IN THE HIGH COURT AT CALCUTTA

CONSTITUTIONAL WRIT JURISDICTION

APPELLATE SIDE

Present:

The Hon'ble Justice Sambuddha Chakrabarti

W. P. No. 20650(W) of 2013

The Managing Committee, Contai Rahmania High Madrasah & Another
Vs.
The State of West Bengal and Others

For the petitioner	:	Mr. L. K. Gupta, Sr. Advocate Mr. Soumen Kumar Dutta, Advocate Mr. Raghunath Chakraborty, Advocate Mr. Abu Sohel, Advocate
For Madrasah Service Commission	:	Mr. Jayanta Mitra, Sr. Advocate Mr. Ekramul Bari, Advocate Mr. S. M. Ali, Advocate
For the State	:	Mr. Bimal Chatterjee, Learned Advocate General Mr. Tapan Mukherjee, Advocate Mr. Nilotpal Chatterjee, Advocate
For the State-Respondents	:	Mr. Jaharlal De, Advocate Mr. Shamim Ul Bari, Advocate
Heard on	:	19.02.2014, 21.02.2014, 26.02.2014 and 27.02.2014
Judgement on	:	12.03.2014

Sambuddha Chakrabarti, J.:

The principal issue involved in the writ petition, though short, is of immense significance, not only from the constitutional point of view but also in a larger socio-economic perspective: whether the right of a minority to establish and administer an institution is compromised by any legislation which tends to take away the right of appointing teachers of the institution or whether this right can be taken away by the state by adopting a legislative procedure claimed to uplift the status of the said community. Inextricably entwined with it is a remoter but inescapable question: whether a constitutional provision or for that matter a fundamental right can ever be held to run against the interest of the community so that any regulatory legislation is permissible interfering with the said freedom.

Contai Rahamania High Madrasah was initially recognized as a X class High Madrasah by the West Bengal Board of Secondary Education. Thereafter, it was upgraded as a Senior High Madrasah with effect from the academic session 2001-02.

By a notification, dated October 12, 2007 Government of West Bengal recognized all Madrasahs in West Bengal as minority institutions and the concerned Madrasah was also accordingly declared as a minority institution in pursuance of Article 30 of the Constitution of India. The

petitioners contend that in terms of Article 30 of the Constitution the Madrasahs have a right to enjoy certain benefits including the right to select and appoint its teaching and non-teaching staff and to administer the same according to its own choice.

The enactment of the West Bengal Madrasah Service Commission Act, 2008 (the Act, for short) is the beginning of the problem for the petitioner. By the said Act a Commission was constituted and Section 8 thereof *inter alia* provided that notwithstanding anything contained in any other law for the time being in force or in any contract, custom or usage to the contrary, it shall be the duty of the Commission to select and recommend persons to be appointed to the vacant posts of teachers in accordance with the provisions of the Act and the Rules made thereunder. The constitutionality of the said provision is really under challenge as, according to the petitioners, it infringes the right conferred by the Constitution and the effect of such legislation makes a serious inroad into the fundamental rights guaranteed by the Constitution. The petitioners contend that with this legislation the state has virtually intended to take away the right to administer the institution effectively inasmuch as the right to select and appoint teachers is a major constituent component of exercise of such a right and the impugned section of the legislation aims at

nullifying the effect of the fundamental right guaranteed to a minority institution.

Mr. Gupta, the learned senior counsel for the petitioners, further submitted that although the petitioners have prayed for declaring Section 8 of the Act as ultra vires what also create more problems for the Madrasah are the effects of the recommendation as provided in Sections 10 to 12 of the Act. According to Section 10 the Managing Committee or the Administrator or the Headmaster/ Headmistress shall be bound to appoint the candidate recommended by the Commission to the post of a teacher in the Madrasah as per the vacancy report. Section 11 provides that any appointment of a teacher made on or after the commencement of the Act in contravention of the provisions of this Act shall be invalid and shall have no effect and teachers so appointed shall not be teachers within the meaning of Section 2(s) of the Act. The consequence of not following the recommendation of the Managing Committee is the penalty provided in Section 12 of the Act. This section gives right to the State Government to direct the Board to dissolve the Managing Committee or to discharge the Administrator and to stop all financial assistance to such Madrasah if they refuse, fail or delay to issue the appointment letter to the candidate recommended by the Commission within the period stipulated for the same. According to Mr. Gupta these consequential measures including the

provision of penalty leave no option to the Managing Committee of the Madrasahs to appoint any teacher of their choice and these provisions really interfere with the Constitutional protection guaranteed under Article 30. He has prayed that sections 10, 11 and 12 of the Act may be declared ultra vires as well.

