of education.*

17. Apart from the learned Judges who constituted the nine-Judge Bench, other learned Judges have also indicated the same view. In the leading case of the ***Kerala Education Bill***, the Constitution Bench observed that, as then advised, they were prepared to treat the clauses which were designed to give protection and security to the ill-paid teachers who were engaged in rendering service to the nation as permissible regulations. The observations were no doubt made in connection with the grant of aid to educational institutions but that cannot make any difference since, aid, as we have seen, cannot be made conditional on the surrender of the right guaranteed by Article 30(1). In ***Mother Provincial*** it was said that to a certain extent the State may regulate conditions of employment of teachers. In ***All Saints High School*** Chandrachud, C.J., expressly stated that for the maintenance of educational standards of an institution it was necessary to ensure that it was competently staffed and therefore, conditions of service prescribing minimum qualifications for the staff, their pay scales, their entitlement to other benefits of service and the safeguards which must be observed before they were removed or dismissed from service or their services terminated were permissible measures of a regulatory character. Kailasam, J. expressed the same view in almost identical language. We, therefore, hold that Section 10 of the Delhi School Education Act which requires that the scales of pay and allowances, medical facilities, pension, gratuity, provident fund and other prescribed benefits of the employees of a recognised private school shall not be less than those of the employees of the corresponding status in schools run by the appropriate authority and which further prescribes the procedure for enforcement of the requirement is a permissible regulation aimed at attracting competent staff and consequently at the excellence of the educational institution. It is a permissible regulation which in no way detracts from the fundamental right guaranteed by Article 30(1), to the minority institutions to administer their educational institutions. Therefore, to the extent that Section 12 makes Section 10 inapplicable to unaided minority institutions, it is clearly discriminatory.

18. Section 8(1) merely empowers the Administrator to make rules regulating the minimum qualifications for recruitment, and the conditions of service of recognised private schools. Section 8(1) is innocuous and in fact Section 13 which applies to unaided minority schools is almost on the same lines as Section 8(1). *The objection of the respondents is really to Section 8(2), 8(3), 8(4) and 8(5) whose effect is (1) to require the prior approval of the Director for the dismissal, removal, reduction in rank or other termination of service of an employee of a recognised private school,* (*2*) to give a right of appeal to a Tribunal consisting of a single member who shall be a District Judge or who has held an equivalent judicial office, (*3*) to require prior approval of the Director if it is proposed to suspend an employee unless immediate suspension is necessary by reason of the gross misconduct of the employee in which case the suspension shall remain in force for not more than 15 days unless approval of the Director is obtained in the meanwhile. In the *Nine-Judge Bench case* Ray, C.J. and Palekar, J. took the view that *Section 51-A of the Gujarat Act which provided that no member of the staff of an affiliated college shall be dismissed, removed or reduced in rank except with the approval of the Vice-Chancellor was violative of Article 30(1) as it conferred arbitrary power on the Vice-Chancellor to take away rights of the minority institutions.* Similarly, Section 52-A which contemplated reference of any dispute connected with conditions of service, between the governing body and any member of the staff to an Arbitration Tribunal consisting of one member nominated by the governing body, one member nominated by the member of the staff and an Umpire appointed by the Vice-Chancellor was also held to be violative of Article 30(1). It was said that this provision would introduce an area of litigious controversy in educational institutions and displace the domestic jurisdiction of the management. Jaganmohan Reddy, J. and Alagiriswami, J., agreed with the conclusions of Ray, C.J. Khanna, J. thought that the blanket power given by Section 51-A to the Vice-Chancellor to veto the disciplinary action and the power given by Section 52-A to the Vice-Chancellor to nominate an Umpire were both objectionable, though he observed that there was nothing objectionable in selecting the method of arbitration for settling major disputes. Mathew, J., also objected to the blanket power given to the Vice-Chancellor by Section 51-A. He also thought that Section 52-A was too wide and permitted needless interference in day-to-day affairs of the institution by providing for arbitration in petty disputes also. *Keeping in-mind the views of the several learned Judges, it becomes clear that Section 8(2) must be held to be objectionable.* Section 8(3) provides for an appeal to the Tribunal constituted under Section 11, that is, a Tribunal consisting of a

person who has held office as a District Judge or any equivalent judicial office. The appeal is not to any departmental official but to a Tribunal manned by a person who has held office as a District Judge and who is required to exercise his powers not arbitrarily but in the same manner as a court of appeal under the Code of Civil Procedure. The right of appeal itself is confined to a limited class of cases, namely, those of dismissal, removal or reduction in rank and not to every dispute between an employee and the management. The limited right of appeal, the character of the authority constituted to hear the appeal and the manner in which the appellate power is required to be exercised make the provision for an appeal perfectly reasonable, in our view. The objection to the reference to an Arbitration Tribunal in the *Nine-Judge Bench case* was to the wide power given to the Tribunal to entertain any manner of dispute and the provision for the appointment of Umpire by the Vice-Chancellor. Those defects have been cured in the provisions before us. Similarly, the provision for an appeal to the Syndicate was considered objectionable in ***Very Rev. Mother Provincial*** as it conferred the right on the University.

19. Section 8(4) would be inapplicable to minority institutions if it had conferred blanket power on the Director to grant or withhold prior approval in every case where a management proposed to suspend an employee but we see that it is not so. The management has the right to order immediate suspension of an employee in case of gross misconduct but in order to prevent an abuse of power by the management a safeguard is provided to the employee that approval should be obtained within 15 days. The Director is also bound to accord his approval if there are adequate and reasonable grounds for such suspension. The provision appears to be eminently reasonable and sound and the answer to the question in regard to this provision is directly covered by the decision in ***All Saints High School*** where Chandrachud, C.J. and Kailasam, J. upheld Section 3(3)(*a*) of the Act impugned therein. We may also mention that in that case the right of appeal conferred by Section 4 of the Act was also upheld. How necessary it is to afford some measure of protection to employees, without interfering with the management's right to take disciplinary action, is illustrated by the action taken by the management in this very case against some of the teachers. These teachers took part along with others in a “silent march”, first on April 9, 1986 and again on April 10, 1986, despite warning by the principal. The march was during the break when there were no classes. There were no speeches, no chanting or shouting of slogans, no violence and no disruption of studies. The behaviour of the teachers appears to have been orderly and exemplary. One would have thought that the teachers were, by their silent and dignified protest, setting an

example and the soundest of precedents to follow to all agitators everywhere. But instead of sympathy and appreciation they were served with orders of immediate suspension, something which would have never happened if all the provisions of Section 8 were applicable to the institution.

20. *Thus, Sections 8(1), 8(3), 8(4) and 8(5) do not encroach upon any right of minorities to administer their educational institutions. Section 8(2), however, must, in view of the authorities, be held to interfere with such right and, therefore, inapplicable to minority institutions.* Section 9 is again innocuous since Section 14 which applies to unaided minority schools is virtually on the same lines as Section 9. We have already considered Section 11 while dealing with Section 8(3). We must, therefore, hold that Section 12 which makes the provisions of Chapter IV inapplicable to unaided minority schools is discriminatory not only because it makes Section 10 inapplicable to minority institutions, but also because it makes Sections 8(1), 8(3), 8(4), 8(5), 9 and 11 inapplicable to unaided minority institutions. That the Parliament did not understand Sections 8 to 11 as offending the fundamental right guaranteed to the minorities under Article 30(1) is evident from the fact that Chapter IV applies to aided minority institutions and it cannot for a moment be suggested that surrender of the right under Article 30(1) is the price which the aided minority institutions have to pay to obtain aid from the Government.

21. The result of our discussion is *that Section 12 of the Delhi School Education Act which makes the provisions of Chapter IV inapplicable to unaided minority institutions is discriminatory and void except to the extent that it makes Section 8(2) inapplicable to unaided minority institutions. We, therefore, grant a declaration to that effect and direct the Union of India and the Delhi Administration and its officers, to enforce the provisions of Chapter IV [except Section 8(2)] in the manner provided in the chapter in the case of the Frank Anthony Public School. The management of the school is directed not to give effect to the orders of suspension passed against the members of the staff.*"

(Emphasis supplied)

48.2.6 Thus, the Supreme Court held that regulatory measures put in place by the DoE towards effective imparting of education by minority educational institutions do not infract Article 30 (1) of the Constitution of India. They cannot, however, nullify, to any extent at

all, the right of such institutions to establish and mange their affairs. Any such trespass into the arena of establishment and administration of the affairs of a minority educational institution would *ipso facto* infract Article 30 (1).

