Atladara Kelavani Mandal and Others Vs State of Gujarat and Others

Special Civil Application No"s. 1065, 6772 of 1997, 2271 of 2002, 6407 of 2002, 6560 of 2002, 5526 of 2002, 6146 of 2002, 6147 of 2002, 6902 of 2002, 174 of 2002, 7169 of 2003, 3087 of 2002, 705 of 2002, 12004 of 2002 to 12021 of 2002, 12049 of 2001, 359

Court: Gujarat High Court

Date of Decision: Oct. 9, 2003

Acts Referred:
Constitution of India, 1950 â€" Article 14, 19, 19(1), 28(1)(3), 29#Gujarat Secondary Education Act, 1972 â€" Section 34, 35, 36

Citation: (2004) 24 GLH 383 : (2004) 1 GLR 244

Hon'ble Judges: Jayant M. Patel, J

Bench: Single Bench

Advocate: B.S. Patel, H.J. Nanavati, Shalin Mehta, B.T. Rao, Shirish Joshi, Mukund Desai, A.K. Clerk and D.D. Vyas for Vyas Associates, for the Appellant; Kamal Trivedi, Addtl. Advocate General, S.K. Vishen, for Respondent-State in Special Civil Application Nos.174/02, 3087/02, 705/02, 12004/02 to 12021/02 and 12049/02 and Civil Application No.7256/02 and A.D. Oza, Government Pleader for Respondent-State in other Special Civil Applications, for the Respondent

Final Decision: Dismissed

Judgement

Jayant Patel, J.
In all these group of petitions, the facts are common in two sets and the points arise for consideration are more or less

common and, therefore, they are being considered by this common judgement.

2. The petitions can broadly be classified into three categories: one set of petitions being preferred by non-minority institutions for the purpose for

challenging the order passed by the authority for giving directions to accommodate and absorb surplus teachers of the other schools; second set of

petitions being preferred by the institutions which are minority institutions; and, third set of petitions being preferred by the petitioners claiming as

minority institutions, but, as per the stand of the State Government, they are neither identified as minority institutions nor recognised and there are

also no sufficient details for extending special protection as that of the minority institution to such institutions. So far as the second and third set of

petitions are concerned, they have been preferred challenging the similar order passed by the authority for absorption of the surplus teachers, but,

the additional protection is sought to be invoked by these institution claiming to be minority institution, on the basis that they are covered by Article

30 of the Constitution of India.

3. The facts of the individual case, for consideration, in brief, are stated hereinafter:

(i) Special Civil Application No.1065 of 2002 is preferred by Atladara Kelavani Mandal challenging the order dated 29th December, 2001 issued

by the District Education Officer (""the DEO"" for short) for absorption in the school run by the petitioner of one Haresh A.Tripathi as Teacher, who

is a surplus Teacher and is ordered to be absorbed on the post of Clerk. The petitioner has also prayed for appropriate directions to the

respondents to restrain them from deputing any teachers, headmasters or any staff in the school run by the petitioner-Trust.

(ii) Special Civil Application No.6772 of 1997 is preferred by Ahmedabad Secondary and Higher Secondary School Managements Association

for challenging Government Resolution dated 21st May, 1994 and the orders passed by the authority based on the said resolution for absorption

of surplus teaching and non-teaching staff in various schools of Ahmedabad.

(iii) Special Civil Application No.2271 of 2002 is preferred by Dhrangadhra Mahila Mandal Secondary School challenging the order dated 2nd

January, 2002 passed by the DEO for absorption in the petitioner-School of one Suresh G.Patel as Junior Clerk (non-teaching staff) and who is

declared as surplus.

(iv) Special Civil Application No.6407 of 2002 is preferred by Navrang Secondary/Higher Secondary School challenging the various orders

directing for absorption of teaching and other staff in the petitioner no.1-School, who are, as per the DEO, declared as surplus. The petitioners

have also prayed to declare the policy of absorption of the surplus teachers of Non-Governmental Secondary and Higher Secondary Schools as

per Government Resolution dated 21st May, 1994 as unconstitutional and the petitioners have also prayed for appropriate writ to direct the DEO

to issue No Objection Certificate for filling up of the post of the teachers, which are vacant in the petitioner no.1-School, from the open market.

(v) Special Civil Application No.6560 of 2002 is preferred by Prerana Education Trust for challenging the order passed by the DEO for

absorption of one S.V.Patel as Senior Clerk (non-teaching staff).

(vi) Special Civil Application No.5526 of 2002 is preferred by Shree Seva Samaj, Vadaj for challenging the order passed by the DEO for

absorption of surplus teacher one Vasudev R.Patel as Clerk in the school run by the petitioner. The petitioner has also prayed for issuance of

appropriate writ to restrain the respondents from deputing any teacher or any staff in the school run by the petitioner.

(vii) Special Civil Application No.6146 of 2002 is preferred by Sanskar Jyoti Charitable Trust challenging the order dated 3rd January, 2002

passed by the DEO for absorption of non-teaching staff and others, who are declared surplus. The petitioner has also prayed for quashing of

Government Resolution dated 27th, September, 1996, Annexure-E, for inserting Clause No.64.3 in the Grant in Aid Code (""the Code"" for short).

Clause No.64.3 whereby provision is made that the school concerned shall absorb the surplus teaching and non-teaching staff, as may be directed

by the DEO. The petitioner has also prayed for restraining the respondents from deputing any teaching or non-teaching staff in the school of the

petitioner.

(viii) Special Civil Application No.6147 of 2002 is preferred by Saurabh Education Trust for the same relief as that of Special Civil Application

No.6146 of 2002, except there is a change in the date of the order passed by the DEO for absorption of service staff.

(ix) Special Civil Application No.174 of 2002 is preferred by Huseinabai Charitable Trust, claiming to be a minority institution, to quash and set

aside the decision of the authority rejecting the application of the school of the petitioners to be declared as a religious minority institution. The

petitioners have prayed for directions to the respondents to issue certificate that the school of the petitioners is a religious minority institution within

the meaning of Article 30(1) of the Constitution of India. The petitioners have also prayed for quashing of the order passed by the DEO for

absorption of non-teaching staff, who is declared as surplus, and the petitioners have prayed for directions to the DEO to issue No Objection

Certificate for filling up of the post of teaching and non-teaching staff in the school of the petitioners.

(x) Special Civil Application No.7169 of 2003 is preferred by C.L.Saraswati Kunj School for challenging the orders passed by the DEO for

absorption of surplus teaching and non-teaching staff. The petitioner has also prayed for challenging Government Resolution dated 21st May, 1994

providing for absorption of such surplus teachers and the petitioner has prayed for appropriate writ/directions to the DEO to grant No Objection

Certificate to the petitioner-School for filling up of the post of Assistant Teacher.

(xi) Special Civil Application No.3087 of 2002 is preferred by Huseinabai Charitable Trust, claiming to be a minority institution, for quashing of the

order passed by the DEO for absorption of surplus Assistant Teacher in the school of the petitioners. The petitioners have also prayed for giving

directions to the respondents to treat the school of the petitioners as a minority school. The petitioners have also challenged Government

Resolution dated 21st May, 1994 directing for absorption of surplus teacher.

