

Queen Mary

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Court : Delhi

Decided On : Nov-21-2011

Judge : Ravindra Bhat; G.P. Mittal, Jj.

Acts : [Delhi School Education Act, 1973](#) - Sections 5, 6, 28; [Constitution of India](#) - Article 30

Appeal No. : W.P. (C) 2845 of 1992; W.P. (C) 4291 of 1993

Appellant : Queen Mary

Respondent : U.O.i

Advocate for Def. : Ms. Avnish Ahlawat

Judgement :

1. The Petitioners in these two writ petitions (one in WP 2845/1992 and four in WP 4291/1993), claim to be minority educational institutions, established and administered by Christian denominations, which fall within the expression "minority" in terms of Article 30 of the [Constitution of India](#). The Petitioner institutions have established schools, in the National Capital Territory of Delhi. These schools are regulated by the [Delhi School Education Act, 1973](#) ("the Act"); and Rules framed under the Act (hereafter "the Rules").

2. The Petitioners claim to be aggrieved by what they term as intrusions into their power to administer, according to their choice, the educational institutions that they

have established. It is alleged that amendments to the Rules, notified in 1990, have the effect of making impermissible inroads into the autonomy guaranteed and guarded by Article 30(1) of the [Constitution of India](#). The offending provisions include the power of the authorities to frame and promulgate Regulations which inter alia, permit the Director of Education (charged with the duty of regulating school education in Delhi) to require reservations for recruitment of teachers and employees in such minority schools; the power to direct absorption of teachers rendered surplus in aided schools as a result of the institution being shut down or sections of it being closed; the power (of the Director) to name nominees to the Selection committees for recruitment and appointment of teachers and various classes of employees (to such schools). An attempt to challenge Sections 5, 6 and 28 of the Act, was made in the petitions, but was given up during the stage of hearing.

3. It is argued that Rules 47, 64 (1) (e) to the extent they enable the authorities under the Act, to require absorption of surplus teachers in other schools, by minority educational institutions, is impermissible. Similarly, the powers conferred by Rule 96 were challenged notwithstanding the introduction of Rule (3A)- which mandates the participation of Director - nominated members of the selection committees (in aided counsel) to be as advisers, without any voting rights. It was submitted that the mere participation of outsiders, without the consent or volition of those in management of the minority institutions, falls foul of the right protected by Article 30(1) of the [Constitution of India](#). Counsel relied on the judgments of the Supreme Court, reported as *In re Kerala Education Bill 1958* SCR 995; *The Ahmedabad St. Xaviers College Society v. State of Gujarat*, AIR 1974 S.C. 1389, particularly the following passage from the judgment of Ray, CJ:

"The right to administer is said to consist of four principal matters. First is the right to choose its managing or governing body. It is said that the founders of the minority institution have faith and confidence in their own committee or body consisting of persons elected by them. Second is the right to choose its teachers. It is said that minority institutions want teachers to have compatibility with the ideals, aims and aspirations of the institution. Third is the right not to be compelled to refuse admission to students. In other words, the minority institutions want to

have the right to admit students of their choice subject to reasonable regulations about academic qualifications. Fourth is the right to use its properties and assets for the benefit of its own institution."

Learned counsel also relied on the decision reported as *T.M.A. Pai Foundation v State of Karnataka* 2002 (8) SCC 481, particularly the following passages:

"122. The learned Judge then observed that the right of the minorities to administer educational institutions did not prevent the making of reasonable regulations in respect of these institutions. Recognizing that the right to administer educational institutions could not include the right to maladminister, it was held that regulations could be lawfully imposed, for the receiving of grants and recognition, while permitting the institution to retain its character as a minority institution. The regulation "must satisfy a dual test the test of reasonableness, and the test that it is regulative of the educational character of the institution and is conducive to making the institution an effective vehicle of education for the minority community or other persons who resort to it". (SCC p. 783, para 92). It was permissible for the authorities to prescribe regulations, which must be complied with, before a minority institution could seek or retain affiliation and recognition. But it was also stated that the regulations made by the authority should not impinge upon the minority character of the institution. Therefore, 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....."