48.2.7 *Conditions of employment of teachers* were held to be regulatory measures, conducive to uniformity, efficiency and excellence in educational courses and did not, therefore, infract Article 30(1). Regulatory measures which regulated the conditions of employment of teachers and staff in minority educational institutions, aided or unaided, are, therefore, valid. Specifically, in para 15 of the report, the Supreme Court holds that "the mere prescription of scales of pay and other conditions of service would not jeopardise the right of the management of minority institutions to appoint teachers of their choice".

48.2.8 Similarly, inasmuch as quality of education imparted by an institution is dependent on the quality of its teaching staff, and their satisfaction with respect to their service conditions, the Supreme Court held that "conditions of service pertaining to minimum qualifications of teachers, their salaries, allowances and other conditions of service which ensure security, contentment and decent living standards to teachers and which will consequently enable them to render better service to the institutions and pupils" did not violate Article 30(1). Such conditions do not, therefore, invade the fundamental right of minority educational institutions.

48.2.9 Predicated on this reasoning, the Supreme Court found the challenge, by the FAPS Employees' Association, to Section 12 of the DSE Act to have substance, *in respect of all provisions except Section 8(2).* The other provisions in Sections 8 to 11 of the DSE Act dealt with the conditions of service of the employees of schools under the DoE and, therefore, there was no justification to treat minority institutions differently. To the extent, therefore, that Section 12 excluded minority institutions from the benefit of Sections 8 to 11 of the DSE Act, Section 12 was found to be unconstitutional.

48.2.10 In respect of Section 8(2) of the DSE Act vis-à-vis Section 12, however, the Supreme Court held otherwise, and it is on this that Mr. Chacko places reliance. Section 8(2) stipulated that, subject to any rule that may be made, "no employee of a recognised private school shall be dismissed, removed or reduced in rank, nor shall his service be otherwise terminated except with the prior approval of the Director". This provision, which required the prior approval of the DoE to be obtained before dismissing, removing, reducing in rank or terminating an employee was held, by the Supreme Court, to invade the fundamental right of establishment and administration guaranteed to a minority institution by Article 30(1) of the Constitution of India. The reasoning of the Supreme Court, in this regard, is contained in para 18 of the decision in ***Frank Anthony Public School Employees Association***, already reproduced *supra*.

48.3 The decision in ***Frank Anthony Public School Employees Association*** is relevant, for our purposes, only to the extent it upholds

the contention of the Union of India and FAPS, before the Supreme Court, that Section 8(2) of the DSE Act could not be made applicable to minority educational institutions. The decision, therefore, is an authority for the proposition that any stipulation which requires prior approval of the DoE to be obtained before an employee of a minority educational institution is dismissed, removed, reduced in rank or terminated, would violate the fundamental right of such minority institution, conferred by Article 30(1) of the Constitution of India.

49. Right to regulate vis-à-vis Article 30(1) – ***Malankara Syrian Catholic College***, ***Sindhi Education Society*** and ***Abhay Nandan Inter College***

49.1 ***Malankara Syrian Catholic College***

49.1.1 It is not necessary for this Court to embark on a discussion of all the earlier decisions on the scope of Article 30(1) of the Constitution, or the extent to which the fundamental right conferred thereby may be regulated by the State, as the judgment of the Supreme Court in ***Secretary, Malankara Syrian Catholic College*** considers all earlier decisions.

49.1.2 The Malankara Syrian Catholic College Association (MSCCA) was, like the petitioner, a minority organisation, running colleges. One such college was the Mar Ivanios College (MIC), which was, therefore, an aided private minority institution, affiliated to the Kerala University. The post of Principal in the MIC fell vacant on 31 March 2000. The manager of the MSCCA issued an

order dated 27 March 2000, giving charge of the post of Principal to one Rev. Daniel Kuzhithaakthil ("Daniel" hereinafter). The appointment of Daniel as Principal was challenged by another lecturer before the High Court of Kerala which, on 24 May 2000, passed an interim order restraining Daniel from functioning as Principal.

49.1.3 In view of the said interim order, the Management of the MSCCA appointed T. Jose ("Jose", hereinafter), Respondent 1 before the Supreme Court and a Senior Lecturer in the MIC, to discharge his duties as Principal, pending regular appointment to the post.

49.1.4 On 6 June 2000, the Management appointed Daniel as a Principal on regular post. This appointment was challenged by Jose before the Kerala University Appellate Tribunal ("the KUAT"). The KUAT, by order dated 20 December 2000, held the appointment of Daniel to be violative of Section 57(3) of the Kerala University Act 1974 ("the KU Act").

49.1.5 This order was challenged by Daniel and by MSCCA before the High Court of Kerala under Article 226 of the Constitution of India. The stand of Daniel and MSCCA was that Section 57(3) of the KU Act could not be applied to minorities as it interfered with their right to establish and administer educational institutions, guaranteed by Article 30(1) of the Constitution. This challenge was rejected by the High Court by judgment dated 5 June 2003, against which MSCCA approached the Supreme Court.

49.1.6 The High Court relied on the 11-Judge decision in ***TMA Pai*** to hold that, once a minority institution received aid from the Government, the protection under Article 30(1) ceased to be available. Grant of aid, according to the High Court, carried the "price" of surrender of a part of its freedom and independence in matters of administration.

49.1.7 The Supreme Court framed the following issues as arising for consideration:

> "(i) To what extent, the State can regulate the right of the minorities to administer their educational institutions, when such institutions receive aid from the State?
>
> (ii) Whether the right to choose a Principal is part of the right of minorities under Article 30(1) to establish and administer educational institutions of their choice. If so, would Section 57(3) of the Act violate Article 30(1) of the Constitution of India?"

49.1.8 Regarding the aforesaid two issues, the Supreme Court held thus:

> "**Re: Question (i)**
>
> 13. Article 30(1) gives minorities the right to establish and administer educational institutions of their choice. In *State of Kerala* v. *Very Rev. Mother Provincial* [(1970) 2 SCC 417] a Constitution Bench of this Court explained "right to administer" thus: (SCC p. 421, paras 9-10)
>
> > "9. … *Administration means 'management of the affairs' of the institution. This management must be free of control so that the founders or their nominees can mould the institution as they think fit, and in accordance with their ideas of how the interests of the community in general and the institution in particular will be best served. No part of this management can be taken away and vested in*

another body without an encroachment upon the guaranteed right.

10. There is, however, an exception to this and it is that *the standards of education are not a part of management as such. These standards concern the body politic and are dictated by considerations of the advancement of the country and its people.* Therefore, *if universities establish the syllabi for examinations they must be followed, subject however to special subjects which the institutions may seek to teach, and to a certain extent the State may also regulate the conditions of employment of teachers and the health and hygiene of students. Such regulations do not bear directly upon management as such although they may indirectly affect it. Yet the right of the State to regulate education, educational standards and allied matters cannot be denied. The minority institutions cannot be allowed to fall below the standards of excellence expected of educational institutions, or under the guise of exclusive right of management, to decline to follow the general pattern. While the management must be left to them, they may be compelled to keep in step with others*."

(emphasis supplied)

14. In ***Ahmedabad St. Xavier's College Society*** a nine-Judge Bench of this Court considered the scope and ambit of minorities' right to administer educational institutions established by them. The majority were of the view that *prescription of conditions of service would attract better and competent teachers and would not jeopardise the right of the management of minority institutions to appoint teachers of their choice*. It was also observed: (SCC pp. 750 & 752, paras 41 & 46-47)

"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 personnel of management is a part of the administration. The university will always have a right to see that there is no maladministration. If there is maladministration, the university will take steps to*

cure the same. There may be control and check on administration in order to find out whether the minority institutions are engaged in activities which are not conducive to the interest of the minority or to the requirements of the teachers and the students.

***

46. The ultimate goal of a minority institution too imparting general secular education is advancement of learning. This Court has consistently held that *it is not only permissible but also desirable to regulate everything in educational and academic matters for achieving excellence and uniformity in standards of education.*

47. *In the field of administration it is not reasonable to claim that minority institutions will have complete autonomy. Checks on the administration may be necessary in order to ensure that the administration is efficient and sound and will serve the academic needs of the institution.* The right of a minority to administer its educational institution involves, as part of it, a correlative duty of good administration."