At the hearing of the petition a serious issue has been raised by Mr. Gupta. According to him, if the petitioners or for that matter the Managing Committee of any Madrasah have a right to administer their own institution they must necessarily have a right to administer it effectively which in turn requires a corresponding right to select teaching and non-teaching staff. To deprive them of this right is in a very major way interfering with the right conferred by Article 30 of the Constitution of India. The right of the petitioners is substantially, therefore, compromised if they lose the right to select and appoint teachers of their choice.

It is difficult to conceive of a situation, Mr. Gupta argues, that a minority will have a right to administer an institution but not the right to appoint teachers according to its own choice. The right to administer in its broad sweep connotes not only the right of day to day administration or to run the institution on a daily basis but must also be held to include the

right to appoint teaching staff as well. If such a right is taken away the autonomy to a very large extent must be held to be compromised.

The concerned minority institution in the present case does not wish to follow any standard of education different from the one fixed by the respondents or to deviate from the standards fixed by them. But the petitioners want to administer the institution in a meaningful way. Mr. Gupta submitted that the right to administer an institution must also necessarily mean a freedom to select and appoint their teachers and any endeavor, legislative or otherwise, tending to curtail the same must be held to be a negation of the right conferred by the Constitution.

In the affidavit used by the State-respondents the steps taken by the State Government have been mentioned to streamline the Madrasah education with other educational institutions. The Government is also rendering necessary aid and help to the Madrasah authorities for appointment of good and quality teachers as per the qualifications prescribed by the NCTE for imparting good quality of education to Madrasah students who are apparently in the “lower echelons of the ladder”.

One of the stands taken by the State-respondents is that after the Act came into being the State Government is rendering necessary help to

recruit qualified teachers and non-teaching staff as per the regulations of law and none of the Madrasahs had ever objected to it. The legislation has also been sought to be validated on the ground of inconvenience which is likely to be faced by a Madrasah. If an individual Madrasah seeks to appoint a teacher or a non-teaching staff through open advertisement the kind of administrative inconvenience they will have to go through will be enormous which can easily be avoided if a central selection body like the Madrasah Commission does the work for an individual Madrasah and the Act was enacted so that qualified teachers might be appointed for those institutions. Neither any partiality nor any personal preference or nepotism can be practiced in the matter of recruitment in an institution if teachers are selected and recommended by the Commission.

The affidavit used by the state-respondents goes a step further to suggest that Section 8 of the Act must be held to be incorporated as per the dictum of the constitutional provision by helping these institutions to screen the applicants without imposing any condition. Under the present Act the Commission merely selects and recommends the teachers and non-teaching staff of the Madrasah but the appointment is given by the concerned institution and the overall control of the Managing Committee in respect of such staff has never been taken away by the respondents. The day to day administration of the Madrasah has not been interfered with

and the Commission merely acts as a recommending body without interfering with the administrative matters of the Madrasah.

For Mr. Chatterjee, the learned Advocate General who had argued the case for the state with commendable restraint and dispassion expected of a person holding such a high post, the justification of the legislation may be sought in the practical realities prevailing in the Madrasahs. In the affidavit filed by the State-respondents some figures have been mentioned, probably not so much as having any bearing on the points in issue but presumably to bolster the stand of the respondents. There are 614 Madrasahs in the state which impart education in accordance with the syllabus prescribed by the competent authority except Arabic and Urdu. Most of these Mdarasahs are located in the remote areas of the state and the number of students is about five lacs of which about 88 per cent. belong to the "backward Muslim Community". The remaining 12 per cent. non-Muslim students belong to the SC and ST categories. The state government declared them as minority institutions so as to render all sorts of help as per the provision of the Constitution of India to uplift the 'backward' minority and other students.

