(2013) 10 MAD CK 0172

Madras High Court

Case No: W.A. No. 2318 of 2011

P. Ravichandran — APPELLANT

Vs

State of Tamil Nadu — RESPONDENT

Date of Decision: Oct. 11, 2013

Citation: (2014) LabIC 166 : (2014) 1 LLN 216 : (2013) 5 LW 514 : (2013) 7 MLJ 641

Hon'ble Judges: N. Paul Vasanthakumar, J; M.M. Sundresh, J

Bench: Division Bench

Advocate: G. Masilamani, for G.M. Mani, Associates, for the Appellant; A.L. Somayaji, Advocate General, Assisted by Mr. D. Krishnakumar, Special Government Pleader and Mr. K. Karthikeyan, Government Advocate, for the Respondent

Final Decision: Disposed Off

Judgement

N. Paul Vasanthakumar, J.
This writ appeal is preferred against the order made in W.P. No. 6811 of 2000 dated 25.6.2009, insofar as not deciding the issue raised by the appellant, viz., whether prior permission for filling up the sanctioned vacant post in appellant''s Aided College is required or not. The brief facts necessary for disposal of this writ appeal are as follows:

(a) Nehru Memorial College was established in the year 1967 at Puthanampatti, Tiruchirapalli District, which is affiliated to Bharathidasan University, Tiruchirapalli. It is an Aided Private College, coming within the purview of the Tamil Nadu Private Colleges (Regulation) Act, 1976 and the Rules framed thereunder (hereinafter referred to as ''Act'' and ''Rules'').

(b) The College is conducting UG and PG courses and number of teaching staff sanctioned to aided courses in the College is 37 and the sanctioned strength of non-teaching staff is 33. Some courses are conducted on self-financing basis.

(c) The College being a Private Aided College as per the provisions of the Act, a College Committee was constituted for its administration. As per Rule 11(1) of the Rules, every

year the Director of Collegiate Education is to fix the staff strength for aided courses and the College Committee being the appointing authority, has to fill up the vacancies, in terms of the provisions of the Act and Rules.

(d) The staff strength of the College is fixed every year based on the workload/number of periods available in each Department of Aided courses and sections. The workload norms are fixed by the Committee called "Workload Norms Committee" consisted of three Vice Chancellors; the Deputy Secretary to Finance Department, Government of Tamil Nadu; and the Director of Collegiate Education, Chennai. As per the said norms fixed by the said Committee dated 8.2.1994, the College is entitled to get larger number of posts viz., 65 for the year 1999-2000, though the post sanctioned was 50 from 29.10.1984.

(e) Out of the said sanctioned posts, several teaching posts became vacant due to death, migration, resignation, retirement and promotion. Some of the posts are lying vacant since 1991 and only six posts were allowed to be filled up during 1995.

(f) The contention of the respondent Department is that for filling up the vacant sanctioned posts, prior permission from the Department/Director is required and by virtue of that process, the College had been forced to wait endlessly for the orders of the Director of Collegiate Education. The second respondent/Director of Collegiate Education was furnished with students strength of the College every year in prescribed format, containing all relevant information such as student strength, staff strength, vacancy, number of periods available, the reason for vacancy, etc. In the salary bill forwarded to the Regional Director of Collegiate Education also, the said facts are revealed every month.

(g) The second respondent by proceeding dated 22.12.1995 permitted to fill up six out of 16 permanent vacancies that have arisen as a result of death, migration, resignation, retirement, promotion, etc. Subsequently, by a common proceeding dated 13.1.1998, permission to fill up 75% of vacancies that may arise due to the said reasons was granted. The said permission was specifically stated to be valid up to 30.4.1998 and it was informed that if there was failure to fill up such posts, the college should send fresh proposal and get the orders renewed.