15. In ***Frank Anthony Public School Employees' Assn*** this Court observed: (SCC p. 731, para 16)

"16. The excellence of the instruction provided by an institution would depend directly on the excellence of the teaching staff, and in turn, that would depend on the quality and the contentment of the teachers. *Conditions of service pertaining to minimum qualifications of teachers, their salaries, allowances and other conditions of service which ensure security, contentment and decent living standards to teachers and which will consequently enable them to render better service to the institution and the pupils cannot surely be said to be violative of the fundamental right guaranteed by Article 30(1) of the Constitution.* The management of a minority educational institution cannot be permitted under the guise of the fundamental right guaranteed by Article 30(1) of the Constitution, to oppress or exploit its employees any more than any other private employee. Oppression or exploitation of the teaching staff of an educational institution is bound to lead, inevitably, to discontent and

> deterioration of the standard of instruction imparted in the institution affecting adversely the object of making the institution an effective vehicle of education for the minority community or other persons who resort to it. The management of minority institution cannot complain of invasion of the fundamental right to administer the institution when it denies the members of its staff the opportunity to achieve the very object of Article 30(1) which is to make the institution an effective vehicle of education."

16. The scope of Article 30(1), with reference to the scope of the right to administer educational institutions, was also considered by this Court in ***Kerala Education Bill***, ***Rev. Sidhajbhai Sabhai***, ***D.A.V. College*** , ***All Saints High School*** , ***St. Stephen's***, ***N. Ammad*** and ***Board of Secondary Education & Teachers Training***.

17. In ***T.M.A. Pai*** this Court made it clear that *a minority institution does not cease to be so, merely on receipt of aid from the State or its agencies.* In other words, *receipt of aid does not alter the nature or character of the minority educational institution receiving aid. Article 30(1) clearly implies that any grant that is given by the State to the minority institution cannot have such conditions attached to it which will in any way dilute or abridge the rights of the minorities to establish and administer educational institutions. But all conditions that have relevance to the proper utilisation of the aid by an educational institution can be imposed.* The High Court, however, wrongly construed ***T.M.A. Pai*** and concluded that acceptance of aid by a minority institution takes away its right to claim immunity from interference and therefore the State can lay down any regulation governing the conditions of service of employees of aided minority institutions ignoring the constitutional guarantee under Article 30(1). For this purpose, the High Court relied on the observations in paras 72 and 73 of ***T.M.A. Pai.*** The said paragraphs are extracted below: (SCC pp. 550-51)

> "72. Once aid is granted to a private professional educational institution, the Government or the State agency, as a condition of the grant of aid, can put fetters on the freedom in the matter of administration and management of the institution. The State, which gives aid to an educational institution, can impose such conditions as are necessary for the proper maintenance of the high standards of education as the financial burden is shared by the State. The State would also be under an obligation to protect the

interest of the teaching and non-teaching staff. In many States, there are various statutory provisions to regulate the functioning of such educational institutions where the States give, as a grant or aid, a substantial proportion of the revenue expenditure including salary, pay and allowances of teaching and non-teaching staff. It would be its responsibility to ensure that the teachers working in those institutions are governed by proper service conditions. The State, in the case of such aided institutions, has ample power to regulate the method of selection and appointment of teachers after prescribing requisite qualifications for the same. Ever since ***Kerala Education Bill***, this Court has upheld, in the case of aided institutions, those regulations that served the interests of students and teachers. Checks on the administration may be necessary in order to ensure that the administration is efficient and sound and will serve the academic needs of the institutions. In other words, rules and regulations that promote good administration and prevent maladministration can be formulated so as to promote the efficiency of teachers, discipline and fairness in administration and to preserve harmony among affiliated institutions. …

73. There are a large number of educational institutions, like schools and non-professional colleges, which cannot operate without the support of aid from the State. Although these institutions may have been established by philanthropists or other public-spirited persons, it becomes necessary, in order to provide inexpensive education to the students, to seek aid from the State. In such cases, as those of the professional aided institutions referred to hereinabove, the Government would be entitled to make regulations relating to the terms and conditions of employment of the teaching and non-teaching staff whenever the aid for the posts is given by the State as well as admission procedures. Such rules and regulations can also provide for the reasons and the manner in which a teacher or any other member of the staff can be removed. In other words, the autonomy of a private aided institution would be less than that of an unaided institution."

But *the aforesaid observations in paras 72 and 73 were not made with reference to aided minority educational institutions. The observations in para 72 were intended for aided non-minority private professional institutions. The observations in para 73 were made in the context of aided non-minority non-professional private institutions. The position of minority educational institutions securing aid from the State or its agencies was considered in paras 80 to 155, wherein it was clearly held that receipt of State aid does not annihilate the right guaranteed to minorities to establish and administer educational institutions of their choice under Article 30(1).*

18. The observations of the eleven-Judge Bench in ***T.M.A. Pai*** in respect of the extent to which the right of administration of aided minority educational institutions could be regulated, are extracted below: (SCC pp. 579-80, paras 141 & 144)

> "*141*. … the State cannot, when it chooses to grant aid to educational institutions, deny aid to a religious or linguistic minority institution only on the ground that the management of that institution is with the minority. We would, however, like to clarify that *if an abject surrender of the right to management is made a condition of aid, the denial of aid would be violative of Article 30(2). However, conditions of aid that do not involve a surrender of the substantial right of management would not be inconsistent with constitutional guarantees, even if they indirectly impinge upon some facet of administration*.
>
> ***
>
> *144*. It cannot be argued that no conditions can be imposed while giving aid to a minority institution. Whether it is an institution run by the majority or the minority, *all conditions that have relevance to the proper utilisation of the grant-in-aid by an educational institution can be imposed. … The conditions for grant or non-grant of aid to educational institutions have to be uniformly applied, whether it is a majority-run institution or a minority-run institution. As in the case of a majority-run institution, the moment a minority institution obtains a grant of aid, Article 28 of the Constitution comes into play*. When an educational institution is maintained out of State funds, no religious instruction can be provided therein."
>
> (emphasis supplied)

Among the questions formulated and answered by the majority while summarising conclusions, Question 5(*c*) and the answer thereto have a bearing on the issue on hand. Question 5(*c*) is extracted below: (SCC p. 589, para 161)

> "5. (*c*) Whether the statutory provisions which regulate the facets of administration like control over educational agencies, control over governing bodies, conditions of affiliation including recognition/withdrawal thereof, and appointment of staff, employees, teachers and principals including their service conditions and regulation of fees, etc. would interfere with the right of administration of minorities?"

The first part of the answer to Question 5(*c*) related to unaided minority institutions. With reference to statutory provisions regulating the facets of administration, this Court expressed the view that in case of an unaided minority educational institution, the regulatory measure of control should be minimal; and in the matter of day-to-day management, like the appointment of staff (both teaching and non-teaching) and administrative control over them, the management should have the freedom and there should not be any external controlling agency. But such institutions would have to comply with the conditions of recognition and conditions of affiliation to a university or board; and a rational procedure for the selection of teaching staff and for taking disciplinary action has to be evolved by the management itself. This Court also held that fees to be charged by unaided institutions cannot be regulated but no institution should charge capitation fee. The second part of the answer to Question 5(*c*) applicable to aided minority institutions, is extracted below: (SCC pp. 589-90, para 161)

> "For redressing the grievances of employees of aided and unaided institutions who are subjected to punishment or termination from service, a mechanism will have to be evolved, and in our opinion, appropriate tribunals could be constituted, and till then, such tribunals could be presided over by a judicial officer of the rank of District Judge.
>
> *The State or other controlling authorities, however, can always prescribe the minimum qualification, experience and other conditions bearing on the merit of an individual for being appointed as a teacher or a principal of any educational institution.*

> *Regulations can be framed governing service conditions for teaching and other staff for whom aid is provided by the State, without interfering with the overall administrative control of the management over the staff."*
>
> (emphasis supplied)

The position enunciated in ***T.M.A. Pai*** is reiterated in ***P.A. Inamdar* v. *State of Maharashtra***[45] .