According to the state the whole purpose behind the legislation was to provide students with certain quality of teaching and to maintain a bare

minimum standard so that with a better teaching facility the overall condition of the community gets elevated. And thus this legislation must be viewed as having been done in the interest of the public at large. The state government is rendering all necessary help to recruit qualified teachers and non-teaching staff as per the eligibility formulated by the NCTE. A more practical concern for them has been sounded that it will be a well-neigh impossible task for them to sort out applications of innumerable candidates who may apply for a single post. This will not be possible for a Madrasah located at a remote area and at the local level there may not be any such expert to select the quality of teachers. The Madrasah Commission conducted the TET and helped the Madrasahs to have better qualified teachers.

For the respondents there are primarily two grounds justifying the relevant provisions of such a legislation. First, the concerned Madrasah is fully aided for its financial requirements which is fulfilled by the state government. Therefore, it is bound to follow recruitment procedures for fair and comparative selection of teachers. Secondly, in terms of the provisions of the impugned Act the Commission merely selects and recommends a teacher but overall control of such staff lies with the Managing Committee where the government does not interfere. Thus the role of the Commission is that of a mere recommendatory body appointed by the government.

From a larger perspective the enactment sought to achieve a real social purpose by eradicating some of the maladies in the Madrasah education. And this piece of legislation aimed to provide the students with better and effective teaching facility which is a mandate under Articles 21 and 45 of the Constitution.

Mr. Mitra, the learned senior counsel for the Commission also supported the submission of the state, but at times for significantly altered reasons. For example, he too judged the legislation from a larger socio-economic perspective, from the stage of the drafting of the Constitution. The basic concern for the framers of the Constitution were to place all people at par. That was the prime vision before them so that the condition and status of all classes less fortunate than others should be elevated justifying the necessity for bringing them within the ambit of a protective umbrella. To a considerable extent this collective state endeavor has succeeded and the necessity for protection with the passage of time has been reduced although its importance cannot be said to have been totally obliterated. Mr. Mitra has relied on the case of *The Ahmedabad St. Xavier's College Society and Another –Vs- State of Gujarat and Another,* reported in A.I.R. 1974 S.C. 1389. According to him, a more important aspect is being gradually recognized, i.e., public interest which the courts have started taking note of. The autonomy of the minority institution cannot be an

absolute one without keeping note of the larger pubic interest and issues for which these institutions are allowed to operate and that is how in different judgements we find repeated emphasis on concepts of regulatory measures, reasonable restrictions, etc. as means to ensure the realization of those larger objectives.

Through an elaborate reference to various judgements, mostly cited by the petitioners as well, Mr. Mitra submitted that the whole purpose of this regulatory measure is to provide for the quality of teaching which in turn will benefit the students and will ensure the upliftment of the community as a whole. For Mr. Mitra it is always a question of perspective. Measures that may otherwise appear to be fettering the rights of the minority community, if viewed from a more dispassioned and wider perspective, must be considered as laudible endeavours with a larger interest to achieve and with a greater objective in view.

Thus, the restrictions which the petitioners have made grievance of are in fact not restrictions *per se* or even if they are to be so viewed they were purposive in nature, i.e., restrictions that had a purpose to achieve. The protective right provided in Article 30 of the Constitution must neither be seen in isolation nor to be so interpreted making its goals achievable only at the cost of sacrificing the educational standards.

Mr. Mitra summed up submitting that in a given situation like this what is expected of a court is to try and strike a balance between different competing rights keeping in mind that the restrictions are not to harm a community or to adversely affect their rights but to subserve the larger national interest.

Thus between the submissions of two sets of respondents there is an obvious similarity with regard to the conclusions reached, but with two very different approaches. While for the State the need to protect the minority is a reality in present continuum and hence the concerned legislation is justified; for the Commission, it is because of the reducing importance of protection a larger public interest is emerging justifying the restrictive legislation of the sort impugned in the present writ petition.

Mr. Gupta referred to a judgement where the Supreme Court had occasion to consider the scope of Article 30 in the case of *State of Kerala etc. –Vs.- Very Rev. Mother Provincial etc.,* reported in (1970) 2 SCC 417 where a six-judge Bench held that Article 30(1) contemplates two rights which are separated in point of time. The first right is to establish an institution of the minority's choice and the second right relates to the administration of such institution. The Supreme Court made it very clear that 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 the management can be taken away and vested in any other body without an encroachment upon the guaranteed right. The apex court, however, made it clear that there is an exception to this right, i.e., the standard of education is not a part of the management as such. It has been observed:

> "*this standard concerned the body polity. And are dictated by the considerations of the advancement of the country and its people. Therefore, if Universities established syllabi for examinations they must be followed, subject, however to special subjects which the institution may seek to teach, and to certain instant the state may also regulate the conditions of importance of teachers and the health and hygiene of students. Such regulations do not bear directly upon the management as such although they may indirectly affected by it*"

These are the regulatory measures to which the minority institution may be subjected to. The reason was also very specifically clarified that a minority institution cannot be allowed to fall below the standards of excellence expected of an educational institution or under the guise of exclusive management cannot decline to follow the general pattern.

