

N. Ammad

Vs

Manager, Emjay High School and Others

Civil Appeals Nos. 4597-98 of 1998

(S. Saghir Ahmed, K. T. Thomas JJ)

07.09.1998

JUDGMENT

K. T. THOMAS, J.

1. Special leave granted.
2. The simple question in these appeals is this : is the management of a minority school free to choose and appoint any qualified person as Headmaster of the school or whether such management is hedged by any legislative edict or executive fiat in doing so ?
3. The above question arose when the management of a school sought to appoint the 4th respondent (P. M. Aboobacker) as Headmaster thereof. The school is : "Emjay Vocational Higher Secondary School", Valliappalli Taluk, Calicut District, Kerala (hereinafter referred to as "the School"). This move was stiffly resisted by the appellant who is the seniormost teacher in the School. At his instance, the District Education Officer (DEO) interfered but of no avail. The appellant thereupon filed a writ petition in the High Court of Kerala for a writ of mandamus to the management of the School to appoint him as Headmaster. Learned Single Judge of the High Court, who heard the writ petition, allowed it and issued a direction as prayed for by the appellant. But a Division Bench of the High Court reversed that judgment and dismissed the writ petition. Hence, the appellant has come up to this Court seeking special leave to appeal.
4. Some more facts will be advantageous to focus on the point in dispute.
5. The appellant was appointed as a teacher (High School Assistant - HSA - as it is called) in the School on 3-6-1982, and in June 1991 he became the seniormost teacher there. The post of Headmaster of the School fell vacant during that time. None in the teaching staff of the School, including the appellant, was qualified to be appointed as Headmaster then. One of the requisites for the post of Headmaster, as per the relevant rules, is that he must possess a minimum service qualification of 12 years of continuous graduate service. The appellant would have completed the said period of 12 years only in June 1994. Nonetheless, the appellant was put in charge as Headmaster of the School with the approval of the DEO concerned. When the appellant completed the required period for service qualification he pressed the management to appoint him as regular Headmaster. The DEO also sent a communication to the management requesting them "to promote and appoint a qualified seniormost HSA as Headmaster with immediate effect". But the management, instead of acceding to the aforesaid request, brought the 4th respondent (who was a graduate teacher having larger period of service than the appellant) from another school as per a transfer order which was approved by the department on 5-9-1994, and appointed him as

Headmaster of the School. It was then that the appellant filed the writ petition for issuing appropriate directions including a direction to send the 4th respondent back to the school where from he was brought.

6. Some undisputed factual features are these : the School was declared by the Government as a Muslim minority community school as per GO (RT) 2959/94/G. Edn. It is an aided school and is governed by the provisions of the Kerala Education Act, 1958 (for short "the Act"). The 4th respondent is qualified to be appointed as Headmaster on the date when he was appointed as such and he has longer service than the appellant as HSA, though he had such service in a different school. As per the relevant rules, when a teacher is transferred from one school to another, his rank in the new school shall be fixed next below the juniormost teacher in that school in the particular grade.

7. The contention of the appellant is that he being the seniormost graduate teacher should necessarily have been appointed as the Headmaster and none else. He also contended that transfer of the 4th respondent from another school was vitiated as approval for such transfer was made on the premise that he was being transferred to hold the post of Headmaster. The third contention is that as the vacancy of Headmaster arose before 2-8-1994, the post should have been filled up in accordance with the Rules and the C protection as minority school cannot be used to thwart the legitimate right of the seniormost teacher.

8. "Educational Agency" is defined under Section 2(2) of the Act as "any person or body of persons permitted to establish and maintain any private school under this Act". Chapter XIV of the Kerala Education Rules contains a fasciculus of Rules regarding "Conditions of service of aided school teachers". Rule 10 which falls under the said Chapter provides that where more than one school are under the same educational agency, a teacher from one such school may be transferred to another such school. Rule 11 provides that a teacher serving in any school under one educational agency may be transferred to a school under another educational agency with the previous approval of the DEO and Rule 13 stipulates that his rank in the new school "will be fixed next below the juniormost teacher in that particular grade in that school". The minimum service qualification for appointment as Headmaster is provided in Rule 44-A. As Rule 44(1) is important it is extracted below :

"The appointment of Headmasters shall ordinarily be according to seniority from the seniority list prepared and maintained under clauses (a) and (b), as the case may be, of Rule 34. The Manager will appoint the Headmaster subject to the Rules laid down in the matter. A teacher if he is aggrieved by such appointment will have the right of appeal to the Department."