(h) Again by order dated 28.10.1999 the second respondent granted permission to fill up certain vacancies in sanctioned posts. However, by order dated 23.11.1999, the second respondent issued another order not to fill up one post each in Economics and Zoology Departments, until further orders. Another communication was issued by the third respondent on 8.12.1993, based on the telephonic instruction said to have been given by the second respondent not to fill up 13 vacancies without stating any reason. The effect of the said communication of the third respondent dated 8.12.1999 is that the 13 vacancies in respect of regular vacancies in the College could not be filled. Therefore the College was forced to be administered without librarian for two years, without Physical Education Director for 12 years, and without Scavenger for two years. No such communication

prohibiting filling up of vacancies in permanent posts were issued to other colleges.

(i) The said order of the second respondent dated 23.11.1999 and the communication of the third respondent dated 8.12.1999 were challenged before the learned single Judge on the ground that, vacancies available in sanctioned posts are bound to be filled up for academic excellence and the teachers to be appointed must have the qualification prescribed by the University; once appointment is made in sanctioned vacancies by the College Committee in terms of the power vested with the College Committee, the Department can very well verify as to whether the persons appointed are qualified in accordance with the University stipulation in respect of teaching staff and the non-teaching staff at the time of sanctioning salary/grant; if anyone is not satisfying the required qualification or appointed in violation of the communal roaster, the respondent Department can very well reject the approval of appointment and deny the payment of grant and the said person appointed will not get any benefit as the College used to appoint persons in sanctioned vacancies specifically stating that their appointment would be subject to the approval by the Department.

(j) It is also contended in the affidavit that Rule 11(1) of the Rules nowhere stipulates that each and every vacancy in sanctioned post can be filled up only by getting prior permission from the Department. Therefore the order requiring prior permission having not been contemplated in the statutory provisions, the respondents 2 and 3 are not empowered to issue any administrative instruction, contrary to the statutory provision.

2. The writ petition was resisted by the Department contending that the State Government has delegated power to the Director of Collegiate Education to grant permission to fill up 100% vacancies available in aided colleges in G.O. Ms. No. 637 Higher Education Department dated 14.12.1998 and approving the number of posts for grant in each and every faculty is based on the students strength as per the workload available for the specific academic year. The sanction order accorded for particular academic year lapses at the end of the said academic year. Hence fresh proposal has to be sent to the Director to get permission to fill up the vacancy arising in subsequent year with workload particulars. The Director of Collegiate Education being the competent authority to fix the number of posts from time to time to the aided colleges, prior permission is required for filling up even the vacant posts. Rule 11(1) contemplates requirement of seeking prior permission. The impugned orders in the writ petitions were issued as there were litigation in respect of five teaching posts pending in Madurai Bench.

3. The learned single Judge noticing the fact about the filling up of 13 posts in terms of the interim order granted by this Court, directed the management to approach the Educational Authorities for approval of appointment of 13 Lecturers appointed pursuant to the interim order by stating that the said direction will govern only the academic year 1999-2000 and question of power to insist for prior permission to fill up the sanctioned post need not be decided. Against the said portion of the order holding that the power of the department requiring to seek prior permission to fill up the sanctioned post having not

been denied, the Management has filed this writ appeal.