In the case of *The Ahmedabad St. Xavier's College Society* (supra) a nine-judge Bench of the Supreme Court viewed the issue from a larger perspective. The right conferred under Article 30 of the Constitution has a purpose so that the majority who can always have their rights by having proper legislation do not pass a legislation prohibiting minorities from establishing and administering educational institutions of their choice. If the scope of Article 30(1) is made an extension of the right guaranteed by Article 29(1) of the Constitution the fundamental right of the minorities to establish and administer educational institutions of their choice will be taken away.

The Supreme Court has also held that the right to administer an institution is primarily to consist of four principal aspects. First, the right to chose its managing or governing body. It is said that the founders of the minority institution have faith and confidence in their committee or body consisting of persons selected by them. Secondly, the right to choose its teachers having compatibility with their ideals, aims and aspirations. Third is the right not to be compelled to refuse admission to the students. Fourthly, the right to use its properties and assets for the benefit of its institution. This judgement thus unambiguously recognizes that the right

to select its teachers is a part of the right to administer an institution which Article 30 has conferred on it. The reasons for that has also been very clearly explained in the judgement:

> "*It is upon the principal and the 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 a overall assessment of their outlook and philosophy is perhaps the most important fascet of the right to administer an educational institution. We can perceive no reason why a representative of the University nominated by the Vice Chancellor should be on the Selection Committee for recruiting the Principal or for the insistence of the head of the department besides the representative of the University being on the Selection Committee for recruiting the members of the teaching staff.* ***So long as the persons chosen have the 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.*** " (emphasis supplied)

Thus, if the presence of a nominee of the Vice Chancellor of a University on the Selection Board is considered an intrusion into the right

of the minorities to administer the institution established by them, the impugned provisions of the concerned Act vesting the right to select and recommend persons to the vacant posts of teachers in accordance with the provisions of the Act and the Rules made thereunder must equally be held to be negating the right guaranteed by the Constitution. Mr. Mitra, the learned Senior Counsel appearing for the West Bengal Madrsaah Service Commission (the Commission, for short) referred to this judgement very elaborately in support of the contentions made by him to which we will make reference at an appropriate stage.

Mr. Gupta, has next relied on the case of *N. Ammad –Vs.- The Manager, Emjay High School & Others*, reported in (1998) 6 SCC 674 in support of his contention that the right to select and appoint teachers is basically ingrained in the right of the minorities to administer an institution established by them. The Supreme Court held that the right of the management to choose a qualified person as the Head Master of the school is well insulated by the protective cover of Article 30(1) of the Constitution and "*it cannot be chiseled out through any legislative Act or executive rule except for fixing up the qualifications and conditions of service for the post.*" The Supreme Court declared that any such statutory or executive fiat to be violative of the fundamental right enshrined in Article 30(1) and hence is void.

Again in the case of *Board of Secondary Education and Teachers Training –Vs.- Jt. Director of Public Instructions, Sagar and Others*, reported in (1998) 8 SCC 555 the controversy was with regard to the choice of the management of a minority educational institution to choose a Principal for the school which was established and administered by them. The court held that in the matter of appointment of a Principal the management of a minority educational institution has a choice. One of the instances of the right to administer a minority educational institution is the selection of the Principal and any rule which takes away this right of the management has been held to be interfering with the right guaranteed by Article 30 of the Constitution. Relying particularly on the decisions of *Very Rev. Mother Provincial (Supra)* and *The Ahmedabad St. Xaviers' College Society (Supra)* the apex court held that these decisions make it clear that this right of a minority educational institution cannot be taken away by any rule or regulation or by enactment made by the State. While acknowledging the power of the state to regulate the affairs of a minority educational institution in the interest of discipline and excellence the Court held that in this process the right of the management cannot be taken away even if the Government is giving 100 per cent. grant.