(xii) Special Civil Application Nos.705 of 2002 and 12004 of 2002 to 12021 of 2002 are the group of petitions preferred by various schools,

claiming to have the status of minority institutions, challenging Government Resolution dated 21st May, 1994 directing for absorption of surplus

teaching and non-teaching staff in the schools, which are aided by the State Government.

(xiii) Special Civil Application No.12049 of 2001 is preferred by St. Mary''s High School, claiming to be a minority institution, for quashing of the

orders passed by the DEO for absorption of surplus staff. The petitioners have also prayed for a declaration that the action of the DEO of forcing

absorption of surplus staff is violative of Articles 14, 29 and 30 of the Constitution of India and the petitioners have also challenged the action of

the authority for withholding of the maintenance grant and have prayed to release the same forthwith.

(xiv) Special Civil Application No.359 of 2002 is preferred by Shri Kadva Patidar Kelavani Mandal challenging the order of the DEO for

absorption of teaching staff in the school of the petitioner, who is declared as surplus, and the petitioner has also prayed for quashing Government

Resolution dated 27th September, 1996 for addition of the above referred Clause-64.3 in the Code.

(xv) Special Civil Application No.356 of 2002 is preferred by Matrushri Shantadevi Educational and Medical Trust challenging the order passed

by the DEO for absorption of non-teaching staff and the Government Resolution for addition of Clause-64.3 in the Code. The petitioner has also

prayed for appropriate writ to restrain the authorities from deputing any teachers, headmasters or other staff in the school of the petitioner.

(xvi) Special Civil Application No.362 of 2002 is preferred by Karjan Taluka Kelavani Mandal praying for the same relief as in Special Civil

Application No.356 of 2002, except there is a change in the date of the order passed by the DEO for absorption of teaching staff, who is declared

as surplus.

(xvii) Special Civil Application No.364 of 2002 is preferred by Karjan Taluka Kelavani Mandal for the same reliefs as they are in Special Civil

Application No.356 of 2002, except a change in the date of the order passed by the DEO for absorption of teaching staff, who is declared as

surplus.

(xviii) Special Civil Application Nos.366 of 2002, 370 of 2002, 374 of 2002 and 3212 of 2002 are the petitions preferred for the same relief as in

Special Civil Application No.356 of 2002, except there is a change in the date of the order passed by the DEO for absorption of either teaching

staff or non-teaching staff, who are declared as surplus. The other prayers are common.

(xix) Special Civil Application No.6902 of 2002 is preferred by H.B.Kapadia Education Trust for challenging the orders passed by the DEO

directing absorption of surplus teachers with an additional contention that the petitioner is a minority institution having religious minority and it has

also been submitted that the status of minority is duly confirmed by the Gujarat Secondary Education Board as per the decision dated 18.10.1997.

4. The submissions made by the learned Counsel appearing for the respective petitioners would accordingly be considered insofar as it touches to

the concerned set of facts of such petitioners. The contentions raised on behalf of the petitioners can broadly be narrated as under :

4.1 So far as minority institutions or non-minority institutions are concerned, there is a common challenge to the Government Resolution of 1994

providing for absorption of teaching staff, and Government Resolution of 1996 providing for addition of Clause-64.3 in the Code. The contention

on behalf of the petitioners, which is common to all, is that in view of the provisions of the Gujarat Secondary Education Act (""the Act"" for short),

power of appointment of a teacher is with the Trust or Management of the school and as per the scheme of the Act, such surplus staff cannot be

fastened upon the school and if such surplus staff are absorbed, it would create a relationship of employer and employee. It has been submitted

that direction for absorption of surplus teacher is not at all provided under any of the provisions of the Act and, therefore, such a policy of the

Government and/or order of the authority directing for absorption is in contravention to the provisions of the Act.

4.2 So far as the Government Resolution of 1996 providing for addition of Clause-64.3 in the Code is concerned, it has been submitted that such

a provision cannot be made in the Code which is in contravention to the Act itself and secondly, grant is not by way of grace from the State

Government and, therefore, even while framing or adding any clause in the Code, insertion of such provision must meet with the test of Article 14

of the Constitution of India. It is further submitted that by insertion of such a clause in the Code, right to administer and manage the school, as

guaranteed under Article 19 of the Constitution of India, is breached and, therefore also, such a clause cannot be there in the Code.

4.3 It has also been contended on behalf of the petitioners that even if the powers are read with the authority, then also, such powers cannot be for

directing absorption of a person to a post for which he is either not qualified or he does not fulfill the basic qualification or the criteria for assuming

the post. In furtherance to the said contention, it was submitted that the teachers, who are qualified to impart `A'' subject are posted as teachers for

imparting education of `B'' subject. Even, certain teachers are posted as clerks or non-teaching staff for the purpose of absorption. It has also been

submitted that the school, in which the teaching or non-teaching staff is to be absorbed, is left with no choice but to absorb the person as their

employee and such an action would violate Article 14 and would operate very harsh. It was also submitted that if such an action is permitted on the

part of the DEO or other competent authority, consequences would be that the field of education would suffer because a teacher or the person,

who is not qualified to discharge duty, is made available for the purpose of rendering services. It was also submitted on behalf of the petitioners

that in majority of the cases, powers are exercised for absorption in absolutely arbitrary manner and it is without any application of mind on the

face of it and, therefore, the orders passed by the DEO deserves to be quashed.

4.4 It was also submitted on behalf of the petitioners that it is the management of the school, who has a right to appoint any teaching or non-

teaching staff, subject to the control of the DEO or the Committee, which may be constituted for the purpose of selection, and, therefore, if surplus

staff is ordered to be absorbed, consequences would be that the management or the school will not be in a position to give appointment to the

person of their choice, of course, after maintaining the merits, and the provisions of the Act shall not be observed. It is submitted on behalf of the

petitioners that it is obligatory on the part of the authority to issue No Objection Certificate for the purpose of allowing recruitment or appointment

on the vacant post in the school concerned.

4.5 So far as the petitioners representing the institutions, who are claiming minority status, are concerned, additional contention sought to be

canvassed is that minority institutions, under no circumstances, can be fastened or directed for absorption of the surplus staff because as per the

scheme of the Constitution, minority institutions stand on a different footing. The Government has no right or authority to interfere in the internal

administration of the minority institution. It has been submitted that the Government, at the most, can provide for qualification and regulations of the

service, but, so far as the appointment of the staff, may be teaching or non-teaching, is concerned, it must be left to the authority of the minority

institution itself. It was also submitted on behalf of such minority institutions that they are, on the face of it, minority institutions and merely because

the status is not identified as that of minority institution by the authority, it would not make any difference in claiming protection under Article 30 of

the Constitution of India.