141. The grant of aid is not a constitutional imperative. Article 337 only gives the right to assistance by way of grant to the Anglo- Indian community for a specified period of time. If no aid is granted to anyone, Article 30(1) would not justify a demand for aid, and it cannot be said that the absence of aid makes the right under Article 30(1) illusory. The founding fathers have not incorporated the right to grants in Article 30, whereas they have done so under Article 337; what, then, is the meaning, scope and effect of Article 30(2)? Article 30(2) only means what it

states viz. that a minority institutions shall not be discriminated against where aid to educational institutions is granted. In other words, 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. If, however, aid were denied on the ground that the educational institution is under the management of a minority, then such a denial would be completely invalid.

142. The implication of Article 30(2) is also that it recognizes that the minority nature of the institution should continue, notwithstanding the grant of aid. In other words, when a grant is given to all institutions for imparting secular education, a minority institution is also entitled to receive it, subject to the fulfillment of the requisite criteria, and the State gives the grant knowing that a linguistic or minority educational institution will also receive the same. Of course, the State cannot be compelled to grant aid, but the receipt of it cannot be a reason for altering the nature or character of the recipient educational institution.

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 institutions 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 utilization of the grant and fulfillment of the objectives of the grant. Any such secular conditions so laid, such as a proper audit with regard to the utilization of the funds and the manner in which the funds are to be utilized, 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."

4. Petitioner's counsel also argued that Rule 64 (1) (g) read with Rule 75 violated the right of minority educational institutions to freely administer them. In this regard, it was submitted that the provisions arm the Directorate with arbitrary and uncanalized power in regard to filling of such vacancies as are determined by the authority. The provision could by no means be saved as regulatory, because the authorities are not bound to keep the minority character of the institutions, while determining or deciding the number of vacancies which are to be filled. Similarly, the powers under Rule 98 to grant or withhold approval to appointments, has been challenged as enabling the executive to make impossible incursions into what are essentially "core" management rights. Reliance was lastly placed on the judgment of the Supreme Court reported as *Sindhi Education Society v. Chief Secretary, Government of NCT of Delhi*, (2010) 8 SCC 49.

5. Ms. Avnish Ahlawat, learned counsel for the respondents, argued that whereas the decision in *Sindhi Education* settles that Rule 64 (1)(b) is inapplicable to minority aided schools, the other provisions are essentially regulatory. Arguing about applicability of Rules 47 and 64 (1) (e), it was submitted that these were uniformly applicable to all aided institutions, and meant to safeguard and protect teachers and other employees, facing redundancy. These provisions were not aimed at making inroads into the management powers of the minority institutions, as much as they were motivated by a benevolent objective, i.e., ensuring temporary absorption through alternative employment. As the funding agency, bearing up to 95% of the recurring maintenance grant permitted to every aided school, the provision enabling adjustment of some teachers hit by closure of schools, or parts of schools in minority aided schools, was in the larger public interest, and it also promoted excellence of the institution. In any event the overwhelming cost for such temporary alternative employment was borne by the State, which is the funding agent, and no exception could be taken.

6. It was next argued that regulatory measures, which uphold the State's legitimate concerns, such as Rule 96 and Rule 98, fell within the class of permissible rules, on a fair application of the principles enunciated in the *Ahmedabad St. Xavier's* case (supra). Being applicable to all aided schools, and introduced to promote transparency and uniformity in regard to selection of teachers, the rules could not

be said to violate Article 30 of the Constitution. It was also argued that these rules were meant to promote the utilization of grants, by the State.

7. This court first proposes to consider the challenge to Rule 47 and Rule 64 (1) (e). Rule 47 reads as follows:

"47. Absorption of surplus [employee] etc.