In more recent times in the case of *Secy., Malankara Syrian Catholic – Vs.- T. Jose and Others*, reported in (2007) 1 SCC 386 the questions that

fell for consideration before the Supreme Court were primarily two: 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; and ii) whether the right to choose a Principal is a part of the right of the minorities under Article 30(1) of the Constitution of India to establish and administer the institutions of their choice. It has been observed:

> "*(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, etc. applicable to all, will equally apply to minority institutions also."

The Supreme Court held in that case i.e., *Malankara Syrian Catholic (Supra)* that subject to the eligibility conditions or qualifications prescribed by the State unaided minority institutions will have the freedom to appoint teachers/lecturers by adopting any rational procedure of selection. Extension of aid by the State does not alter the nature and character of the minority institution. Conditions can be imposed by the State to ensure proper utilization of the aid without, however, diluting or abridging the right under Article 30(1) of the Constitution.

It is worth mentioning in this context that one of the issues involved in the last mentioned case before the Supreme Court was whether Section 57(3) of the Kerala University Act, 1974 was violative of Article 30(1) of the Constitution. Section 57(3) of the said Act provided that the post of Principal when filled up by promotion was to be made on the basis of seniority-cum-fitness. In view of what had been decided and the ratio laid down in various judgements the apex court held that the said provision 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 interfered with the right of the minority management to have a person of their choice as the head of the institution and thus violated Article 30(1) of the Constitution.

This judgement reiterated the concept of the selection of a teacher of their choice and the like-mindedness by the management of a minority institution. An essential aspect of the right of the minority is to select a teacher of its choice having regard to the outlook of the person so selected and the social and philosophical purposes for which the minority institution has been set up. Herein lies the importance of acknowledging the rights of the minorities to select teachers of their choice.

This principle was again recognized in the case of *Sindhi Education Society and Another –Vs.- Chief Secretary, Government of NCT of Delhi and Others*, reported in (2010)8 SCC 49. In that case as well it has been reiterated that appointment of teachers is an important part of administration of educational institutions and administration framed by the minority institution in that regard. The Supreme Court in that case also laid down the judicially settled principle of law that the right to appoint a teacher is a part of the regular administration and management of the school. This is indeed subject to the condition that the qualification or eligibility criteria for a teacher can most certainly be defined and within

those specific parameters the right of a minority institution to appoint a teacher cannot be interfered with. Mr. Gupta has laid emphasis on paragraph 111 of the said judgement which *inter alia* provides:

> "*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.*"

In paragraph 114 of the said judgement it has been observed that 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. The Court held that this would tantamount to imposing impermissible restrictions. The minority has an in-built right to appoint persons who in its opinion are better culturally and linguistically compatible to the institution.

That regulatory measures are permissible to a limited extent has been judicially accepted. But does the provision impugned in this legislation qualify for being passed as a regulatory measure? In view of the well defined parameters of the regulatory measures can it be said that taking away the right of selection of teachers from the jurisdiction of the petitioners is also an act to regulate the affairs of the Madrasah and not to interfere with its administration? Answers to these queries are essentially related to a resolution of the present dispute.

The public interest theory so elaborately submitted my Mr. Mitra is far too obvious. If every legislation has a societal justification it has an equally larger issue to address. If every legislation has an immediate purpose to achieve such limited objective must match with a wider social purpose, even if may not be in immediate sight. This theoretical formulation is true and is perhaps very true as a general purpose behind any legislative exercise.

In *The Ahmedabad St. Xaviers' College Society (Supra)* it has been observed that the right to administer the minority institution implies their obligation and duty to render the very best to the students. Checks and balances in the shape of regulatory measures are required to ensure the appointment of good teachers and their conditions of service. Mr. Mitra laid stress on the observation that the right to administer is to be tempered with regulatory measures to facilitate smooth administration. Regulations which serve the interests of students and teachers are of paramount importance in good administration and they are necessary to facilitate preservation of harmony among affiliated institutions.

The Ahmedabad St. Xaviers' College Society (Supra) reiterated that the right to administer educational institutions cannot include the right to maladminister. The State can prescribe regulations to ensure the excellence of the institution. Prescription of standards for educational institutions does not militate against the right of the minority to administer the institutions. Regulations made in the true interest of efficiency of instruction, discipline, health, sanitation, morality, public order and the like may undoubtedly be imposed. It has been specifically laid down that such regulations are not restrictions on the subsistence of the right which is guaranteed. On the other hand they secure the proper functioning of the institution in matters of education. The minority institutions cannot be

allowed to fall below the standards of excellence expected of an educational institution or under the guise of exclusive right of management to decline to follow the general pattern.