5. On behalf of the State Government and authorities of the State, learned Additional Advocate General, Mr.K.B.Trivedi, and learned

Government Pleader, Mr.A.D.Oza, while supporting the Government Resolution and the orders passed by the DEO, for absorption of the staff,

have contended, inter alia, that as per the policy of the Government, all teaching staff who are ordered to be absorbed are protected teachers and

their salary is to be borne by the Government once a school is granted registration with grant-in-aid facility. It has been submitted that if the surplus

teachers are not accommodated at a place where there are vacancies, consequences would be that the public exchequer would suffer inasmuch as

the Government will have to pay the salary to these teachers, who are declared as surplus, without taking any work from them and on the other

hand, if new recruitments or fresh appointments are permitted in the school where there are vacancies, it would create additional burden upon the

public exchequer while providing the grant-in-aid. It has also been submitted on behalf of the respondents that once an institution agrees to take

grant-in-aid or claims the grant-in-aid, it should and must abide by the policy of the Government providing grant-in-aid from time to time. It is

submitted that if the Government makes any change in the policy and if the institutions are desirous to continue to have benefit of grant-in-aid, they

should abide by the terms and conditions of the grant-in-aid. It is also submitted that the grant-in-aid cannot be claimed as a right and it is

essentially a policy decision of the State Government. On the question of qualification of the staff, who is declared as surplus and ordered to be

absorbed, the learned Additional Advocate General submitted that such modalities can be worked out with a view to see that the quality of the

education is not suffered, but, assertion of the claim by the institutions that they will, under no circumstances, absorb the surplus staff, may be

teaching or non-teaching, should not be allowed to be maintained. It has also been submitted by the learned Additional Advocate General that if

the Government does not formulate such a policy for directing absorption of surplus staff, consequences would be that on the one hand, it will have

to retrench or terminate the services of such surplus staff and on the other hand, it will have to permit the recruitment and appointment of new staff,

which is not in the public interest.

It was also submitted by the learned Government Pleader that the teachers have agreed to work as non-teaching staff which is a lower post and,

therefore, it is not a matter where such persons are not at all having any qualification.

6. So far as the minority institutions are concerned, it has been submitted by the learned Additional Advocate General that if the minority institutions

are to claim the grant-in-aid from the Government, as per the policy of the Government, it should and must abide by the same terms and conditions

as they are applicable to the non-minority institutions. If it would have been a case where grant-in-aid is not being claimed, the matter would have

been different. It is further submitted that even for the purpose of claiming minority status, it must be with a view to promote and maintain the

interest of minority institution. Merely because an institution is set up by certain persons, belonging to a minority community, would not be sufficient

to confer the status of minority institution nor such institutions will be able to invoke Article 30 of the Constitution of India, providing special

protection to the minority institution. It is submitted on behalf of the State by the learned Additional Advocate General that in the majority of cases,

on the basis of which the status is sought to be claimed as that of minority institution, there are no sufficient details at all for claiming the status of

minority and, therefore, such petitioners would not be entitled to claim the status of minority and in any case, once they are aided schools, where

the grant is being provided by the State Government, it would not make any difference so far as the absorption of the teaching or non-teaching staff

is concerned.

7. Therefore, the first aspect, which is required to be taken into consideration, is the distinguishing feature of the status, as sought to be claimed by

the minority institution, which is provided the grant-in-aid and which can be said to be an aided institution. The Apex Court had an occasion to

consider the matter for lifting the veil of a minority institution running professional colleges in the case of A.P. Christians Medical Educational

Society Vs. Government of Andhra Pradesh and Another, . At paragraph-8, it was observed by the Apex Court as under:

It was seriously contended before us that any minority, even a single individual belonging to a minority, could found a minority institution and had

the right so to do under the Constitution and neither the Government nor the University could deny that society''s right to establish a minority

institution, at the very threshold as it were, howsoever they may impose regulatory measures in the interests of uniformity, efficiency and excellence

of education. The fallacy of the argument in so far as the instant case is concerned lies in thinking that neither the Government nor the University has

the right to go behind the claim that the institution is a minority institution and to investigate and satisfy itself whether the claim is well founded or ill

founded. The Government, the University and ultimately the court have the undoubted right to pierce the minority veil with due apologies to the

Corporate Lawyers and discover whether there is lurking behind it no minority at all and in any case, no minority institution. The object of Art.

30(1) is not to allow bogies to be raised by pretenders but to give the minorities a sense of security and a feeling of confidence not merely by

guaranteeing the right to profess, practise or propagate religion to religious minorities and the right to conserve their language, script and culture to

linguistic minorities, but also to enable all minorities, religious or linguistic, to establish and administer educational institutions of their choice. These

institutions must be educational institutions of the minorities in truth and reality and not mere masked phantoms. They may be institutions intended to

give the children of the minorities the best general and professional education, to make them complete men and women of the country and to

enable them to go out into the world fully prepared and equipped. They may be institutions where special provision is made to the advantage and

for the advancement of the minority children. They may be institutions where the parents of the children of minority community may expect that

education in accordance with the basic tenets of their religion would be imparted by or under the guidance of teachers, learned and steeped in the

faith. They may be institutions where the parents expect their children to grow in a pervasive atmosphere which is in harmony with their religion or

conducive to the pursuit of it. What is important and what is imperative is that there must exist some real positive index to enable the institution to

be identified as an educational institution of the minorities. We have already said that in the present case, apart from the half a dozen words as a

Christian minorities institution occurring in one of the objects recited in the memorandum of association, there is nothing whatever, in the

memorandum or the articles of association or in the actions of the society to indicate that the institution was intended to be a minority educational

institution. As already found by us these half a dozen words were introduced merely to found a claim on Art. 30(1). They were a smoke-screen.

Therefore, it is not a matter where an institution claims the status of minority and it would get the status of minority. It would be for the authority or

the Court to lift the veil and to examine as to whether it is a genuine institution representing the minority or an institution formed by the minority for

protecting the interest of the minority or for encouraging the advancement of the minority.

Therefore, Mr.Shalin Mehta, learned Counsel, as well as Mr.D.D.Vyas, learned Senior Counsel, who are representing the petitioners claiming the

status of minority, are not right in submitting that once a status is claimed of the minority and once the institution is formed by the person belonging

to the minority, may be religious minority or linguistic minority, the institution will be able to claim the status of minority.

8. Much reliance was placed by Mr.Shalin Mehta, learned Counsel appearing for the concerned petitioners, claiming the status of minority

institution, upon a decision of this Court in the case of Firdaus Amrut Higher Secondary School, Ahmedabad Vs. M.M. Dave, , for contending

that once an institution is formed by the person belonging to religious or linguistic minority, it is the institution, which can claim the status of minority.

Mr.Mehta relied upon the observations made by this Court (Coram:S.D.Shah, J., [as he then was]) in the aforesaid judgement at paragraph-15,

for supporting his contention. In the said case, the Court was considering the question as to whether a clause in the Trust Deed providing for

induction of a person belonging to a non-minority community would change otherwise the status of the minority community to non-minority or not,

and, therefore, the Court found that merely because a person belonging to non-minority community is inducted in the body or the Trust, it would

not change the status if otherwise is a minority institution.