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/Principals) as also non-teaching staff, and to take action if there is dereliction of duty on the part of any of its employees*;
> >
> > (*c*) to admit eligible students of their choice and to set up a reasonable fee structure;
> >
> > (*d*) to use its properties and assets for the benefit of the institution.
>
> (*ii*) The right conferred on minorities under Article 30 is only to ensure equality with the majority and not intended to place the minorities in a more advantageous position vis-à-vis the majority. There is no reverse discrimination in favour of minorities. The general laws of the land relating to national interest, national security, social welfare, public order, morality, health, sanitation, taxation,

[45] **(2005) 6 SCC 537**

etc. applicable to all, will equally apply to minority institutions also.

(*iii*) *The right to establish and administer educational institutions is not absolute. Nor does it include the right to maladminister. There can be regulatory measures for ensuring educational character and standards and maintaining academic excellence. There can be checks on administration as are necessary to ensure that the administration is efficient and sound, so as to serve the academic needs of the institution. Regulations made by the State concerning generally the welfare of students and teachers, regulations laying down eligibility criteria and qualifications for appointment, as also conditions of service of employees (both teaching and non-teaching), regulations to prevent exploitation or oppression of employees, and regulations prescribing syllabus and curriculum of study fall under this category. Such regulations do not in any manner interfere with the right under Article 30(1).*

(*iv*) Subject to the eligibility conditions/qualifications prescribed by the State being met, the unaided minority educational institutions will have the freedom to appoint teachers/lecturers by adopting any rational procedure of selection.

(*v*) *Extension of aid by the State does not alter the nature and character of the minority educational institution. Conditions can be imposed by the State to ensure proper utilisation of the aid, without however diluting or abridging the right under Article 30(1).*

20. Aided institutions give instruction either in secular education or professional education. Religious education is barred in educational institutions maintained out of the State funds. These aided educational minority institutions providing secular education or professional education should necessarily have standards comparable with non-minority educational institutions. Such standards can be attained and maintained only by having well-qualified professional teachers. *An institution can have the services of good qualified professional teachers only if the conditions of*

service ensure security, contentment and decent living standards. That is why the State can regulate the service conditions of the employees of the minority educational institutions to ensure quality of education. Consequently, any law intended to regulate the service conditions of employees of educational institutions will apply to minority institutions also, provided that such law does not interfere with the overall administrative control of the management over the staff.

21. *We may also recapitulate the extent of regulation by the State, permissible in respect of employees of minority educational institutions receiving aid from the State, as clarified and crystallised* in ***T.M.A. Pai***. *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 abridging or diluting the right to establish and administer educational institutions.*

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 overall 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*."

Re: Question (ii)

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.

23. In . ***Very Rev. Mother Provincial*** this Court upheld the decisions of the Kerala High Court declaring sub-sections (1), (2) and (3) of Section 53 of the Kerala University Act, 1969 relating to appointment of Principals were ultra vires Article 30(1) in respect of minority institutions. This Court affirmed the following findings of the High Court (***Very Rev. Mother Provincial*** v. *State of Kerala* [1969 KLT 749 (FB)] without independently considering the same: (***Very Rev. Mother Provincial*** *case* [1969 KLT 749 (FB)] , KLT pp. 770-71, para 38)

> "The principal of a college is, as Section 2(12) recognises, the head of the college, and, the post of the principal is of pivotal importance in the life of a college; around him wheels the tone and temper of the institution; on him depends the continuity of its traditions, the maintenance of discipline and the efficiency of its teaching; *and the right to choose the principal is perhaps the most important facet of the right to administer a college. The imposition of any trammel thereon—except to the extent of prescribing the requisite qualifications and experience or otherwise fostering the interests of the institution itself—cannot but be considered as a violation of the right guaranteed by Article 30(1) of the Constitution, and, for the reasons we have already given, by Article 19(1)(f) as well.* To hold otherwise would be to make the rights 'a teasing illusion, a promise of unreality'. *Provision may, of course, be made to ensure that only proper persons are appointed to the post of principal; the qualifications necessary may be prescribed, and the mode of selection for the purpose of securing the best men may be laid down. But to go beyond that and place any further fetter on the choice would be an unreasonable interference with the right of management. Therefore, so far as the post of principal is concerned, we think it should be left to the management to secure the services of the best person available. This, it seems to us, is of paramount importance, and the prospects of advancement of the staff must yield to it. The management must have as wide a field of choice as possible; yet sub-section (2) of Section 53 restricts the choice to the teachers of the college or of all the colleges, as the case may be, and enables the appointment of an outsider only if there is no suitable person in such college or colleges. That might well have the result of condemning the post to a*

> *level of dull mediocrity. A provision by which an outsider is to be appointed, or a junior member of the staff preferred to a senior member, only if he is of superior merit, the assessment of which must largely be left to the management, is understandable; but a provision which compels the management to appoint only a teacher of the college (or colleges) unless it pronounces all the teachers unsuitable, is clearly in derogation of the powers of the management, and not calculated to further the interest of the institution. …* But we might say that there can be no objection to the appointment of the principal as of any other member of the staff being subject to the approval of some authority of the University so long as disapproval can be only on the ground that the person appointed has not the requisite qualifications. Also that if disapproval is not to be only on some such stated ground, but is left entirely to the will and pleasure of the appointing authority, that would be to deprive the educational agency of its power of appointment and would be bad for offending Article 19(1)(*f*) and Article 30(1).”

24. *The importance of the right to appointment of Principals/Headmasters and teachers of their choice by minorities, as an important part of their fundamental rights under Article 30 was highlighted in* ***St. Xavier's*** thus: (SCC pp. 815-16, para 182)

> “*182.* 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. … So long as the persons chosen have the qualifications 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.*”

25. In ***N. Ammad*** the appellant contended that he being the seniormost graduate teacher of an aided minority school, he should be appointed as the Headmaster and none else. He relied on Rule 44-A of the Kerala Education Rules which provided that appointment of Headmaster shall ordinarily be according to

seniority from the seniority list prepared and maintained under clauses (*a*) and (*b*) of Rule 34. This Court held: (SCC p. 680, paras 18-19)

> "*18. Selection and appointment of Headmaster in a school (or Principal of a college) are of prime importance in administration of that educational institution.* The 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 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.
>
> *19.* How important is the post of Headmaster of a school has been pithily stated by a Full Bench of the Kerala High Court in ***Aldo Maria Patroni* v. *E.C. Kesavan***[46] . Chief Justice M.S. Menon has, in a style which is inimitable, stated thus:
>
> > 'The post of the headmaster is of pivotal importance in the life of a school. Around him wheels the tone and temper of the institution; on him depends the continuity of its traditions, the maintenance of discipline and the efficiency of its teaching. The right to choose the headmaster is perhaps the most important facet of the right to administer a school, and we must hold that the imposition of any trammel thereon—except to the extent of prescribing the requisite qualifications and experience—cannot but be considered as a violation of the right guaranteed by Article 30(1) of the Constitution. To hold otherwise will be to make the right "a teasing illusion, a promise of unreality".' "

[46] **AIR 1965 Ker 75**

Thereafter, this Court concluded that *the management of minority institution is free to find out a qualified person either from the staff of the same institution or from outside, to fill up the vacancy; and that the management's right to choose a qualified person as the Headmaster of the school is well insulated by the protective cover of Article 30(1) of the Constitution and it cannot be chiselled out through any legislative act or executive rule except for fixing up the qualifications and conditions of service for the post; and that any such statutory or executive fiat would be violative of the fundamental right enshrined in Article 30(1) and would therefore be void*. This Court further observed that if the management of the school is not given the wide freedom to choose the person for holding the key post of Principal subject, of course, to the restriction regarding qualifications to be prescribed by the State, the right to administer the school would get much diminished.

26. In ***Board of Secondary Education & Teachers Training*** this Court held: (SCC p. 556, para 3)

"*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 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 decisions in ***Very Rev. Mother Provincial*** and ***Ahmedabad St. Xavier's College Society*** **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 per cent grant."

27. It is thus clear that the freedom to *choose the person to be appointed as Principal has always been recognised as a vital facet of the right to administer the educational institution*. This has not been, in any way, diluted or altered by ***T.M.A. 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.*

(Emphasis supplied)

49.1.9 The takeaway from ***Malankara Syrian Catholic College*** may be noted thus:

(i) "Administration" refers to management of the affairs of an institution. This management had to be free of state control, in the case of a minority educational institution, so that the founders of the institution could mould the institution as they thought it fit, and in accordance with their ideas of how the interests of the minority community would be best served. No part of this autonomy could be divested.