Mr. Mitra has referred to the relevant portion of the case of *Sindhi Education Society (Supra)* for a proposition that the right under Article 30(1) of the Constitution of India is not absolute but subject to reasonable restrictions which may be framed having regard to the public interest and national interest of the country. Regulations can also be framed to prevent maladministration as well as for laying down the standards of education, teaching, discipline, public order, health morality etc. Regulatory measures are necessary for ensuring orderly, efficient and sound administration. Regulations framed to achieve those purposes are permissible for the efficiency and excellence of the educational standards to achieve various allied purposes as well. Mr. Mitra particularly drew the attention of the court to the observations made in paragraphs 99 and 103 in the said judgement wherein it has been held that the relevant Act for that judgement was enacted primarily for the better organization and development of school education and the very object of the Act was to improve standard and management of school education. It will be far fetched to read into this object that the law was intended to make inroads into character and privileges of the minority.

Th learned counsel for the Commission again referred to the case of *P. A. Inamdar and Others –Vs.- State of Maharashtra and Others*, reported in (2005) 6 SCC 537. It has been reiterated that merely because Article 30(1) has been enacted minority educational institutions do not become immune to the operation of the regulatory measures because the right to administer does not include the right to maladminister. The real purpose sought to be achieved by Article 30 is to give the minorities some additional protection. Certain conditions in the nature of regulations can legitimately accompany the state aid. Since the right to impart education is a fundamental right under Article 19(1)(g) of the Constitution available to all citizens the same right is subject to the laws imposing reasonable restrictions in the interest of the general public. He has also relied upon the observation made in the case of *T. M. A. Pai Foundation –Vs.- State of Karnataka*, reported in 2002(8) SCC 481 that "*any regulation framed in the national interest must necessary apply to all educational institutions whether run by the majority or minority. Such a limitation under Article 30(1) cannot be such as to override the national interest or to prevent the government from framing regulations in that behalf*."

For both the learned Advocate General as well as for Mr. Mitra these observations make sufficient justification for the sustenance of the impugned provisions of the Act. As this is a law made in the larger social

interest, viewed from a still larger perspective the legislation must be held to be a just and valid one. The learned Advocate General has also relied on the case of *Dayanand Anglo Vedic (DAV) College Trust and Management Society –Vs.- State of Maharashtra And Another*, reported in 2013(4) SCC 14 for the observations made in paragraph 32 thereof:

> "*In view of the opinion expressed by this Court in a catena of decisions, there cannot be any controversy that minorities in India have a right to establish and administer educational institutions of their choice and the State Government or the universities cannot interfere with the day-to-day management of such institutions by the members of minority community. At the same time, this Court pointed out that though Article 30 itself does not lay down any limitation upon the right of a minority to administer an educational institution but this right is not absolute. This is subject to reasonable regulations for the benefit of the institution. The State Government and universities can issue directions from time to time for the maintenance of the standard and excellence of such institution which is necessary in the national interest.*"

The petitioner, however, does not have any quarrel with it. Mr. Gupta has not questioned the permissibility of the State authorities to legislate or to make any regulation to achieve larger social purposes. For example, while challenging Section 8 and other provisions of the concerned Act the

petitioners have never questioned the competence of the appropriate authority to lay down the eligibility criteria of the teachers, their qualifications, the educational standards or any regulation made or enactment passed on any other aspect. They do not say that in respect of any minority institution the State is powerless to frame laws to oversee that matters relating to health, hygiene, sanitation, nutrition, discipline, morality, finance and the like are properly maintained. The petitioners have accepted these regulatory measures subject to which the minority institution is to be run. That the right guaranteed under Article 30 is not absolute has not been for once doubted by Mr. Gupta. That the enjoyment of the right requires a corresponding obligation on the part of these institutions is too trite and are inherent in the exercise of the right itself.