9. A question may arise as to what would be and could be the yardstick for the purpose of ascertaining the status of an institution as that of

minority institution. In my view, there can be various considerations for coming to the conclusion as to whether an institution is a minority institution

or not. Merely because it is formed by the person belonging to the minority, may be linguistic or religious, itself would not confer the status

automatically as that of the minority institution. It is not necessary that a person belonging to the minority community or linguistic minority may not

desire to make charity or render services to the public at large irrespective of the fact that the beneficiaries are belonging to such minority or not. If

the belonging of the author of the Trust or belonging of the community of the author of the Trust or belonging of the community of the Trustees,

who are to participate in the Trust, are to be treated as the only yardstick then in my view, it would frustrate the basic features or quality of human

psychology or mankind in general. It is not necessary that a person belongs to a minority community and, therefore, he would be every time

desired to see that his fund or property is used only for the community to which he belongs. There are number of cases where the persons

belonging to minority have extended their valuable properties and services by various modes to all public, including non minority. There are also

cases where the persons belonging to non-minority have rendered their valuable properties and services to non-minority as well as to minority.

Therefore, a person is belonging to a minority community, may be religious or linguistic, cannot be the sole and absolute criteria for testing the

institution as that of the minority institution. It may be one of the considerations, but, at the same time, major consideration, in my view, which

would rather be one of the crucial tests, is the formation of the institution for the benefit of linguistic or religious minority. Fund may be coming from

any source or who is the author of such Trust, or settlor of the Trust, may be relevant, but not the only relevant consideration. What is more

required to be considered is the desire of the settlor of the Trust or the Trustees itself or the Deed of the Trust, which would speak for

advancement, encouragement or for upliftment of such minority institution. If the Deed is silent on this aspects, then, it would be possibly difficult to

reach to a definite conclusion that an institution belongs to a minority. The intention appears to be that if an institution is formed by the person

belonging to the minority for the benefit of the minority. It may be that in addition thereof the benefits of the institutions are made available to non-

minority but, at some where or at some place, the intention must be shown to make it apparent for encouraging or for advancement or for

upliftment or even for preservation of culture or class of minority, may be in the field of education or any other field. Therefore, Mr.Mehta and

Mr.Vyas are not right in contending that since the institution is formed by the majority of the persons belonging to the religious or linguistic minority,

it would automatically be entitled to claim the status of minority. It is true that identification of such status may not be relevant but when a claim is

based for invoking Article 30 of the Constitution, or wherever such provision of Article 30 is invoked, it would be for the authority concerned or

the Court concerned to examine the facts of each case and to find out as to whether the institution is genuinely a minority institution or as in the

language used by the Apex Court in the above referred judgement in the case of A.P. Christians Medical Educational Society (supra) that it is

having a mask of phantoms for claiming the status of minority. Therefore, there cannot be any straight jacket formula for testing or examining the

status of an institution as minority. It would vary from facts to facts and various considerations may be required to be examined and some of them

are - the persons forming the institutions, the intention with which the institutions is formed, the beneficiaries of the institutions by and large and

whether any intention is made express or implied for advancement, upliftment or preservation of minority, etc.

10. Mr.K.B.Trivedi, learned Additional Advocate General, is right in submitting that in all the petitions which are preferred by Mr.Vyas, being

Special Civil Application Nos.705 of 2002 and 12004 of 2002 to 12021 of 2002, there are no sufficient details nor any cogent and proper

materials are produced before the Court, on the basis of which, this Court can conclude or properly and conveniently examine the status of such

petitioners as that of minority institution.

11. So far as the institutions, which are already given status or which are identified as minority institutions by the Board itself, are concerned, this

Court is not required to examine the said aspect further, namely, for the petitioner of Special Civil Application No.12049 of 2002 which is a

Christian minority institution. However, so far as the petitioners of Special Civil Application Nos.3087 of 2002 and 174 of 2002 are concerned,

such status was claimed and is declined on the ground that some of the Trustees are belonging to non-minority community. The contention of

Mr.Mehta, to that extent, deserves to be accepted inasmuch as if merely because some of the Trustees or the Deed provides for induction of some

of the persons belonging to non-minority community, it would not disentitle the institution for claiming the status of the minority institution, but,

various other considerations, as observed earlier, will be required to be examined by the authority concerned, while considering the question as to

whether an institution can claim the status of minority so as to invoke the provisions of Article 30 of the Constitution of India or not.

12. The next contention, which is required to be examined by this Court, is if an institution is a minority institution, whose status is either identified

by the authority or proved before the Court as that of minority institution and also takes grant-in-aid from the Government, to what extent it will be

able to claim protection under Article 30 of the Constitution insofar as the appointment of teaching or non-teaching staff in a school is concerned.

In the recent decision of the Apex Court in the case of T.M.A. Pai Foundation and Others Vs. State of Karnataka and Others, , the Apex Court,

at paragraph 135, after considering its earlier judgements, observed as under :

135. We agree with the contention of the learned Solicitor-General that the Constitution in Part III does not contain or give any absolute right. All

rights conferred in Part III of the Constitution are subject to at least other provisions of the said Part. It is difficult to comprehend that the framers

of the Constitution would have given such an absolute right to the religious or linguistic minorities, which would enable them to establish and

administer educational institutions in a manner so as to be in conflict with the other Parts of the Constitution. We find it difficult to accept that in the

establishment and administration of educational institutions by the religious and linguistic minorities, no law of the land, even the Constitution, is to

apply to them.

The Court further observed at paragraphs 136 to 138 as under :

136. Decisions of this Court have held that the right to administer does not include the right to maladminister. It has also been held that the right to

administer is not absolute, but must be subject to reasonable regulations for the benefit of the institutions as the vehicle of education, consistent with

national interest. General laws of the land applicable to all persons have been held to be applicable to the minority institutions also - for example,

laws relating to taxation, sanitation, social welfare, economic regulation, public order and morality.

137. It follows from the aforesaid decisions that even though the words of Article 30(1) are unqualified, this Court has held that at least certain

other laws of the land pertaining to health, morality and standards of education apply. The right under Article 30(1) has, therefore, not been held to

be absolute or above other provisions of the law, and we reiterate the same. By the same analogy, there is no reason why regulations or conditions

concerning, generally, the welfare of students and teachers should not be made applicable in order to provide a proper academic atmosphere, as

such provisions do not in any way interfere with the right of administration or management under Article 30(1).