(ii) Standards of education, however, are not part of management of the institution. Syllabi prescribed for examinations, by the University, had, therefore, necessarily to be followed.

(iii) To an extent, the State could also regulate the conditions of service of teachers, and regulations made in that regard would also not infract the right to administer the minority institution.

(iv) There is a distinction between the restriction on the right of administration and a regulation prescribing the manner of administration. The right of administration refers to day-to-day administration. The choice in personnel of management is part of administration.

(v) The right to administer does not, however, include the right to maladminister. If there is maladministration, the University can step in to control it. Control and check on the administration of minority institutions, in order to ensure that they were not being maladministered would not, therefore, infract Article 30 (1). Regulation in educational and academic matters was desirable.

(vi) Thus, even for minority institutions, checks on their administration may be necessary in order to ensure that the administration is efficient and sound and will serve the academic needs of the body politic.

(vii) Conditions of service pertaining to minimum qualifications of teachers, their salaries, allowances and other conditions of service which ensure security, contentment and decent living standards to teachers and enable them to render better service to the institutions and pupils does not, therefore, violate Article 30(2).

(viii) Receipt of aid from the State, irrespective of the extent, does not alter the character of the institution as a minority educational institution. The grant of aid could not, therefore, be hedged in by conditions which would dilute or abridge the right of the minority to establish and administer educational institutions.

(ix) Conditions, in order to ensure proper utilisation of the aid granted by the Government, could, however, legitimately be imposed.

(x) Regulations which interfered with the overall administrative control by the Management over the staff or abridged or diluted the right to establish and administer the educational institution would, to that extent, be inapplicable to minority institutions.

(xi) The right to choose the Principal and to have teaching conducted by teachers appointed by the Management after an overall assessment of their outlook and philosophy is the most important facet of the right to administer an educational institution. In deciding the choice of the Principal or of teachers, the minority educational institution would ordinarily take into account the outlook and philosophy of the candidate which would determine whether he was supportive of the objects of the institution.

(xii) Except to the extent of prescribing requisite qualifications and experience, any restriction on the right to choose a Principal would be a violation of the right guaranteed by Article 30(1) of the Constitution. While it is permissible to stipulate the qualifications for Principal, and prescribe the mode of selection, so that the best man could be selected, any further fetter on the choice of the Principal would amount to unreasonable interference with the right of the minority to administer the

educational institution. The Management of the educational institution was required to have with it as wide a field of choice as possible. So long as the persons concerned possessed the qualifications prescribed by the University, their choice had to be left to the management.

(xiii) Following these discussions, the Supreme Court, in para 19 (reproduced *supra*) of ***Malankara Syrian Catholic College***, enunciated the general principles relating to establishment and administration of educational institutions by minorities.

(xiv) Among the rights of minorities to establish and administer educational institutions, the Supreme Court included the right to choose its governing body, in whom the founders of the institution had faith and confidence and the right to appoint teaching staff and non-teachings staff and to take action in the event of dereliction of duty on the part of any employee.

(xv) Thus, the State could prescribe, without doing violence to Article 30(1),

(a) the qualification, experience and other criterion for making appointment and

(b) the service conditions of employees,

without interfering with overall administrative control by the management of the institution over the staff.

49.2 *Sindhi Education Society*

49.2.1 The facts of this case closely mirror those of the present.

49.2.2 Sindhi Education Society ('SES') was running a School, known as SES Baba Nebhraj Senior Secondary School (SES School). The SES School was admittedly established for preservation of the Sindhi language. The Sindhi community was again undisputedly a linguistic minority within the meaning of Article 30(1) of the Constitution.

49.2.3 This Court, in its judgment in ***Sindhi Education Society v. Director of Education***[47] held that SES was a Linguistic Minority and that, *inter alia*, Rule 64[48] of the DSE Rules was applicable to the SES only to the extent it was in consonance with Article 30(1) of the

[47] **Judgment dated 14 July 1982 in W.P.(C) 940/1975**

[48] **64. No aid to be given unless suitable undertakings are given by the managing committee**

No school shall be granted aid unless its managing committee gives an undertaking in writing that:

(a) it shall comply with the provisions of the Act and these rules;

(b) it shall fill in the posts in the school with the Scheduled Castes and the Scheduled Tribes candidates in accordance with the instructions issued by the Central Government from time to time and also maintain the roster and other connected returns in this behalf;

(c) it shall deposit its five percent share towards pay and allowances, medical facilitates, pension, gratuity, provident fund and other prescribed benefits with the Administrator every month;

(d) it shall disburse or cause to be disbursed the dues maintained in clause (c), within the first week of every month to the employees of the school;

(e) while filling up the posts in the school, it shall give first preference to such of the employees of other aided schools as have become surplus in pursuance of the provisions of rule 47;

(f) it shall comply with the directions given by the Director under sub¬section (3) of Section 24 of the Act;

(g) it shall fill in such number of posts in the school as have been approved by the Director, in accordance with the post fixation in pursuance of rule 75, without any discrimination or delay as per the Recruitment Rules prescribed for such posts;

(h) it shall ensure that the head of the school possesses the necessary papers of an employee who is due to retire from service after attaining the age of superannuation or otherwise, with a view to avoid any delay in sanctioning the pension, gratuity, provident fund to such employee of his/her family, as the case may be; and

(i) it shall attend to all the claims of the service matters of the employees of its school as and when they become due, promptly without any delay or discrimination, strictly in accordance with the Recruitment Rules or the instructions issued by the Central Government from time to time on the subject.

(2) The breach of any constitution specified in sub-rule (1) shall render such school liable to be removed from the grant-in-aid list.

Constitution. Rule 64 deals with the conditions for providing grant-in-aid. It stipulates that no aid was to be granted unless a suitable undertaking was given by the Managing Committee of the Institution.

49.2.3.1 In September 1989, the SES received a communication addressed by the DoE to all schools, stating that appointment of Scheduled Caste and Scheduled Tribe candidates was a pre-condition for all agencies receiving grant-in-aid from the Government and mandating strict compliance with this requirement for being provided grant-in-aid under Rule 64 of the DSE Rules. The SES challenged this decision, by way of a writ petition[49] which came to be allowed by a learned Single Judge of this Court. The GNCTD appealed against the decision of the learned Single Judge vide LPA 33-36/2006 and 40-43/2006, which came to be allowed by the Division Bench on 30 November 2006. SES appealed against the said decision to the Supreme Court.

49.2.3.2 The Supreme Court noted the relevant provisions of the DSE Act and, in para 37 of the report, observed that the scheme of the DSE Act, in particular, is to give greater freedom to the aided minority institutions and not to impinge upon their minority status as granted under Article 30(1) of the Constitution.

49.2.3.3 Thereafter, the Supreme Court referred to the decisions in ***In Re. Kerala Education Bill, 1957***, ***T.M.A. Pai***, ***Ahmedabad St. Xavier's College Society*** and ***Khalsa Middle School v. Mohinder***

[49] **W.P.(C) 2426/1992, decided on 14 September 2005**

Kaur[50], and held that the prevailing view that emerged from the said decisions was that the fundamental right available to minority institutions under Article 30(1) was not absolute, but could be subjected to conditions which could not, however, destroy or diminish the status and constitutional direction available to the minority.

49.2.3.4 The Supreme Court, thereafter, referred to the decisions in ***Brahmo Samaj Education Society v. State of West Bengal***[51], and ***Islamic Academy of Education v. State of Karnataka***[52] and observed, in para 67, that there were "two basic concepts – one relating to imposition of conditions with regard to the management of the institutions and secondly, the power of the State to step in where there are questions of national interest."

49.2.3.5 Thereafter, the Supreme Court further referred to the decisions in ***Kanya Junior High School, Bal Vidya Mandir v. U.P. Basic Shiksha Parishad***[53], and ***Malankara Syrian Catholic College*** and went on to observe:

> "92. The right under clause (1) of Article 30 is not absolute but subject to reasonable restrictions which, inter alia, may be framed having regard to the public interest and national interest of the country. Regulation can also be framed to prevent maladministration as well as for laying down standards of education, teaching, maintenance of discipline, public order, health, morality, etc. It is also well settled that a minority institution does not cease to be so, the moment grant-in-aid is received by the institution. An aided minority educational institution, therefore, would be entitled to have the right of admission of students belonging to the minority group and, at the same time, would be

[50] **1993 Supp (4) SCC 26**
[51] **(2004) 6 SCC 24**
[52] **(2003) 6 SCC 697**
[53] **(2006) 11 SCC 92**

> required to admit a reasonable extent of non-minority students, to the extent, that the right in Article 30(1) is not substantially impaired and further, the citizen's right under Article 29(2) is not infringed."