The matter would have been less complicated and far easier to approach had the relevant provisions of the legislation taken exception of could so easily be classified as a regulatory measure. Howsoever it is sought to be projected that the legislative exercise was merely for the purpose of regulating the affairs of the concerned Madrasah this is not without doubt ant it would be too simplistic a formulation to accept it without any clarification. Regulatory measure *per se* suggests a measure or an action taken to regulate the affairs of a certain institution irrespective of its nature and function. A regulatory measure is such that is taken

accepting and acknowledging the right of the minorities and then to ensure imposition of certain conditions for the better functioning and realisation of those rights. It has been repeatedly laid down that the right to administer never ever means or includes any right to maladminister. Therefore, any measure taken to prevent the same cannot be said to be either arbitrary or is liable to be questioned merely because of the right conferred by Article 30(1) of the constitution of India.

First, no right is absolute and unfettered in the ultimate sense and as such the emphasis that the right conferred by Article 30 of the Constitution has its limitations, is equally indubitable. Within this well-accepted theoretical parameters of exercise of any right, particularly the one guaranteed in Article 30 of the Constitution, the justification of the curtailment effected by the impugned provisions of the legislation has to be judged.

It cannot be gainsaid that the concerned provision of the Act impugned has really made an inroad into some of the basic rights of the minority institution to administer its own affairs. If right to administer does not mean right to maladminister the state's right to regulate also does not equally mean right to deprive the minorities of their essential right for

the purpose of running a minority institution. If such a right is accepted on the part of the state the minority will be denuded of its right to run an institution of its choice. The very purpose for which the status of a minority institution has been recognized and granted by the State would be nullified, frustrated, negatived and ultimately the right accompanying the declaration of a minority status to run an institution would be reduced to a precious nothing. If the petitioners' right is to be balanced by an accompanying obligation the right of the state to make regulatory measures is also to be equally balanced by the obligation to oversee that the inalienable and basic characteristics of the aspects that those rights consist of are not really destroyed. Thus a state is not empowered to make any law which has the effect of taking away these rights reducing the declaration of minority status to a paper formality.

The submissions of the respondents contain some other dimensions as well calling for serious consideration. For example, it has been emphasized that the restrictions are necessary for the protection of a minority community so that it can always develop and blossom into the desired stage. This argument in turn overlooks that the whole purpose behind conferring a right under Article 30 of the Constitution is to protect the minority. It is meant to inculcate a sense of confidence in the minorities against any encroachment into their rights. It cannot be

disputed for once that what Article 30 in fact guarantees as a right is in the nature of a protection. If that be so, the defence of the respondents poses a tautology: whether a protection given by the Constitution can be taken away for the purpose of achieving a better protection or conversely viewed, whether what is given by way of protection can be destroyed in the name of protection itself. If the answer is in the affirmative, one will still be inexorably required to answer a further query: if that be so, which of the two is a more genuine protection, i.e., whether the protection that was given or the taking away of the same for other protection.

If a minority does not enjoy an absolute right neither do the respondents enjoy a corresponding absolute freedom to legislate anything in the name of regulatory measures. Section 8 and the consequential provisions of the Act have the effect of totally annihilating or destroying the substance of the right under Article 30(1) of the Constitution by taking away from the minority the right to appoint its own teachers. It has been judicially accepted that such a right is intrinsic and inalienable in respect of the right to administer and to take it away would tantamount to negativing a Constitutional protection without any authority.

The stand of the respondents again overlooks yet another serious aspect of the case. Section 15 of the West Bengal School Service

Commission Act, 1997 excludes the Commission from the operation of the Act to minority institutions. In other words, if an institution is declared as a minority institution West Bengal School Service Commission has no authority to make any recommendation for any teaching post in respect of those institutions. That being so, it is difficult to comprehend why an exception should be made to the Madrasah Commission Act.

Mr. Mukherjee, the learned Additional Government Pleader submitted that this Madrasah had been functioning for quite some time but it was only from the year 2007 onwards that it raised a hue and cry about the destruction of its protected rights. The reasons are not far too seek. It was only in October, 2007 that the Madrasahs were granted minority status. If before that date recommendations were made by the School Service Commission it was only because they were not granted the requisite status earlier to claim for the protection. After the minority status was invested on it the School Service Commission cannot operate and function in respect of a minority institution.

Therefore, when the School Service Commission the purpose of which is also largely similar to that of the Madrasah Service Commission, has no authority in respect of a minority institution, to recognize such right in favour of the Madrasah Service Commission would be to encourage an

inter se discrimination. If other minorities have the right to administer their institutions remaining outside the scope of the School Service Commission, and wonder why cannot the same privilege be enjoyed by a Madrasah which, but for the impugned provisions in the relevant legislation, would have also enjoyed the same privilege.