4. Mr. G. Masilamani, learned Senior Counsel appearing for the appellant reiterated the contentions raised in the affidavit filed in support of the writ petition and argued that on the teeth of Rule 11(1), the second respondent has no jurisdiction to issue any circular or direction to the appellant not to fill up the sanctioned and vacant post in an aided post without amending the statutory rule. The learned Senior Counsel also argued that seeking prior permission from the second respondent to fill up each and every sanctioned and vacant post that arise within the academic year for which the staff strength has already been fixed based on the workload and availability of students, will create lot of hurdle to private aided colleges in conducting classes to the students and even if any application is submitted, the Department will take its own time for passing orders and if there is delay in filling up the vacant post, instructions to students will be affected, which cannot be compensated. The learned Senior Counsel further submitted that as long as the post sanctioned/staff strength fixed for the academic year is not withdrawn, the management is entitled to fill up the vacant post by appointing a fully qualified person by following the provisions of the Act and Rules, and the said issue was already considered by the Division Bench of this Court in several decisions. The learned Senior Counsel also filed copies of the judgments rendered by this Court by way of an additional typed set of papers. The learned Senior Counsel also relied on the judgment of the Division Bench reported in The Association of Managements of Private Colleges and Others Vs. The State of Tamil Nadu and Others, wherein the Government Order issued direction to the effect that 50% of seats in all Unaided Private Colleges are to be selected through Government agency without making any amendment in the Act or Rules, was set aside by holding that the Tamil Nadu Private Colleges (Regulation) Act and Rules, 1976, are complete Code for establishment, administration, admission of students, appointment of teachers and non-teaching staff, sanction of grant, withdrawal of grant, code of conduct to staff, closure of the course/courses, etc., and by virtue of an executive order or administrative instruction or circular issued by the Director of Collegiate Education, the right of the management of the private colleges shall not be curtailed. The learned Senior Counsel ultimately submitted that as and when vacancy arises in sanctioned post of Private Aided College, the management are entitled to fill up the post with a qualified person in accordance with the statutory provisions and without amending the Act, the second respondent cannot insist the management to get prior permission to fill up vacant posts and such insistence is an unauthorised and arbitrary action.

5. Mr. A.L. Somayaji, learned Advocate General on the other hand submitted that as the management of the colleges are getting aid from the Government, they are to follow the circulars/instructions issued by the Department from time to time and the circulars issued are in exercise of incidental power, though not stated in the statutory rule viz., Rule 11(1) of the Rules. To sustain the said argument, the learned Advocate General heavily relied on the judgment of the Supreme Court reported in Kolawana Gram Vikas Kendra Vs. State of Gujarat and Others, and the decision of the learned single Judge of this Court

made in W.P. No. 20508 of 2007 dated 12.8.2011. The learned Advocate General further submitted that by approaching the second respondent for filling up vacant posts, no right to administer the institution is interfered, and as and when application is submitted, the Department will have to consider the same with reference to the students strength available and grant permission to fill up the post. Contending as above, the learned Advocate General prayed for dismissing the writ appeal.

6. We have considered the rival submissions of the learned Senior Counsel appearing for the appellant as well as the learned Advocate General, perused the relevant provisions of the Act and Rules, and the judgments relied by both sides.

7. The point arises for consideration in this writ appeal is as to whether prior permission is required to be obtained by the management of the Private Aided Colleges to fill up the vacancies of teaching and non-teaching staff arising in a sanctioned post during middle of the academic year, in the absence of any prohibitory order issued by the Government for filling up the vacancies.

8. The appellant is a "Private College" as defined u/s 2(8) of the Tamil Nadu Private Colleges (Regulation) Act, 1976, which reads as follows:

2(8) "private College" means a college maintained by an educational agency and approved by, or affiliated to, a University but does not include a college-

(a) established or administered or maintained by the Central Government or the Government or any local authority or any University; or

(b) giving, providing or imparting religious instruction alone, but not any other instructions.

For Administering the private college, a College Committee is to be constituted in terms of Section 11 of the Act, which section reads as follows:

11. Constitution of college committee.- Every private college, not being a minority college, shall have a college committee which shall include the following persons employed in the private college, namely:-

(a) the Principal;

(b) the senior-most Selection Grade Lecturer or Reader;

(c) one other Selection Grade Lecturer; and

(d) the senior-most Superintendent;

Provided that if there is no Selection Grade Lecturer in the private college, the senior-most Lecturer and one other Lecturer shall be included in the college committee:

Provided further that if the senior-most Selection Grade Lecturer or the senior-most Lecturer, as the case may be, or the senior-most Superintendent is not willing to be included in the advisory committee as a member, the next senior person in the respective category who is willing to be included as a member shall be included in the college committee:

Provided also that if there is only one post in the category of Superintendent and the person holding the post is not willing to be included in the college committee as a member, the senior-most Assistant shall be included as a member in the college committee.