(1) Where as a result of -

(a) the closure of an aided school or any class or classes in any aided school; or

(b) withdrawal of recognition from an aided school: or- (c) withdrawal of aid from an aided school, Any student or employee becomes surplus, such student or employee, as the case may be, [may be absorbed] as far as practicable, in such Government school or aided school as the Administrator may specify:

Provided that the absorption in government service of any employee who has become surplus shall be subject to the availability of a vacancy and shall be subject further to the condition that the concerned employee possesses the requisite qualifications for the post and has not been retrenched by the management of the aided school on any ground other than the ground of closure of the school or any class or classes of the school, or withdrawal of recognition or aid from the school: Provided further that where any such surplus employee is absorbed in a Government school, he shall be treated as junior to all the persons of the same category employed in the Government schools on the date immediately preceding the date on which he is so absorbed, and where such surplus employee is absorbed in an aided school, he shall rank as junior to all the persons of the same category employed in that school on the date immediately preceding the date on which he is so absorbed.

(2) Where any surplus [employee] is absorbed under sub-rule (1):-

(a) the salary and other allowances last drawn by him at the school from which he has become surplus shall be protected;

(b) his provident fund account shall be transferred to the school in which he is so absorbed, and thereupon such provident fund shall be governed in accordance with the rules and regulations in force in that school in relation to provident fund; and

(c) the period of his qualifying service in the school in which he had worked before such absorption and any previous period of qualifying service, if any, in any recognised aided school in Delhi shall be taken into account for the purpose of computing his pension and other retirement benefits.

(3) Without prejudice to the provisions of sub-rules (1) and (2), where an employee becomes surplus by reason of the closure of any class or section thereof or the discontinuance of the teaching of any subject, such employee may be absorbed in the first instance, as far as practicable, in such Government or aided school as the Administrator may specify, and if the class or section which was closed is reopened by the former school or if any new class or section thereof is opened by such school or if the subject, the teaching of which was discontinued, is re-introduced by such school, or the strength of the staff of the former school is increased, such employee be re-absorbed in the former school; but if such re-absorption does not take place within a period of five years from the date of absorption of such employee in the Government or aided school, such employee shall be regularly absorbed in such Government or aided school, as the case may be.

(4) Re-absorption of a employee in a former school shall not affect his continuity of service or his seniority in relation to that school or his emoluments, provident fund, gratuity and other retirement benefits.

Explanation - For the purposes of sub rules (3) and (4), "former school" means the school from which a employee had become surplus."

Rule 64 reads as follows:

"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 facilities, pension, gratuity, provident fund and other prescribed benefits with the Administrator every month;

(d) it shall disburse or cause to be disbursed the dues mentioned 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 or 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 condition specified in sub-rule (1) shall render such school liable to be removed from the grant-in-aid list."

8. It is evident that the rule is categorical that "No school shall be granted aid unless its managing committee gives an undertaking in writing that:.." it would, pursuant to Clause (1) (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" Right from the decision in *Re Kerala Education Bill*, the courts have held that minority educational institutions cannot be asked to surrender or give away their rights under Article 30, if they are recipients of aid, as condition for grant of aid. This was put crisply, in *Frank Anthony Public School Employees Association v. UOI*, AIR 1987 SC 311, (which is of specific relevance to the Act, and considered the various the impact of its provisions) in the following manner:

"If one thing is clear, it is that the fundamental rights guaranteed by Article 30(1) cannot be surrendered, wholly or partly, and the authorities cannot make the grant of aid conditional on the surrender of a part of the Fundamental Rights."

The 11 judge Constitution Bench reiterated this position, in *T.M. A Pai (supra)*, as follows:

"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 institutions 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 utilization of the grant and fulfillment of the objectives of the grant. Any such secular conditions so laid, such as a proper audit with regard to the utilization of the funds and the manner in which the funds are to be utilized, 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."

9. The essential or core management right to appoint teachers and other personnel of their choice, even while preserving the state's regulatory power to

prescribe basic qualifications, for filling the post, was spelt out in the nine-Judge Bench in The Ahmedabad St. Xavier's College Society case 1974 (1) SCC 717. The decision highlighted the importance of the role of the Principal of a college, and other teachers. In support of majority view in that decision K.K. Mathew, J. observed that:

"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."

H.R. Khanna, J. adopted a still broader view that even selection of teachers is of great importance in the right to manage a school. Learned Judge stated that:

"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)."