138. As we look at it, Article 30(1) is a sort of guarantee or assurance to the linguistic and religious minority institutions of their right to establish

and administer educational institutions of their choice. Secularism and equality being two of the basic features of the Constitution, Article 30(1)

ensures protection to the linguistic and religious minorities, thereby preserving the secularism of the country. Furthermore, the principles of equality

must necessarily apply to the enjoyment of such rights. No law can be framed that will discriminate against such minorities with regard to the

establishment and administration of educational institutions vis-a-vis other educational institutions. Any law or rule or regulation that would put the

educational institutions run by the minorities at a disadvantage when compared to the institutions run by the others will have to be struck down. At

the same time, there also cannot be any reverse discrimination. It was observed in St.Xavier''s College case at SCR p.192 that: (SCC p.743,

para9)

The whole object of conferring the right on minorities under Article 30 is to ensure that there will be equality between the majority and the

minority. If the minorities do not have such special protection they will be denied equality.

In other words, the essence of Article 30(1) is to ensure equal treatment between the majority and the minority institutions. No one type or

category of institution should be disfavoured or, for that matter, receive more favourable treatment than another. Laws of the land, including rules

and regulations, must apply equally to the majority institutions as well as to the minority institutions. The minority institutions must be allowed to do

what the non-minority institutions are permitted to do.

While considering the question of grant of aid, it has been observed by the Apex Court at paragraphs 141 to 143 as under :

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 institution 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 aid 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 institution to establish and administer that institution. The

conditions that can normally be permitted to be imposed, on the educational institutions receiving the grant, must be related to the proper 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.

At paragraph-144, the Apex Court observed that there is nothing in the language of Article 28(1) and (3), Article 29(2) and Article 30, to suggest

that, on receiving the aid, Articles 28(1) and (3) will apply, but Article 29(2) will not. Therefore, the Apex Court ultimately, negatived the

contention that the institutions covered by Article 30 are outside the injunction of Article 29(2) of the Constitution of India.

Further, the Apex Court, at paragraph-148, after considering Articles 29 and 30 of the Constitution, observed, inter alia, that when constitutional

provisions are interpreted, it has to be borne in mind that the interpretation should be such as to further object of their incorporation. They cannot

be read in isolation and have to be read harmoniously to provide meaning and purpose. They cannot be interpreted in a manner that renders

another provision redundant. If necessary, a purposive and harmonious interpretation should be given.

Thereafter, while considering the question of the right of the student to be admitted in minority institution, the Apex Court, at paragraph-149,

observed as under:

149. Although the right to administer includes within it a right to grant admission to students of their choice under Article 30(1), when such a

minority institution is granted the facility of receiving grant-in-aid, Article 29(2) would apply, and necessarily, therefore, one of the rights of

administration of the minorities would be eroded to some extent. Article 30(2) is an injunction against the State not to discriminate against the

minority educational institution and prevent it from receiving aid on the ground that the institution is under the management of a minority. While,

therefore, a minority educational institution receiving grant-in-aid would not be completely outside the discipline of Article 29(2) of the Constitution,

by no stretch of imagination can the rights guaranteed under Article 30(1) be annihilated. It is in this context that some interplay between Article

29(2) and Article 30(1) is required. As observed quite aptly in St. Stephen''s case (at SCC p.608, para 85), ""the fact that Article 29(2) applies to

minorities as well as non-minorities does not mean that it was intended to nullify the special right guaranteed to minorities in Article 30(1)"". The

word `only'' used in Article 29(2) is of considerable significance and has been used for some avowed purpose. Denying admission to non-

minorities for the purpose of accommodating minority students to a reasonable extent will not be only on the grounds of religion etc., but is

primarily meant to preserve the minority character of the institution and to effectuate the guarantee under Article 30(1). The best possible way is to

hold that as long as the minority educational institution permits admission of citizens belonging to the non-minority class to a reasonable extent

based upon merit, it will not be an infraction of Article 29(2), even though the institution admits students of the minority group of its own choice for

whom the institution was meant. What would be a reasonable extent would depend upon variable factors, and it may not be advisable to fix any

specific percentage. The situation would vary according to the type of institution and the nature of education that is being imparted in the institution.

Usually, at the school level, although it may be possible to fill up all the seats with students of the minority group, at the higher level, either in

colleges or in technical institutions, it may not be possible to fill up all the seats with the students of the minority group. However, even if it is

possible to fill up all the seats with students of the minority group, the moment the institution is granted aid, the institution will have to admit students

of the non-minority group to a reasonable extent, whereby the character of the institution is not annihilated, and at the same time, the rights of the

citizen engrafted under Article 29(2) are not subverted. It is for this reason that a variable percentage of admission of minority students depending

on the type of institution and education is desirable, and indeed, necessary, to promote the constitutional guarantees enshrined in both Article 29(2)

and Article 30.

At paragraph-152, the Apex Court further observed that the admissions to aided institutions, whether awarded to minority or non-minority

students, cannot be at the absolute sweet will and pleasure of the management of minority educational institutions. As the regulations to promote

academic excellence and standards do not encroach upon the guaranteed rights under Article 30, the aided minority educational institutions can be

required to observe inter se merit amongst the eligible minority applicants and passage of common entrance test by the candidates, where there is

one, with regard to admissions in professional and non-professional colleges. If there is no such test, a rational method of assessing comparative

merit has to be evolved.

Thereafter, the Apex Court has, while answering Question No.4, placed the aided minority educational institutions, more or less, at par with the

non-minority institutions except to some extent providing for identification of percentage of students to be admitted and it is observed that aided

minority institutions would be more or less at par with non-minority institutions so far as admission of the students on the management quota is

concerned.

13. In my view, basically, Article 30 of the Constitution of India ensures that there will be a right to the minorities to establish an institution and to

administer the same and Article 30(2) ensures that there shall be no discrimination in granting aid to the educational institutions by the State on the

ground that it is under the management of minority, whether based on religion or language. Therefore, even if the right to establish and run the

educational institution is read, the protection extended is that there shall not be any discrimination in the matter of providing grant on the ground that

the management is run by the minority. Therefore, it appears that if the State tries to discriminate in the matter of providing grant to any educational

institution on the ground that it is run by the minority, the action of the State would be hit by Article 30(2) of the Constitution, but, thereby it cannot

be said that in the matter of receiving grant, the institutions run by the minorities will have any additional rights, which can be claimed for the

purpose of receiving the grant. So far as providing of the grant in the field of education is concerned, it would be essentially a policy matter of the

State and it would be for the State to lay down various guidelines and yardsticks providing for eligibility of the grant, manner and method of

providing the grant and conditions for entitlement of the grant. If a condition is incorporated, which results into discrimination, between a non-

minority and minority, it would be hit by Article-30(2) of the Constitution, but, if some common yardsticks are provided or the method or the

eligibility criterion are provided, in my view, it can hardly validly be contended that a minority institution would get any additional right in the matter

of getting grant-in-aid for running the educational institution.

14. Keeping in view the aforesaid observations, if the matter is examined accordingly, it appears that the State, by the present action, has not

discriminated the minority institution in the matter of providing of the grant. Clause-64.3, which is impugned by all the petitioners, whether minority

institution or non-minority institution, is sought to be made applicable by the State Government as per the Government Resolution dated 27th

September, 1996 to all the schools or institutions receiving the grant, irrespective of the fact that whether they are minority or non-minority

institutions. Therefore, in my view, the Government Resolution dated 27th September, 1996 providing for addition of Clause-64.3 in the Code

does not offend Article-30 of the Constitution of India, as sought to be canvassed on behalf of the institution claiming to have the status of minority.