Payment of grant to a private aided college is stated in Section 10 of the Act, which reads as follows:

10. Payment of grant.-

(1) Subject to such rules as may be prescribed, the Government may pay to the private college grant at such rate and for such purposes as may be prescribed.

(2) The Government may withhold permanently or for any specified period the whole or part of any grant referred to in sub-section (1) in respect of any private college-

(i) which does not comply with any of the provisions of this Act or any rules made or directions issued thereunder in so far as such provisions, rules or directions are applicable to such private college, or

(ii) in respect of which the pay and allowances payable to any teacher or other person employed in such private college are not paid to such teacher or other person in accordance with the provisions of this Act or the rules made thereunder, or

(iii) which contravenes or fails to comply with any such conditions as may be prescribed.

(3) Before withholding the grant under sub-section (2), the Government shall give the educational agency an opportunity of making its representations.

If any excess grant was sanctioned and paid, recovery of excess grant can be ordered as per Section 10-A, which reads thus:

10-A. Recovery of excess grant.-If the competent authority is satisfied that the grant referred to in sub-section (1) of section 10 has been paid on misrepresentation or otherwise to any private college or has been utilised by the private college in contravention of the provisions of the Act or any rules made or directions or orders issued thereunder, the grant so paid or utilised shall be treated as excess grant and such excess grant shall, without prejudice to any other mode of recovery, be recovered as arrears of land revenue.

Rule 11(1) of the 1976 Rules contemplates fixing of staff strength in private aided colleges. Rule 11(1) reads thus,

11(1) The number of teachers employed in a college shall not exceed the number of posts fixed by the Director, from time to time, with reference to the academic requirements and norms of work load prescribed by the respective Universities and overall financial considerations.

Rule 11(3) states that in case of regular vacancies, fully qualified candidates can be appointed only on regular basis. However, in temporary vacancy, arising on account of leave, deputation/training or suspension, etc., qualified candidate may be appointed temporarily for a specified period, provided such teachers" services shall not be terminated before expiry of the said period.

Rule 11(4) contemplates the mode of filling up of post by promotion or by direct recruitment. Rule 15 states about pay and allowances of teachers and other persons employed in college to be paid in the prescribed format. Rule 15 reads thus,

15. Pay and allowances of teachers and other persons employed in college to be paid in the prescribed form.-Every teacher and other person employed in a college shall be paid his pay and allowances for each month on the first working day of the succeeding month. Such payments shall be made, by cheque or by demand draft and not by cash, by the Secretary of the committee or in his absence, for any reason whatsoever, by the person duly authorised by the educational agency.

From the above referred statutory provisions it is clear that the number of teachers employed in a college shall not exceed the number of posts fixed from time to time by the Director of Collegiate Education with reference to the academic requirements and norms of workload prescribed by the respective Universities and overall financial consideration.

9. It is an admitted fact that academic requirements, that is number of students admitted in a course based on which the availability of workload will be fixed by applying the norms fixed by the University and the financial consideration, that is the budgetary allocation of each financial year, are all based on a particular academic year. "Academic year" is defined u/s 2(1) of the Act thus,

"academic year" means the year commencing on the first day of June." The Aided College teachers as well as the Government College teachers, who are attaining the age of superannuation during the middle of the academic year are allowed to continue up to the end of the academic year, i.e. upto the end of May, if their conduct is good and they are physically fit. The same is made clear, insofar as colleges are concerned, in G.O.Ms. No. 281 Education Department, dated 13.2.1981. The underlying idea behind the said Government Order, which is still in force is, to ensure continuity of the benefit of teaching to students by the teachers, who attain the age of superannuation during middle of the year, for rest of the academic year. Re-employment of a retiring teacher and filling up of a

sanctioned vacant post with some other teacher during the middle of the academic year, if not granted, continuity of benefit of teaching to the students will definitely be affected. Thus, the importance of continuity of teaching was recognised by the Government/first respondent herein in the year 1981 itself, in respect of aided colleges. Wherever the management was not adhering to the said direction issued by giving re-employment of teachers attaining the age of superannuation during the middle of the academic year after satisfying with the requirements mentioned therein viz., physical fitness and good conduct and character, this Court ordered re-employment to such teachers. Some of the decisions to that effect are,

(i) 1996 WLR 259 (C. Davidthampi Dhas v. The Governing Body of N.M. Christian College, etc.)