The judgment in Sindhi Education Society v. Chief Secretary, Government of NCT of Delhi, (2010) 8 SCC 49, again interpreting various provisions of the Act, after exhaustively surveying the previous decisions on the interpretation of Article 30, stated that:

"100. The power to regulate, undisputedly, is not unlimited. It has more restriction than freedom particularly, in relation to the management of linguistic minority institutions. The rules, which were expected to be framed in terms of Section 28 of the DSE Act, were for the purpose of carrying out the provisions of the Act. Even, otherwise, it is a settled principle of law that rules must fall within the ambit and scope of the principal legislation. Section 21 is sufficiently indicative of the inbuilt restrictions that the framers of the law intended to impose upon the State while exercising its power in relation to a linguistic minority school.

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 case⁸, 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. Further, the Court specifically noticed the view recorded by Khanna, J. in reference to Kerala Education Bill, 1957 case⁷, and to Clauses 11 and 12 of the Bill in particular, where the learned Judge had declared that, it is the law declared by the Supreme Court in subsequently contested cases as opposed to the Presidential Reference, which would have a binding effect and said: (T.M.A. Pai case⁸, SCC p. 571, para 123) "123. ... '... The words "as at present advised" as well as the preceding sentence indicate that the view expressed by this Court in Kerala Education Bill, 1957, in this respect was hesitant and tentative and not a final view in the matter.'*"

What the Court had expressed in para 123 above, appears to have found favour with the Bench dealing with T.M.A. Pai⁸. In any case, nothing to the contrary was observed or held in the subsequent judgment by the larger Bench.

Although the court's observations were in the context of autonomy of a linguistic minority educational institution, the same principles would apply in the cases of institutions established and administered by religious minorities, i.e the state's effort to enforce regulations which would directly or indirectly give a decisive role or say (or even a veto) in the appointment of teachers, would violate the right guaranteed under Article 30 (1). This court notices that a previous single judge decision, in *St. Anthony's Girls Senior Sec. School v. Govt. of NCT of Delhi*, ILR (2005) 2 Del 52 did make observations about applicability of Rule 47, the judgment stopped short of pronouncing on the invalidity or inapplicability of the rule.

10. Rule 47 and Rule 64 (1) (e), in this Court's opinion, cannot be made applicable to minority schools- aided or otherwise. The power to require aided schools to absorb teachers and employees rendered surplus in other institutions is laudable, as it furthers the twin social goals of ensuring that trained and experienced manpower does not go waste, and also of assuring employment to teachers and employees, who may be rendered helpless in such circumstances. The state's objective in protecting the laissez faire consequences from such vulnerable - and at the same time valuable - sections of the society cannot be over emphasized. Yet, that social purpose cannot obscure, equally that when those personnel are deployed by the administration on an unwilling (if not protesting) minority institution, it becomes an imposition, robbing the school or institution its choice to pick its personnel, guaranteed by the Constitution. Therefore it is held that Rules 47 and 64 (1) (e) are inapplicable, to the extent that an unwilling school cannot be directed to accept such teachers or employees.

11. The Petitioners had also challenged Rule 64 (1) (b); the provision required aided schools, (including minority aided schools) to

"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..." The challenge to this rule was considered in *Sindhi Education Society*, where the Supreme Court held that it was inapplicable in view of its previous judgments. Therefore, the rule is inapplicable to minority aided schools.

12. It would be necessary to next consider the challenge to Rule 64 (1) (g). It inter alia, obliges every aided school, to give an undertaking to the effect that:

"(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..."

Rule 75 enables the concerned authorities to fix staff and teacher strength. It states:

"XXXXXX XXXXXX XXXXXX

Approved expenditure.- The approved expenditure for recurring maintenance grant shall comprise salaries of the staff appointed with the approval of the Director to the extent of the number of posts which have been sanctioned and approved by the Director for the purpose of aid in accordance with the post-fixation rules made by the Director from time to time.