9. What happens if the management of the school does not conform to the above rules ? Section 14 of the Act enables the Government to take over the management of schools for a period not exceeding 5 years "whenever it appears to the Government that the manager of any aided school has neglected to perform any of the duties imposed by or under this Act or the rules made thereunder". But the aforesaid action cannot be taken against a minority school because sub-section (9) of Section 14 says that "nothing in this section shall apply to minority schools".

10. In the light of the scheme of the Act as set out above relating to appointment of Headmaster in a minority school, we have now to consider a whether the DEO can compel the management to appoint the appellant as Headmaster of the School. For answering the said question we have to deal with the first contention that the School could not have claimed any protection as a minority school

before 2-8-1994, the date when the Government declared the School as a minority school. The contention, in other words, is that the above declaration of the Government is only prospective.

11. "Minority school" is defined in Section 2(5) of the Act as under :

"2. (5) 'Minority school' means school of their choice established and administered, or administered, by such minorities as have the right to do so under clause (1) of Article 30 of the Constitution."

12. Counsel for both sides conceded that there is no provision in the Act which enables the Government to declare a school as a minority school. If so, a school which is otherwise a minority school would continue to be so whether the Government declared it as such or not. Declaration by the Government is at best only a recognition of an existing fact. Article 30(1) of the Constitution reads thus :

"30. (1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice."

13. When the Government declared the School as a minority school it has recognised a factual position that the School was established and is being administered by a minority community. The declaration is only an open acceptance of a legal character which should necessarily have existed antecedent to such declaration. Therefore, we are unable to agree with the contention that the School can claim protection only after Government declared it as a minority school on 2-8-1994.

14. We will now consider the next contention that the management of a minority school is also bound by Rule 44(1) of the Kerala Education Rules and hence the seniormost HSA of the school should have been appointed as Headmaster.

15. A Constitution Bench of seven Judges of this Court in Kerala Education Bill, 1957, Re (AIR 1958 SC 956) has examined the constitutional validity of the Bill which was the precursor to the Act when the President of India had sought the advice of the Supreme Court under Article 143 of the Constitution. One of the propositions laid down by the said Constitution Bench in the said decision is this : the right guaranteed under Article 30(1) is a right that is absolute and any law or executive direction which infringes the substance of that right is void to the extent of infringement. But the absolute character of the right will not preclude making of regulations in the true interests of efficiency or instruction, discipline, health, sanitation, morality, public order and the like, as such regulations are not restrictions on the substance of the right guaranteed by the Constitution.

16. The aforesaid proposition was approved by another Constitution a Bench of this Court in Sidhrajbhai Sabbai v. State of Gujarat (AIR 1963 SC 540 : 1962 Ker LT 135) and also by a nine-Judge Bench of this Court in Ahmedabad St. Xavier's College Society v. State of Gujarat ((1974) 1 SCC 717)

17. Thus the legal position adumbrated in Kerala Education Bill, Re (AIR 1958 SC 956) remains unchanged now.

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* (1964 Ker LT 791 : AIR 1965 Ker 75) 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'."

20. The importance of the key role which a Headmaster plays in the school cannot be better delineated than that. The nine-Judge Bench in the *Ahmedabad St. Xavier's College Society* ((1974) 1 SCC 717) has highlighted the importance of the role of the Principal of a college. In support of majority view in that decision K. K. Mathew, J. has observed 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."

21. H. R. Khanna, J. has adopted a still broader view that even selection of teachers is of great importance in the right to manage a school. Learned Judge has stated thus : (SCC p. 789, para 103)

"The selection and appointment of teachers for an educational institution is one of the essential ingredients of the right to manage an educational institution and the minorities can plainly be not denied such right of selection and appointment without infringing Article 30(1)"

22. Krishna Iyer, J. who dissented from the majority view in *Gandhi Faiz-E-Am College v. University of Agra* ((1975) 2 SCC 283 (1975) 3 SCR 810) has, nevertheless, emphasised the importance of the post of the Principal in the following words :

"21. An activist principal is an asset in discharging these duties which are inextricably interlaced with academic functions. The principal is an invaluable insider - the Management's own choice - not an outsider answerable to the Vice-Chancellor. He brings into the work of the Managing Committee that intimate acquaintance with educational operations and that necessary expression of student-teacher aspirations and complaints which are so essential for the minority institution

to achieve a happy marriage between individuality and excellence."