49.2.3.6 The Supreme Court further went on to echo the view, expressed in earlier decisions, that receipt of grant-in-aid did not dilute the minority status of an institution or render it "State" within the meaning of Article 12 of the Constitution of India. Following this, the legal position regarding the fundamental right conferred by Article 30(1) vis-à-vis the right of the State to regulate activities of Minority Educational Institutions was thus set out:

> "89. The limited extent of control exercisable by the authorities is demonstrated in DSE Rules 44, 59 and 96(3)(*a*) and (3)(*b*). Every school is required, when it desires to establish a new school, to give intimation in writing to the Administrator or its office to establish such a school to specifically exempt the minorities' institutions from application of this detailed provision. In addition to this, the management of a minority school cannot be taken over by the authorities in terms of Section 20 of the DSE Act as the statute itself prohibits the application of Section 20 to such school in terms of Section 21 of the Act. *Besides these statutory provisions and the scheme under the DSE Act, various judgments of this Court have also consistently taken the view that the State has no right of interference in the establishment, administration and management of a school run by linguistic minority except the power to regulate as specified.*
>
> 90. *The right to establish and administer includes a right to appoint teachers. Thus, except providing grant-in-aid as per the DSE Rules and having no power to discriminate in terms of Article 30(2) of the Constitution, the Government has a very limited regulatory control over the minority institutions and no control whatsoever on the managing committee, internal management of the school and, of course, has no power to take over such an institution.* This Court has also expressed the view in some judgments that in respect of minority or even non-minority institutions, steps can be taken even for closure of such institutions, in the national interest which of course may be a rare exception. Once the State lacks basic power of jurisdiction to make special provisions and reservations in relation to minority institutions,

which do not form part of service under the State, it will be difficult for the Court to hold that Rule 64(1)(*b*) can be enforced against aided minority institution. There are still other aspects which can usefully be examined to analyse this issue in a greater detail.

91. In ***T.M.A. Pai*** *case* the right to establish an institution is provided. The Court held that the right to establish an institution is provided in Article 19(1)(*g*) of the Constitution. Such right, however, is subject to reasonable restriction, which may be brought about in terms of clause (6) thereof. Further, that minority, whether based on religion or language, however, has a fundamental right to establish and administer educational institution of its own choice under Article 30(1).

92. *The right under clause (1) of Article 30 is not absolute but subject to reasonable restrictions which, inter alia, may be framed having regard to the public interest and national interest of the country. Regulation can also be framed to prevent maladministration as well as for laying down standards of education, teaching, maintenance of discipline, public order, health, morality, etc. It is also well settled that a minority institution does not cease to be so, the moment grant-in-aid is received by the institution.* An aided minority educational institution, therefore, would be entitled to have the right of admission of students belonging to the minority group and, at the same time, would be required to admit a reasonable extent of non-minority students, to the extent, that the right in Article 30(1) is not substantially impaired and further, the citizen's right under Article 29(2) is not infringed.

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94. *It is also equally true that the right to administer does not amount to the right to maladminister and the right is not free from regulations. The regulatory measures are necessary for ensuring orderly, efficient and sound administration.* The regulatory measures can be laid down by the State in the administration of minority institutions. *The right of the State is to be exercised primarily to prevent maladministration and such regulations are permissible regulations. These regulations could relate to guidelines for the efficiency and excellence of educational standards, ensuring the security of the services of the teachers or other employees, framing rules and regulations governing the conditions of service of teachers and employees and their pay and allowances and prescribing course of study or syllabi of the nature of books, etc. Some of the impermissible regulations are refusal to affiliation without sufficient reasons, such conditions as would completely destroy the autonomous status of the educational institution, by introduction of outside authority either directly or*

through its nominees in the governing body or the managing committee of a minority institution to conduct its affairs, etc. These have been illustrated by this Court in ***Very Rev. Mother Provincial*** *,* ***All Saints High School*** and ***T.M.A. Pai*** *case*.

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97. It is not necessary for us to examine the extent of power to make regulations, which can be enforced against linguistic minority institutions, as we have already discussed the same in the earlier part of the judgment. No doubt, right conferred on minorities under Article 30 is only to ensure equality with the majority but, at the same time, *what protection is available to them and what right is granted to them under Article 30 of the Constitution cannot be diluted or impaired on the pretext of framing of regulations in exercise of its statutory powers by the State. The permissible regulations, as afore-indicated, can always be framed and where there is a maladministration or even where a minority linguistic or religious school is being run against the public or national interest, appropriate steps can be taken by the authorities including closure but in accordance with law. The minimum qualifications, experience, other criteria for making appointments, etc. are the matters which will fall squarely within the power of the State to frame regulations but power to veto or command that a particular person or class of persons ought to be appointed to the school failing which the grant-in-aid will be withdrawn, will apparently be a subject which would be arbitrary and unenforceable.*

98. Even in ***T.M.A. Pai*** *case*, which view was reiterated by this Court in ***Malankara Syrian Catholic College*** , it was held that *the conditions for proper utilisation of the aid by the educational institution was a matter within the empowerment of the State to frame regulations but without abridging or diluting the right to establish and administer educational institutions. In that case, while dealing with the appointment of a person as Principal, the Court clearly stated the dictum that the freedom to choose the person to be appointed as Principal has always been recognised as a vital facet to right to administer the educational institution. It being an important part of the administration and even if the institution is aided, there can be no interference with the said right.* The power to frame regulations and control the management is subject to another restriction which was reiterated by the Court in ***P.A. Inamdar*** *case* stating that it is necessary that the objective of establishing the institution was not defeated.

99. At last, what is the purpose of granting protection or privilege to the minorities in terms of Article 29, and at the same

time, applying negative language in Article 30(2) in relation to State action for releasing grant-in-aid, as well as the provisions of the DSE Act, 1973 and the Rules framed thereunder? It is obvious that the constitutional intent is to bring the minorities at parity or equality with the majority as well as give them right to establish, administer and run minority educational institutions. With the primary object of Article 21-A of the Constitution in mind, the State was expected to expand its policy as well as methodology for imparting education. The DSE Act, as we have already noticed, was enacted primarily for the purpose of better organisation and development of school education in the Union Territory of Delhi and for matters connected therewith or incidental thereto. Thus, the very object and propose of this enactment was to improve the standard as well as management of school education. *It will be too far-fetched to read into this object that the law was intended to make inroads into character and privileges of the minority….*

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101. *To appoint a teacher is part of the regular administration and management of the school. Of course, what should be the qualification or eligibility criteria for a teacher to be appointed can be defined and, in fact, has been defined by the Government of NCT of Delhi and within those specified parameters, the right of a linguistic minority institution to appoint a teacher cannot be interfered with.* The paramount feature of the above laws was to bring efficiency and excellence in the field of school education and, therefore, it is expected of the minority institutions to select the best teacher to the faculty. To provide and enforce any regulation, which will practically defeat this purpose would have to be avoided. *A linguistic minority is entitled to conserve its language and culture by a constitutional mandate. Thus, it must select people who satisfy the prescribed criteria, qualification and eligibility and at the same time ensure better cultural and linguistic compatibility to the minority institution.*

102. At this stage, at the cost of repetition, we may again refer to the judgment of this Court in ***T.M.A. Pai*** *case* , where in para 123, the Court specifically noticed that while it was permissible for the State and its educational authorities to prescribe qualifications of a teacher, *once the teachers possessing the requisite qualifications were selected by the minorities for their educational institutions, the State would have no right to veto the selection of the teachers…..*

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104. *In our considered view, it will not be permissible to infringe the constitutional protection in exercise of State policy or by a subordinate legislation to frame such rules which will impinge*

upon the character or in any way substantially dilute the right of the minority to administer and manage affairs of its school….

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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 institution, 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 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.

113. A linguistic minority institution 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 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.*"

49.2.3.7 Following the above discussion, the Supreme Court held that Rule 64(1)(b) and the DoE Circular of September 1989 were not enforceable against linguistic minority schools in the GNCTD.