XXXXXX XXXXXX XXXXXX Now, the power to fix staff strength, on the basis of student intake and availability, is a part of the State's regulatory power. This power is essential to ensure basic standards for imparting education. It is akin to fixing the minimum space requirements for every class room, the standards of hygiene which are to be maintained, the kind of playgrounds and their area, which schools should provide to their pupils, and so on. This conclusion is fortified by the decision reported as *Kolawana Gram Vikas Kendra v. State of Gujarat*, (2010) 1 SCC 133, where it was held that: "However, the requirement of this prior approval is necessitated because it is for the Government to see as to whether there were actually posts available in the said institution as per the strength of students and secondly; whether the candidates, who were sought to be appointed, were having the requisite qualifications in terms of the rules and regulations of the Education Department."

However, the further condition in the rule is that posts shall be filled "without discrimination" as per Recruitment Rules. Now, this latter injunction cannot be binding upon minority schools, regardless of whether they are aided or not,

because their autonomy in appointing teachers of their choice, cannot be interfered with. Similarly, the Recruitment Rules which can apply are those which prescribe minimum qualifications, and pertain to educational standards.

13. Rules 96, and 98 to the extent they are relevant, read as follows:

"96. Recruitment

- (1) Nothing contained in this Chapter shall apply to an unaided minority school.
- (2) Recruitment of employees in each recognised private school shall be made on the recommendation of the Selection Committee.
- (3) The Selection Committee shall consist of:--
 - (a) in the case of recruitment of the head of the school,:-
 - (i) 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;
 - (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.

(c) in the case of an appointment of any other employee, not being an employee belonging to 1["Group D"].

(i) the Chairman of the managing committee or a member of the managing committee, to be nominated by the Chairman; (ii) head of the school;

(iii) a nominee of the Director;

(iv) in the case of an aided school, two officers having experience of the administration of school, to be nominated by the Director; 2[(d) in the case of an appointment of a Group 'D' employee:--

(i) the Chairman of the Managing Committee or a member of the Managing Committee nominated by the Chairman;

(ii) the head of the school;]

3[(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) 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. (3-B) Notwithstanding anything contained in sub-rule (3), the selection committee of a

minority school shall not be limited by the number specified in the said sub-rule and its managing committee may fix such number.]

(4) Nomination of any educationist or expert as a member of the Selection Committee shall be made out of a panel prepared for the purpose by the Advisory Board.

(5) The Chairman of the managing committee, or, where he is not a member of the Selection Committee, the member of the managing committee who is nominated by the Chairman to be a member of the Selection Committee, shall be the Chairman to the Selection Committee.

98. Appointing authority

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

1[(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]"

14. In the year 1975, immediately after the decision in The Ahmedabad St. Xavier (supra) a Division Bench of this court, had occasion to consider the (pre-amended) Rule 96. The relevant portion of the discussion, in the judgment S.S. Jain Sabha (of Rawalpindi) Delhi v. Union of India, ILR (1976) 2 Del 61 is as follows:

"27. This is also a part of the right of administration. Under rule 96 (3) the number of the members of Selection Committee is limited. Any such limitation may be placed only by the management. Rule 96 (3) (a) (iii). -- The presence of two

educationists nominated by the Director will be of great help to the Selection Committee. But we hold that in regard to minority schools they will act only as advisers and will not have the power to vote or actually control the selection of employees. The minority schools are not bound to give preference to persons recommended by the Employment Exchange.

Rule 96 (3) (a) (iv). -- The nominee of the Director will also act only as an adviser. The advisory capacity of the members nominated by the Director under clauses (iii) and (iv) of rule 96 (3) (a) in regard to minority schools may be made clear by appropriate amendment. The same kind of amendment is called for in rule 96 (3) (b) (iv) and (v). Clause (iii) of rule 96 (3) (b) will not apply to a minority school. Similarly, the nominees of the Director in clauses (iii) and (iv) in rule 96 (3) (c) will also act only as advisers."