23. Whatever is said about the importance of the post of Principal of a college vis-a-vis the administration of the institution would in pari materia apply to the Headmaster of a school with equal force.

24. If management of the school is not given very wide freedom to choose the personnel for holding such a key post, subject of course to the restrictions regarding qualifications to be prescribed by the State, the right to administer the school would get much diminished.

25. The appellant in this case adopted an alternative contention that the vacancy of Headmaster should have been filled up on 1-6-1991, the date on which the vacancy arose. Rule 45-C (Chapter XIV) of the Kerala Education Rules provides for temporary promotion as Headmaster in the contingency when a qualified teacher is not available to be promoted in accordance with the Rules. In such contingency the Rule says that the appointing authority "shall promote the seniormost teacher on the staff of the school or the schools under the educational agency, as Headmaster, temporarily". A Division Bench of the Kerala High Court has taken the view that even in a minority school, appointment of Headmaster shall be with reference to the date of vacancy. [vide *Henry Gomez v. Govt. of Kerala* (ILR (1994) 1 Ker 808).] In that case the vacancy arose on 2-5-1987 and none in that School was qualified and so the management of that school brought one teacher from outside and appointed him as Headmaster. The Division Bench thereupon held that "the management is bound to find out a qualified teacher from among the a members of its staff to be posted as Headmaster of the school in the vacancy that arose on 2-5-1987".

26. If the said observations were meant for a non-minority school, we would not have considered its implications here. But as the observations are meant for a minority school in that case we may state at once that we are unable to concur with it. The management of a minority school is free to find out a qualified person either from the staff of the same school or from outside to fill up the vacancy. We may point out, in this context that the Division Bench in *Henry Gomez* case (ILR (1994) 1 Ker 808) has quoted with approval the following observations of another earlier Division Bench decision of the same High Court in *Manager Corporate E. Agency v. State of Kerala* ((1990) 2 Ker LT 240) :

"The right to appoint the Headmaster of a school or the Principal of a college, is one of prime importance in the administration of the institution. The right of the minority to administer an educational institution of its choice requires the presence of a person in whom they can repose confidence, who will carry out their directions, and to whom they can look forward to maintain the traditions, discipline and the efficiency of the teaching. When once the pivotal position of the Headmaster is recognised, it has to be held that the right to appoint a person of its choice as Headmaster is of paramount importance to the minority, any interference with which (otherwise than by prescribing qualifications and experience) will denude the right of administration of its content, reducing it to mere husk, without the grain. Such an inroad cannot be saved as a regulation which the State might impose for furthering the standards of education."

Approval of the above observations of the earlier Division Bench decision of the same court does not go in consonance with the direction issued in *Henry Gomez* case (ILR (1994) 1 Ker 808) that the management is bound to find out a qualified teacher from among the members of its staff to be posted as Headmaster of the school.

27. Shri R. F. Nariman, learned Senior Counsel contended, alternatively, that if the management is anxious to find out the most qualified person to fill up the post of Headmaster, the management should have advertised for the post inviting applications from qualified persons. To buttress up the said argument learned counsel cited a two-Judge Bench decision of this Court in *Shainda Hasan v. State of U.P.* ((1990) 3 SCC 48 : 1990 SCC (L&S) 432 : (1990) 13 ATC 577 : (1990) 2 SCR 699) In that case the management of a college advertised for the post of Principal and when the appellant was selected by relaxing the qualifications the University declined to accord approval thereto. When the appellant approached this Court, learned Judges suggested that the University might not interfere with the selection and appointment under the facts of that case. But no legal proposition has been laid down that the selection process must be through advertisement. According to us, it is for the management of the minority educational institution to choose the modality for selecting the qualified persons for appointment.

28. Thus 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 b conditions of service for the post. Any such statutory or executive fiat would be violative of the fundamental right enshrined in the aforesaid article and would hence be void.

29. In the present case, nobody has alleged that the 4th respondent does not possess the qualifications prescribed for the post of Headmaster. If that is the position, the management has the right and freedom to appoint him as the Headmaster of the School whether it is by bringing him down from another school or even from outside the State. We, therefore, concur with the conclusion of the Division Bench of the High Court in the impugned judgment and dismiss these appeals.