15. Accordingly, if the Government Resolution dated 21st May, 1994 is examined, there is no discrimination in the matter of extending benefit of

grant amongst minority and non-minority institutions. Clause-9 of the said Resolution, inter alia, provides that if any teacher is declared surplus from

a school, which is of religious or linguistic minority, then, he/she will be accommodated in such other school of the minority or in the alternative,

he/she will be required to be retrenched after the payment of compensation as per Regulation No.33. Therefore, the said clause is meant to

provide that if there are vacancies available in other similar minority school, then, such surplus teacher shall be accommodated and if there is no

vacancy in such similar minority school, they will be retrenched after the payment of the compensation in accordance with law. So far as extending

the protection to the teachers, who are already appointed prior to 15th April, 1994 is concerned, protection is extended to all the teachers of all

the schools, irrespective of the status of the school concerned as of minority or non-minority institution. Therefore, the contention raised on behalf

of the learned Counsel appearing for the institutions claiming the minority status that the Government Resolution of 1994 and the Government

Resolution providing for insertion of Clause-64.3 in the Code offends Article-30(2) of the Constitution of India, cannot be accepted and hence,

rejected.

16. Mr.Mehta, Mr.Vyas and Mr. Clerk, learned Counsels appearing for the institutions claiming the status of minority, also made an attempt to

submit that right to form and manage an educational institution is a right guaranteed under Article-19 of the Constitution of India and formation of

such right can be subject to the reasonable restriction. They submitted that providing of a clause compelling absorption of surplus teacher to a non-

minority institution would violate the right guaranteed under Article-19(1)(g) of the Constitution of India.

It appears that the Government has formed a policy for extending protection to a certain class of teachers of the school receiving grant-in-aid with

a view to see that their services may not be required to be terminated. A policy, which is formulated to accommodate such teachers, who are

declared as surplus in the school where there are vacancies, can hardly be said to be unreasonable or arbitrary policy. On the contrary, if the

services of the surplus teachers are to be terminated and other schools are to be given permission to make fresh appointments, then, such action

may be unreasonable or may operate harsh qua teachers, who are declared as surplus. Such principles are not unknown in the field of

administration that if there are surplus staff in `A"or `B" department, they are being accommodated and absorbed in other departments where there

are vacancies of such staff, subject to the fulfillment of necessary qualification and other factors. Therefore, it cannot be said that the policy

extending protection to the teachers by the Government Resolution of 1994 and the policy for accommodation of such teachers in other schools

receiving grant-in-aid, would be unreasonable or arbitrary. It appears that such a policy on the part of the Government would be in the larger

interest of the teachers, who are serving in different schools receiving grant-in-aid, and with a view to see that the school authorities or institutions

may not be required to pay compensation in case if termination of such teachers takes place or the institution is required to retrench such teachers

either on the ground that there are no sufficient number of students or for any other reason whatsoever. Such policy also appears to be to reduce

financial burden of State in the matter of providing grant-in-aid to such concerned schools.

If the said policy of the State Government is examined in context with the challenge made by the non-minority institutions, position would be the

same. As observed earlier, the policy of the Government formulated as per the Resolution dated 21st May, 1994, cannot be said to be

unreasonable or arbitrary and on the contrary, it appears that such a policy is in the larger interest of the teachers and also the institutions running

the schools and for reducing the burden upon public exchequer. Therefore, challenge to the said Government Resolution dated 21st May, 1994

made by the non-minority institutions or other petitioners than the minority institutions, on the touchstone of Article-14 of the Constitution of India,

cannot be sustained and would fail.

17. The aforesaid takes me to examine the challenge to the insertion of Clause-64.3 in the Code. It is true that it is an obligation on the part of the

State to see that all children gets the education. The right to have the education upto the primary level is as per the well settled position of law laid

down by the Apex Court in the case of Unni Krishnan, J.P. and others Vs. State of Andhra Pradesh and others etc. etc., is a fundamental right.

However, such fundamental right can only be invoked by a student or a child inspiring to get the education. The institution imparting education

cannot assert as of right that the State should and must provide grant-in-aid to all educational institutions imparting education upto the secondary or

higher secondary level. If such institutions are to assert their right under the Constitution, the only right which may be available to them would be

under Article-19(1)(g) of the Constitution of India. Article-19(1)(g) of the Constitution, as per the settled legal position, is not an absolute right,

but, is a right subject to reasonable restriction by the State. Further, the grant-in-aid is being provided by the State from its own funds, which is a

public fund, and utilisation of funds for educational purpose, may be upto secondary or higher secondary level, would be one of the use for the

larger interest and may be in the interest of the education field of the State. Various considerations may prevail when the State forms a policy for

the purpose of providing the grant-in-aid to the educational institutions. Such considerations, inter alia, may include availability of funds at the

disposal of the State, eligibility criteria, conditions for providing grant, machineries to be formed for the purpose of regulating disbursement of such

grant, liability, which may accrue on account of taking over of the responsibility of providing grant to such institutions, and also other consequential

effects qua monetary benefits of the employees of the institutions, which are being provided grant by the State. There is no dispute on the point that

the salary of the staff of the aided institutions, more particularly, teachers, are being provided from the State''s fund by way of grant and, therefore,

while framing policy of providing grant, which is popularly known as Grant In Aid Code, the State has liberty to formulate its own method and

manner of regulating the same and also for controlling the situation, which may not result into huge financial burden upon the State. It is not

necessary that an institution can impart education only if the grant-in-aid is provided to it. Article-19(1)(g) of the Constitution of India recognises

the right to run and establish the institutions and, therefore, if the State controls such right of Article 19(1)(g), it must meet with the test of

reasonableness. As observed earlier, without the facility of the grant-in-aid, it is always open and within the right of any institution, may be minority

or non-minority, to form an institution to impart education subject to fulfilling of requirement under relevant statute and, therefore, availability of the

grant-in-aid is not a condition precedent for enjoying or invoking the right under Article-19(1)(g) of the Constitution of India because as observed

earlier, without there being grant also, such right can be invoked and enjoyed by any citizen. Therefore, in my view, claiming of the grant-in-aid and

entitlement of the grant-in-aid would not be a right, which would fall under Article-19(1)(g) since the policy of providing of grant-in-aid by the

State is independent of it. Therefore, when the State has decided various terms and conditions regulating the method and manner and entitlement of

the grant-in-aid, it can hardly be contended that such Clause-64.3 in the Code violates Article-19(1)(g) of the Constitution of India. As such, so

far as the State is concerned, entitlement and receiving of the grant-in-aid and its disbursement are the policy matters and so far as the citizens are

concerned, if the State tries to discriminate on the ground, which is either not warranted under the Constitution or under the law, the citizens can

justifiably raise grievance. If the State treats all the institutions equally, there would be hardly any scope for the institutions to raise any grievance for

assailing the clause of the Code on the ground that it violates Article-19(1)(g) of the Constitution of India. Therefore, there is no substance in the

contention raised by Mr.Mehta that providing of Clause-64.3 in the Code violates Article-19(1)(g) of the Constitution of India and hence, the said

contention is also rejected.