It was therefore, recognized long ago that Rule 96 in its un-amended form impinged on the rights of minority aided schools, to recruit teachers; the Court, in the state of law, then existing, held that if nominees of the Director were permitted, they could only function in an advisory capacity. At the time, when the Court delivered its judgment, it was felt that participation, without voting rights, in the decision making process, was not intrusive. However, the argument of the Petitioners is that the choice of recruitment is an unfettered right, and subjected only to regulatory conditions such as fulfilling minimum educational and experience standards. The imposition of anyone in the recruitment process, in whatever capacity, is invasive. In this context, it would be useful to notice a recent judgment of the Supreme Court in *Brahmo Samaj Education Society v. State of W.B.*, (2004) 6 SCC 224, where it was held that:

"control cannot extend to the day-to-day administration of the institution. It is categorically stated in *T.M.A. Pai* (SCC at p. 551, para 72) that the State can regulate the method of selection and appointment of teachers after prescribing requisite qualification for the same. Independence for the selection of teachers among the qualified candidates is fundamental to the maintenance of the academic and administrative autonomy of an aided institution. The State can very well provide the basic qualification for teachers. Under the University Grants

Commission Act, 1956, the University Grants Commission (UGC) had laid down qualifications to a teaching post in a university by passing Regulations. As per these Regulations UGC conducts National Eligibility Test (NET) for determining teaching eligibility of candidates. UGC has also authorised accredited States to conduct State-Level Eligibility Test (SLET). Only a person who has qualified NET or SLET will be eligible for appointment as a teacher in an aided institution. This is the required basic qualification for a teacher. The petitioners' right to administer includes the right to appoint teachers of their choice among the NET-/SLET-qualified candidates.

8. Argument on behalf of the State that the appointment through the College Service Commission is to maintain the equal standard of education all throughout the State of West Bengal, does not impress us. The equal standard of teachers are already maintained by NET/SLET. Similarly, receiving aid from State coffers can also not be treated as a justification for imposition of any restrictions that cannot be imposed otherwise"

The state's argument that the rule mandating the inclusion of nominees whose participation is minimal, and whose views are not binding, is a harmless rule, seems attractive. Yet, this court cannot lose sight of the fact that the basic right to recruit personnel of its choice, is that of the minority aided school management. If, as in the case of Rule 47 and Rule 64 (1) (a) and (e), the management cannot be dictated upon about the actual candidate, to be recruited by it, there is no rationale why it should be made to suffer the participation of an outsider, whose presence is not wanted, in the first place, no matter whether that individual's views are not binding. This view is fortified by Rule 98, (which deals with approval of appointment); it does not apply to aided schools, as is evident from Rule 98 (2) proviso (2). Therefore, this Court sees no logic in the minority aided school being compelled to allow participation of nominee members in the selection committee, even if their views or votes are not binding. For these reasons, it is held that minority aided schools are not bound to adopt the composition of the recruitment committees indicated in Rule 96; they are to adhere to the rules applicable to unaided minority schools, i.e., Rules 127-128.

15. The right guaranteed under Article 30 (1) is not subject to any entrenched "reasonable restriction" provision- an aspect which has been repeatedly highlighted in various judgments. The character of permissible state action is therefore, necessarily different from those in relation to other fundamental rights, particularly as in Article 19. The Constitution makers in their wisdom, felt that this provision guaranteed minorities - both linguistic, and religious, the right to propagate their culture, and also ensure that the children of their communities could be assured some modicum of education, so that they could advance with the times. The provision is to be seen as a protective cover to preserve the multicultural fabric of the Indian identity, against possible onslaught resulting from political vicissitudes through hostile legislative majorities.

16. In view of the above discussion, we hold and declare that Rules 47, 64 (1) (b), (e) and 96 of the Delhi School Education Rules, are inapplicable to aided minority schools. Rule 64 (1) (g) is held inapplicable to the extent that it mandates such schools to fill the posts "without any discrimination or delay as per the Recruitment Rules prescribed for such posts"; it is clarified that the managements of such aided minority schools shall adhere to the Recruitment Rules, and other general norms, to the extent they prescribe qualifications, experience, age, and other such criteria, for appointment (as they are regulatory).

17. The writ petitions are allowed to the above extent. There shall however, be no order as to costs.

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