49.2.3.8 From this decision, the following principles emerge:

(i) The scheme of the DSE Act is to give greater freedom to aided minority institutions and not to impinge on their minority status.

(ii) The right conferred by Article 30(1) is not absolute. Conditions can be imposed to regulate the right, but such conditions cannot either destroy or diminish the scope of the right.

(iii) Imposition of conditions with regard to management of institutions and the power of the State to step in where there are questions of national interest are two separate concepts.

(iv) The laws made by the State to regulate administration of educational institutions which receive grant-in-aid, if they interfered with the overall administrative control by the management over the staff, or abridged or diluted the right to establish and administer educational institutions, would not be applicable to minorities.

(v) Receipt of grant-in-aid does not detract from the minority status of an institution, nor is it thereby rendered "State" within the meaning of Article 12 of the Constitution of India.

(vi) The State has no right of interfere in the establishment, administration and management of a school run by a linguistic minority except to regulate within permissible limits.

(vii) The right to establish and administer an educational institution includes the right to appoint the Principal and teachers.

(viii) Permissible Regulations which would not infract Article 30(1) would include Regulations intended to prevent mal-administration or to lay down standards of education, teaching, maintenance of discipline, public order, health and morality,

etc.

(ix) These Regulations should not impinge on the basic character of the minority institution. Prescribing of conditions to ensure proper utilization of aid granted by the State to the minority institution is permissible under Article 30(1) of the Constitution.

(x) The freedom to choose the Principal and teachers are vital facets of right to administer an educational institution irrespective of whether the institution is aided or unaided.

(xi) A linguistic minority is entitled to conserve its language and culture by virtue of Article 29(1) of the Constitution. It is entitled, therefore, to select people who satisfy the prescribed criteria, qualification and eligibility and ensure better cultural and linguistic compatibility to the minority institution.

(xii) The regulatory power of the State in the matter of appointment of teachers and Principals in minority educational institutions is restricted to stipulation of their qualification and eligibility criteria. If the persons appointed possess the stipulated eligibility and qualifications, no further regulatory power vests in the State.

(xiii) There is, therefore, a fine distinction between a restriction on the right of administration and a Regulation prescribing the

manner of administration.

49.3 *Abhay Nandan Inter College*

49.3.1 The Supreme Court was concerned, in ***Abhay Nandan Inter College***, with a challenge to the judgment of the Division Bench of the High Court of Allahabad which declared as unconstitutional Regulation 101 framed under the Intermediate Education Act, 1921. The said Regulations stipulated thus:

> "101. The appointing authority, except for the prior approval of the Inspector, shall not fill any vacant post of non-teaching staff (clerical cadre) in any recognised or aided institution; with the restriction that the District Inspector of Schools shall make available the total number of vacancies to the Director of Education (Secondary Education) and also put forth justification for filling of the posts, showing the strength of the students in the institution. On receipt of the order from Director of Education (Secondary Education), the District Inspector of Schools shall give permission to the appointing authority for filling the said vacancies (except the vacancies of Class IV posts) and while giving the permission, he shall ensure compliance of the Reservation Rules specified by the Government as also of the prescribed norms in justification for the posts.
>
> With respect to the Class IV vacancies, arrangements shall be made by way of outsourcing only; but the relevant Rules, 1981, as amended from time to time, for recruitment of dependants of teaching or non-teaching staff of the non-government aided institutions dying in harness shall be applicable in relation to the appointments to be made on the vacant posts of Class IV category."

49.3.2 The High Court was of the view that Regulation 101 was *ultra vires* Section 16G of the Intermediate Education Act, 1921 and the provisions of the Uttar Pradesh High Schools and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act,

1971. The Division Bench also observed that "outsourcing" as a concept of making available staff to perform Class IV jobs was unconstitutional, arbitrary and illegal.

49.3.3 While the Supreme Court was concerned with larger issues, it examined the aspect of the challenge in so far as it related to minority institutions. Paras 31 to 34 of the Report, on which Mr. Yeeshu Jain, places great reliance read thus :

> **"Minority and non-minority**
>
> 31. *When it comes to aided institutions, there cannot be any difference between a minority and non-minority one. Article 30 of the Constitution of India is subject to its own restrictions being reasonable. A protection cannot be expanded into a better right than one which a non-minority institution enjoys*. Law has become quite settled on this issue and therefore does not require any elaboration.
>
> 32. Thus, on the aforesaid issue we have no hesitation in reiterating the principle that *an institution receiving aid is bound by the conditions imposed and therefore expected to comply. Once we hold so, the challenge made on various grounds, falls to the ground.*
>
> 33. *The haze between a minority and non-minority institution is no longer in existence*. This Court in ***Sk. Mohd. Rafique* v. *Contai Rahamania High Madrasah***[54], has dealt with the same through the following paragraphs:
>
> > "*41*. In the backdrop of the decisions of this Court referred to hereinabove, we must now consider whether the relevant provisions of the Commission Act, 2008 transgress upon the rights of a minority institution or the said provisions can be termed as 'tenable as ensuring the excellence of the institution without injuring the essence of the right' Expression used by Krishna Iyer, J. in ***Gandhi Faiz-e-am-***

[54] **(2020) 6 SCC 689**

College* v. *University of Agra[55], of a minority institution. Right from ***Kerala Education Bill***, *1957, In re case* the issue that has engaged the attention of this Court is about the content of rights of minority educational institution and the extent and width of applicability of Regulations and what can be said to be permissible Regulations. If the cases in the first segment i.e. up to the decision in ***T.M.A. Pai*** are considered,…

***

42. We now turn to ***T.M.A. Pai*** *Foundation case* and consider the principles that it laid down and whether there was reiteration of the principles laid down in the decisions of this Court in the earlier segment or whether there was any change or shift in the emphasis:

42.1. In para 50, five incidents were stated to comprise the "right to establish and administer" and three of them were stated to be:

(*a*) right to admit students;

(b) right to appoint staff — teaching and non-teaching; and

(c) right to take disciplinary action against the staff.

The discussion in the leading judgment was under various *headings* and the important one being "*5. To what extent can the rights of aided private minority institutions to administer be regulated*?"

42.2. The earlier decisions of the Court were considered and while considering the judgment of this Court in *Sidhrajbhai Sabhai case* [***Sidhrajbhai Sabhai* v. *State of Gujarat***[56], it was observed : (***T.M.A. Pai case*** ,SCC p. 563, para 107)

> '*107*. If this is so, it is difficult to appreciate how the Government can be prevented from framing Regulations that are in the national interest, as it seems to be indicated in the passage quoted hereinabove. *Any Regulation framed in the national interest must necessarily*

[55] **(1975) 2 SCC 283 : 1 SCEC 277**
[56] **(1963) 3 SCR 837 : AIR 1963 SC 540**

> *apply to all educational institutions, whether run by the majority or the minority. Such a limitation must necessarily be read into Article 30. The right under Article 30(1) cannot be such as to override the national interest or to prevent the Government from framing Regulations in that behalf. It is, of course, true that Government Regulations cannot destroy the minority character of the institution or make the right to establish and administer a mere illusion; but the right under Article 30 is not so absolute as to be above the law.'*

42.3. Thus, the principle laid down in ***Sidhrajbhai Sabhai*** *case that the right under Article 30(1) cannot be whittled down by the so-called regulative measures conceived in the interest not of the minority educational institution, but of the public or the nation as a whole was not accepted in* ***T.M.A. Pai***. The emphasis was clear that any Regulation framed in the national interest must necessarily apply to all educational institutions, whether run by the majority or the minority and put the matter beyond any doubt. A caveat was however entered and it was stated that the Government Regulations cannot destroy the minority character of the institution.