18. As observed earlier, there is no compulsion on the part of any educational institution to receive the grant-in-aid, whether one would be entitled

to a grant or not. The action of the State for providing of the grant-in-aid to the educational institution is essentially a policy matter and the State

should have the liberty to decide its own yardsticks and criterion for advancement of education. If a person or institution is desirous to have the

grant-in-aid, it would be for such person or institution to abide by various clauses governing the conditions of the grant-in-aid. Once a person or

institution having voluntarily accepted that it would abide by the various conditions governing the grant-in-aid, would not be justified in raising a

grievance subsequently that certain clauses of the Code are operating harsh and, therefore, it should not be made applicable to such person or

institution. Further, entitlement of the grant-in-aid can never be asserted by any institution as of right. It is the self-volition on the part of the

institution to abide by the conditions of the Code for receiving grant-in-aid for running the institution. Even otherwise also, the clauses of the Code

are not having any statutory force. If a grant is sanctioned and the same is not released, the matter would be different, but, if the Government has

granted recognition/registration to a school without payment of grant-in-aid and the institution has accepted the same, it can hardly be subsequently

validly contended by such institution that it should also be provided with the grant-in-aid. If discrimination is made by the State authority among a

class of institutions, while implementing the provisions of the Code, the matter would be different. Various clauses of the Code are, more or less,

having a regulatory measure, which are dependent upon self volition on the part of the institution receiving grant, and the obligation on the part of

the State to provide grant-in-aid if all the conditions are fulfilled or accepted by the institution concerned. Therefore, as observed earlier, since the

right guaranteed under Article-19(1)(g) of the Constitution of India is not dependent upon the State providing the grant-in-aid to such institutions,

Clause-64.3 inserted in the Code would not violate the right of any of the petitioners, may be minority or non-minority institution, guaranteed by

Article-19(1)(g) of the Constitution of India and, therefore, the said contention deserves to be rejected and hence, rejected.

19. The contention raised on behalf of the petitioners that the orders passed by the DEO based on Clause-64.3 of the Code are in violation of the

statutory provisions, deserves scrutiny. It is true that as per Chapter-VI of the Act, there are various provisions relating to services in registered

private secondary schools and as provided u/s 35, selection or appointment of the staff is to be regulated in the manner, as provided, by the

Committee. Therefore, the contention canvassed on behalf of the petitioners is that there is no provision under the Act providing for absorption of

surplus teacher, who is appointed in a different school by a different management. Similarly, it was also sought to be canvassed on behalf of the

petitioners that if such surplus teachers are absorbed by the institution, it creates the relationship of employer and employee between the person

concerned and the management, which cannot be fastened unless there is any authority on the part of the State. Prima facie, such contention

appears to be attractive but, on a close scrutiny, it appears that if a school or an institution is to run without availability of the grant-in-aid facility,

then, in that case, it would be within their right to contend that no such surplus staff or teacher can be ordered to be absorbed. As observed earlier,

there is no compulsion to receive the grant-in-aid. If the institution is desirous to receive the grant-in-aid from the State, it has to abide by the terms

and conditions of the Code, but, the provisions of the Code or insertion of any clause in the Code cannot be assailed on the ground that it violates

the statutory provision of Section-35. Even otherwise also, the provisions of Section-35 providing for selection and appointment of staff would be

applicable in a case where fresh appointments are to be made. Absorption of teachers, who are otherwise selected by regular selection process in

different schools, cannot be said to be, as such, the fresh appointees, as envisaged under Section-35 of the Act. The question, which arises in these

petitions, is not that whether the authority can fasten or compel the institution to absorb the other teacher appointed by different school in its own

school, but, in my view, the question is if the school is desirous to continue with the grant-in-aid facility and if the Government, with a view to

reduce the financial burden upon the public exchequer, has formulated the policy of accommodation and absorption of such surplus teachers or

staff in other schools, can such action be maintained or not. Therefore, on close scrutiny of the aforesaid submission, it appears that various

provisions of Sections 34 to 36 of the Act, including those regulating the service in registered private secondary school, are of no help to the

petitioners in assailing the action of the State Government for insertion of Clause-64.3 of the Code. The said contention is, therefore also, ultimately

found to be of no substance.

20. The other contention raised on behalf of the petitioners that the clause leaving all powers to the DEO and the State to direct for absorption,

irrespective of the qualification of the teachers, without there being any choice to the management, is violative of Article-14 of the Constitution of

India, deserves consideration. It appears that the State, even while formulating the policy, may be in the matter of providing of the grant-in-aid or

regulating such grant-in-aid, cannot act arbitrarily. It would be the duty of the State to ensure that quality of education is maintained and an absurd

situation is not created, which basically frustrates and seriously damages the purpose of the education. Therefore, the State, while framing such

policy, has to keep in mind that the quality of education is not disturbed or that appropriate norms providing for qualification of the concerned

teacher or the staff are maintained. If the matter is examined accordingly, it is true that as per the petitioners, certain persons, who are not qualified

for the post are ordered to be absorbed. For example, vacancy is of a teacher in `A'' subject whereas the person posted is a teacher in `B''

subject. There are also certain cases in this group of petitions where unqualified persons are posted over the post. Such a situation, in my view, can

never be said to be intended by the State even while inserting Clause-64.3 in the Code. On a true and correct interpretation of Clause-64.3 of the

Code, it appears that the DEO, while directing for absorption of the surplus staff, has to bear in mind the qualification of the person, who is

ordered to be absorbed vis-a-vis the post which is vacant. The person, who is declared surplus and who is ordered to be absorbed, must fulfil the

requisite qualification for imparting education in the said subject or must fulfil the requisite criteria and qualification for discharging the work in case

if he belongs to the category of non-teaching staff. DEO, while directing absorption of teacher on non-teaching post, is required to consider as to

whether such teacher holds basic qualification for such non-teaching staff or not. Therefore, if the DEO has not considered the qualification of the

person, who is ordered to be absorbed, and the qualification of the person required for filling up of the vacancy, the order would be beyond the

scope and ambit of power under Clause 64.3 of the Code. Similarly, on a true and correct interpretation of Clause-64.3 of the Code, it appears

that the DEO, while considering the question for directing absorption in the school, should also ensure that the quality of education in the said

school is not put to jeopardy or is not damaged. It may be that in `A'' school, the standard of other teachers may be high and as a result thereof,

the school may be gaining the reputation where good education is being provided and, therefore, the school or the management may be reluctant in

absorbing a teacher, who may not be upto the mark or upto the standard of the school. The aforesaid does not mean that the school for

extraneous considerations, declines to absorb the teachers or gets any right to refuse absorptions, but, at the same time, it will be the duty of the

DEO to consider the said aspects while taking decision for ordering absorption. Similarly, nothing prevents the DEO from giving some choice to

the school if more than one surplus teacher or surplus staff is available for absorption. If only one teacher is available, then school has no option but

to absorb such teacher but if there is more than one teacher in such subject as surplus, then if such a choice is given to the management, it would

encourage a good atmosphere and would rather subserve the intention with which Clause-64.3 is inserted in the Code, and would also be in the

interest of atmosphere of the school and also the relations between the management and the person concerned, who is ordered to be absorbed.