It may be mentioned that the attention of the learned Advocate General as well as of Mr. Mitra was drawn to a Government Order bearing no. 1092-/ES/S/1014-104/2011, dated June 6, 2012, issued by the School Education Department, Law Branch, Government of West Bengal. The subject-matter of the said order was recruitment procedure in Christian Minority Institutions enjoying special rules for management. The said order specifically provided that appointment of Headmaster, Headmistress, Assistant Teacher, Non-Teaching Staff, etc. of those institutions shall be given after selection from eligible candidates through an open advertisement of vacancies and such appointment shall be made by the school authority as per the selection procedure and selection committee which is to be duly constituted by the school authority in question. Such appointment shall be subject to the approval of the concerned District Inspector of Schools. It is not understood if one minority enjoys the privilege of selecting and appointing a teacher why not the other minorities also will equally enjoy it. To allow this state of affairs to continue

might perhaps raise suspicion about the possibility of an inverted discrimination between the two communities and state cannot in exercise of its powers indulge in any act discriminatory to the interests of different communities. That will be against the constitutional mandate and larger interest of national integration.

It may be mentioned that by the 93rd Amendment of the Constitution of India Clause (5) was inserted in Article 15 with effect from January 20, 2006. This new provision provide that nothing in Article 15 or Article 19(1)(g) of the Constitution shall prevent the state from making any special provision by law for the advancement of any socially and educationally backward class of citizens or for the Scheduled Castes or the Scheduled Tribes insofar as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided by the state or not, other than the minority institutions referred to in Article 30(1) of the Constitution. This in turn confers on the state the right to make any legal provision for the advancement of certain classes of citizens for admission to any educational institution except those run by the minorities as provided in Article 30(1) of the Constitution. Thus, the freedom to administer the minority educational institutions has been preserved even with regard to the admission to educational institutions. This right of the minorities has been left untouched only to render the

protection guaranteed under Article 30(1) fruitful and effective. In the constitutional scheme even Article 15 does not supersede the guarantee contained in Article 30 of the Constitution.

Mr. Mitra in his usual fairness has admitted that the reasons for passing the impugned Act, as argued from the bar, have not been contained in any statements of objects and reasons. Therefore, the reasons mentioned by the respondents as causative compulsion for the enactment must be deemed to be largely statements from the bar and not substantiated by any record of the legislature.

The learned Advocate General suggested a via media to salvage the Act. He suggested that instead of appointing any teacher as per the recommendation of the Commission the Madrasahs may be directed to appoint teachers from the panel prepared by the Commission so that a Madrasah may get sufficient number of qualified teachers and at the same time the kind of maladies that the Act had addressed itself to, might as well be obliterated. Apart from the fact that it relates to a legislative exercise, this also may not be the solution to the problem. The point of complaint and grievance shall continue to persist. Instead of being compelled to take a teacher as recommended by the Commission the minorities will have only numerically more options from which they shall

have to select their teachers. The effect in an altered context will, however, continue to perpetuate. In either case selection will have to be made from amongst the candidates selected by the Commission and autonomy of Madrasahs in either case will have to be compromised.

Thus, I find that the impugned provisions of the Act tend to take away the protected right conferred upon the minorities to administer institutions according to their choice. The right of the Commission to select and recommend teachers for these institutions in a very major way interferes with the right to administer those institutions rendering a constitutional mandate virtually ineffective. The perception of a prevailing social reality cannot circuitously circumvent a constitutional protection.

The impugned provisions of the Act are thus not only not in consonance with the protection guaranteed by the Constitution but are definitely in derogation thereof. Section 8 of the Act cannot be read in isolation. Read with the subsequent provisions there is an element of compulsion in the effect of the recommendation made by the Commission which is really against the freedom guaranteed in Article 30 of the Constitution of India. Section 8 of the said Act is hereby declared ultra vires the Constitution. In view of what has been discussed before the prayer of the petitioner is moulded and sections 10, 11 and 12 of the Act are also declared ultra vires the Constitution.

The writ petition is allowed.

There shall be no order as to costs.

Urgent Photostat certified copy of this order, if applied for, be supplied to the parties on priority basis upon compliance of all requisite formalities.

(Sambuddha Chakrabarti, J.)

S. Banerjee