42.4. The leading judgment then observed that the correct approach would be—what was laid down by Khanna, J. in ***Ahmedabad St. Xavier's College*** *case* : (***T.M.A. Pai*** *case*, SCC p. 570, para 122)

> *'122. … a balance has to be kept between the two objectives — that of ensuring the standard of excellence of the institution, and that of preserving the right of the minorities to establish and administer their educational institutions. Regulations that embraced and reconciled the two objectives could be considered to be reasonable. This, in our view, is the correct approach to the problem.'*

42.5. The majority judgment then summed up the matter and stated : (***T.M.A. Pai*** *case*, SCC p. 578, paras 135 & 137)

> *135. … It is difficult to comprehend that the Framers of the Constitution would have given such an absolute right to the religious or linguistic minorities, which would enable them to establish and administer educational institutions in a manner so as to be in conflict with the other Parts of the Constitution. …*
>
> ***
>
> *137. … The right under Article 30(1) has, therefore, not been held to be absolute or above other provisions of the law, and we reiterate the same. By the same analogy, there is no reason why Regulations or conditions concerning, generally, the welfare of students and teachers should not be made applicable in order to provide a proper academic atmosphere, as such provisions do not in any way interfere with the right of administration or management under Article 30(1).'*

It was further laid down : (***T.M.A. Pai*** *case*, SCC p. 579, para 138)

> '*138*. … In other words, the essence of Article 30(1) is to ensure equal treatment between the majority and the minority institutions. … Laws of the land, including rules and Regulations, must apply equally to the majority institutions as well as to the minority institutions.'

43. The decision in ***T.M.A. Pai***, rendered by eleven Judges of this Court, thus put the matter beyond any doubt and clarified that the right under Article 30(1) is not absolute or above the law and that conditions *concerning* the welfare of the students and teachers must apply in order to provide proper academic atmosphere, so long as the conditions did not interfere with the right of the administration or management. What was accepted as correct approach was the test laid down by Khanna, J. in ***Ahmedabad St. Xavier's***

> ***College*** *case* that a balance be kept between two objectives—one to ensure the standard of excellence of the institution and the other preserving the right of the minorities to establish and administer their educational institutions. The essence of Article 30(1) was also stated — '*to ensure equal treatment between the majority and the minority institutions*' and that rules and Regulations would apply equally to the majority institutions as well as to the minority institutions.
>
> ***
>
> *59. In our considered view going by the principles laid down in the decision in* ***T.M.A. Pai****, the provisions concerned cannot, therefore, be said to be transgressing the rights of the minority institutions. The selection of the teachers and their nomination by the Commission constituted under the provisions of the Commission Act, 2008 would satisfy the national interest as well as the interest of the minority educational institutions and the said provisions are not violative of the rights of the minority educational institutions."*
>
> (emphasis in original)

34. We would also like to point out two additional paragraphs of the lead judgment in ***T.M.A. Pai*** that would put a quietus to the issue before us qua grant of aid and the conditions that may be imposed by the State in light of the protection granted to minority institutions under Article 30 of the Constitution of India : (SCC p. 580, paras 143-44)

> "*143*. This means that the *right under Article 30(1) implies that any grant that is given by the State to the minority institution cannot have such conditions attached to it, which will in any way dilute or abridge the rights of the minority institution to establish and administer that institution. The conditions that can normally be permitted to be imposed, on the educational institutions receiving the grant, must be related to the proper utilisation of the grant and fulfilment of the objectives of the grant. Any such secular conditions so laid, such as a proper audit with regard to the utilisation of the funds and the manner in which the funds are to be utilised, will be applicable and would not dilute the minority status of the educational institutions. Such*

> *conditions would be valid if they are also imposed on other educational institutions receiving the grant.*
>
> *144. It cannot be argued that no conditions can be imposed while giving aid to a minority institution. Whether it is an institution run by the majority or the minority, all conditions that have relevance to the proper utilisation of the grant-in-aid by an educational institution can be imposed. All that Article 30(2)* states is that on the *ground* that an institution is under the management of a minority, whether based on religion or language, grant of aid to that educational institution cannot be discriminated against, if other educational institutions are entitled to receive aid. The conditions for grant or non-grant of aid to educational institutions have to be uniformly applied, whether it is a majority-run institution or a minority-run institution."
>
> (Emphasis Supplied)

49.3.4 Mr. Jain seeks to submit that opening sentence in para 31 of the decision in ***Abhay Nandan Inter College*** itself eviscerates the distinction between an aided minority institution and aided non-minority institution. Para 32 goes on to observe that an aided institution is expected to comply with the conditions subject to which aid is granted. Para 33 further observes that "haze between a minority and non-minority institution is no longer in existence."

49.3.5 The reliance by Mr. Yeeshu Jain on these observations of the Supreme Court is, however, myopic. The decision goes on, in express terms, to approve the principle, in ***T.M.A. Pai*** that the regulatory power of the State over aided minority institutions does not extend to compromising on right of the minority to establish and administer the institution. The principle that grant of aid can also not

be subjected to conditions which prejudices the said right also finds approval in para 34 of ***Abhay Nandan Inter College***. In para 33, the Supreme Court has relied, *inter alia*, on para 42.1 of its earlier decision in ***Sk. Mohd. Rafique*** in which the Supreme Court reiterated the observation in ***T.M.A. Pai*** that the right to appoint staff, teaching and non-teaching, and the right to take disciplinary action against the staff were among the essential incidents to establish and administer an educational institution.

49.3.6 The judgment in ***Abhay Nandan Inter College*** cannot, therefore be regarded as diluting the principles contained in ***Frank Anthony Public School Employees' Association***, ***Malankara Syrian Catholic College*** and ***Sindhi Education Society***.

49.4 Applying the law to the facts

49.4.1 When the above principles are applied to the facts on hand, the conclusion is inescapable. The petitioner, as an aided minority institution has an absolute right to appoint the persons whom the petitioner chooses, as Principal, teachers and other staff, in the educational institutions run by it. No prior permission or approval of the DoE is required. The extent of regulation by the DoE is limited to prescribing qualifications and experience of the Principals and teachers. So long as the Principals and teachers who are appointed possess the prescribed qualifications and experience, there can be no restriction whatsoever on the right of the petitioner to make appointments to fill in the vacancies in the schools run by it.

49.4.2 The grant of aid, by the State, to the minority institution, makes no substantial difference to this legal position. At the highest, the State can regulate the proper utilization of the aid which it grants. It cannot subjugate the minority educational institution to its dictates in the matter of appointment of teachers, or Principals, on the pretext that it has granted aid to the institution.

49.4.3 The objection of the respondent, in the letter dated 1 December 2023, that the schools run by the petitioner did not have Managing Committees, is entirely alien to the issue at hand. That apart, on facts too, this allegation has been found to be incorrect. Each of the petitioner's schools has an independent Management Committee and this position is not disputed even by Mr. Yeeshu Jain during the course of arguments. The only objection of Mr. Jain is that one Mr. Raju was working as a common Manager in all the Managing Committees, which was impermissible.

49.4.4 The Supreme Court has clearly held that the constitution of Managing Committees is also part of the right to establish and administer minority educational institutions, guaranteed by Article 30(1) of the Constitution. Inherent in this right would be included the right to decide who would be the Manager of the Managing Committee. It is questionable, therefore, in my view, whether the prescription that there can be no common Manager in the Managing Committees of schools run by one institution can be applied to aided minority institutions such as the respondent.

49.4.5 Besides, the fact that one person may be a Manager in more than one Managing Committees is clearly, at the very worst, a curable defect. It cannot therefore constitute a legitimate basis to refuse permission to the petitioner to fill in the vacancies of Principals and teachers in its educational institutions. At the highest, the DoE can only call upon the petitioners to ensure that there are separate Managers in its Managing Committees. I am not inclined to express any view in this regard and leave it open to the DoE, should it so choose, to call upon the petitioner in that regard. If it does, it would be for the petitioner to take appropriate action either to comply with the request of the DoE or to convince the DoE that the existence of one common Manager in the Managing Committees of its schools does not infract the DSE Act.

49.4.6 In any event that cannot constitute a legitimate ground on the basis of which the DoE can refuse the request of the petitioner to fill in the vacancies of Principals and Teachers in the schools run by it. As no prior approval of the DoE is required, therefore, the decision dated 1 December 2023 is also unsustainable in law.

Conclusion

50. It is accordingly held that the petitioner is entitled to make appointments against the vacant posts of Principals and teachers in the schools run by it without prior approval of the DoE. The Selection Committee would, however, be constituted in accordance with the

Rule 96(3)(a) of the DSE Rules in the case of Principals and 96(3)(b) in the case of teachers, subject to the role of the nominees of the DoE being restricted in terms of Rule 96(3-A).

51. Resultantly, the order dated 1 December 2023, rejecting the petitioner's request for filling up of 52 vacant posts is quashed and set aside.

52. The writ petition stands allowed, with no orders as to costs.

C. HARI SHANKAR, J.

MAY 28, 2024
Yg/rb/*dsn*