There cannot be any exhaustive list for dealing with various contingencies, but, it may be individual action of the DEO, which may fail or which may

be bad, if such aforesaid considerations are not taken into account and in a mechanical manner or with some extraneous considerations, the order

for absorption is passed. Therefore, while considering the individual case for examining the order of the DEO, the matter will have to be

considered accordingly and if the DEO fails to consider the said aspects, it will be for the Director of Education to issue suitable guidelines for

regulating the exercise of power by the DEO as per Clause-64.3 of the Code.

21. There is no substance in the contention raised on behalf of the petitioners that they will not accept the absorption of surplus teacher, but, they

must be allowed to make appointment by a fresh recruitment and, therefore, No Objection Certificate is wrongly denied by the DEO. If a vacancy

is there in a school and if the Government has to bear the burden of the salary of such staff and accordingly, grant-in-aid is claimed on such vacant

post, it would be unfair on the part of the management or the school to claim that it must be given liberty to make fresh recruitment. As observed

earlier, the action would not be reasonable if those who are experienced or duly selected teachers or staff are to be terminated on account of non-

availability of work and fresh appointments are to be permitted on the ground that work is available. As such, the schools, which are receiving

grant-in-aid, in all, can be said to be in one block so far as the policy of the Government is concerned because ultimately, the burden of salary,

even after declaration of surplus teacher, is to be borne by the State. As observed earlier, if the State, in the larger interest, has formulated the

policy of absorption of surplus teacher in a school where there are vacancies, such an action cannot be said to be unreasonable or arbitrary. On

the contrary, the contention of the petitioners that they would insist for fresh appointment or fresh recruitment of new staff and will not absorb the

experienced staff, who came to be appointed by regular selection process, lacks bona fides. If the petitioners are desirous to assert their rights as

per Section-35 of the Act for appointment of the staff by the Committee, nothing prevents the petitioners to declare that they will not claim any

grant for the whole of the school or in any case for such new post and they will bear the burden for running the institution or in any case for such

new post. But, if the burden is to be thrown and to be based over to the State or public exchequer and if the grant-in-aid is to be claimed over the

fresh recruits of teaching or non-teaching staff, the Government and the authority will be justified in declining No Objection Certificate so long as all

surplus teachers or staff is not accommodated in all the schools, which are receiving the grant-in-aid or the schools, which are running at the cost of

the Government and where there are vacancies available of such teaching or non-teaching staff as the case may be.

22. Similarly, if the clause is inserted in the Code, which, as per the observations of the Court made hereinabove, is found to be reasonable and

valid, and if on one hand the Government is compelled to pay the salary of surplus staff and on the other hand, the institution is not acting as per

Clause-64.3 of the Code, the authority will be justified in withholding the grant-in-aid on the ground that the institution has failed to observe and

comply with the terms and conditions of the Code. If the institutions receiving the grant-in-aid are allowed to create a situation whereby the

Government is compelled to pay the salary to the surplus staff without taking work and the Government is saddled with the additional financial

responsibility of new staff by recruitment, the same, in my view, would be against the public interest and would result into wastage of public money

and also public time, and therefore, such a challenge on the part of the petitioners that the DEO has no power to withhold the grant-in-aid if the

order for absorption is not complied with cannot be sustained and deserves to be rejected.

23. In view of the aforesaid discussions and observations, in all the petitions, challenge made to the legality and validity of the Government

Resolution dated 21st May, 1994 and insertion of Clause-64.3 in the Code fails and are rejected.

Concerning to the subject matters of these petitions, it would not make any difference whether such petitioners belong to minority or non-minority

and as observed earlier, none of the Resolutions of the State Government, either of 1994 or of 1996, violates Article-30 or Article-19(1)(g) of the

Constitution of India and, therefore, challenge to the same are negatived. However, since in Special Civil Application No. 174 of 2002, petitioners

have also challenged the order rejecting application for giving status of minority, the concerned authority will have to reconsider the issue in light of

observations made hereinabove at paragraph-9.

Similarly, the challenge made by the petitioners, who are minority as well as non-minority institutions, qua the non-issuance of No Objection

Certificate for fresh recruitment or appointment, is also without any substance and deserves to be dismissed.

24. However, it appears that in all these petitions, the concerned DEO, while passing the order for absorption of the surplus teachers or non-

teaching staff, has not examined the qualification of the person concerned, who is declared surplus, and the qualification of the post for which there

are vacancies. The concerned DEO has also not considered the subjectwise qualification of the teachers and has also not considered as to whether

choice can be given to the management or school of two-three persons holding the qualifications for the post, which is vacant, or not and where

such surplus teachers available are more than one. It will be, therefore, for the concerned DEO to reconsider the matter in light of the observations

made by this Court, as referred to in paragraph-20 and the concerned DEO will have to communicate accordingly. However, thereafter, also if the

compliance of the order for absorption is not made, it would be open to the DEO to withhold the grant-in-aid of such institution in accordance with

law.

25. In view of the aforesaid discussion and observations, I am of the view that the following directions shall meet the ends of justice :

(i) The DEO concerned will examine the question for posting of so-called surplus teacher or non-teaching staff in the concerned school keeping in

view the observations made by this Court in the above referred paragraph-20 and shall pass necessary orders in that regard within a period of one

month from the date of receipt of order of this Court.

(ii) Till the DEO reconsiders the matter and passes the fresh order, status quo, as prevailing, shall be maintained.

(iii) In addition to above, so far as Special Civil Application No. 174 of 2002 is concerned, the concerned authority at State Government level

shall reconsider the matter for deciding application for conferring status of religious minority keeping in view the observations made hereinabove in

this judgment at paragraph-9 and in accordance with law within a period of three months from the receipt of the order of this Court and shall pass

fresh order in accordance with law.

(iv) This judgment and order shall not prejudice the right of any of the petitioners to apply to concerned authority for claiming status of minority

institution, if available in accordance with law.

(v) It is clarified in respect of all earlier directions that as far as position of ordering absorption of surplus teachers to the school receiving grant-in-

aid is concerned, whether minority or non-minority, the position would be the same qua concerned petitioners and shall be governed accordingly

as per this judgment.

26. All the petitions shall stand allowed only to the extent of the aforesaid directions only and the petitions for all other reliefs are dismissed. Rule

partly made absolute to the aforesaid extent only. There shall be no order as to costs.

27. In view of the judgment and orders in main Special Civil Applications, no orders on Civil Applications. Hence, disposed of accordingly.