(ii) A. Karunanidhi Vs. The Secretary and Correspondent, Poompuhar College,

(iii) W.A. No. 1179 of 1993, etc., dated 6.9.1994

(S. Sundaram v. Secretary, C.S.I. Diocese of Madras) Thus, it is clear that the Director of Collegiate Education is bound to fix staff strength as required under Rule 11(1) of the Rules every year, and once the staff strength of a particular academic year is assessed and informed to the college, giving further direction to get prior permission to fill up any vacant post arising within the academic year due to death, resignation, etc., is not contemplated under the said Rule viz. Rule 11(1).

10. The Tamil Nadu Private Colleges (Regulation) Rules, 1976 was issued by virtue of the rule making power available to the Government u/s 53 of the Act. The said Section 53 reads thus,

53. Power to make rules.-

(1) The Government may make rules to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:-

(a) all matters expressly required or allowed by this Act to be prescribed;

(b) the form of applications and the statements under this Act and the particulars which such application and statement shall contain;

(c) the establishment and maintenance of private colleges;

(d) the giving of grants to private colleges;

(e) the grant of permission under sub-section (1) of section 5;

(f) the admission of students in private colleges including special provision for the advancement of socially and educationally Backward Classes of citizens and the Scheduled Castes and the Scheduled Tribes.

Explanation.-In this clause, "Scheduled Castes" and "Scheduled Tribes" shall have the same meaning as in the Constitution;

(g) the manner in which accounts, registers and records shall be maintained in private colleges and the authority responsible for such maintenance;

(h) the submission of returns, statements, reports, and accounts by educational agencies of private colleges;

(i) the purposes of the private college for which the premises of the private colleges may be used and the conditions subject to which such premises may be used for any other purpose;

(j) the conditions subject to which donations or contributions from the public may be accepted for the purposes of private colleges and the naming of private colleges;

(k) the procedure and the disposal of the business of the Tribunal.

From the perusal of the above section it is clear that Rules can be issued by the Government, or Government can make rules only to carry out the purposes of the Act, which are stated in the Act. If the posts are sanctioned/fixed to an aided college based on the students strength, availability of workload, and overall financial consideration of the Government. The said posts will continue in the college till the end of the academic year. Section 52 of the Act states about overriding effect of the Act, which reads as follows:

52. Overriding effect of this Act.-The provisions of this Act shall have effect notwithstanding anything to the contrary contained in any other law for the time being in force including any regulation or statute of any University.

As per the said section, the proviso of this Act will prevail over any other provisions of law including Statute or Regulation of University.

11. One of the functions of the College Committee is to appoint teachers and other persons of the private college, fix their pay and allowances and define the duties and conditions of their service as per section 16 of the Act. Thus, the College Committee of a Private Aided College is entitled to appoint teachers in sanctioned posts, who are qualified as per the University Regulation, or Statute, or Ordinance to which the college is affiliated, and insofar as staff other than teachers are concerned, the Government may make rules specifying the qualification required for appointment as per section 15(1) and (2). Every teacher appointed by the College Committee are issued with appointment order specifically stating that their appointment would be subject to approval by the

Regional Joint Director, and the person appointed in permanent vacancy are to enter into an agreement with the College Committee under Form 7-A in terms of sub-rule (2)(i) of Rule 11 of the Rules. Similarly, a person appointed in a temporary vacancy shall sign an agreement under Form 7-B. Insofar as the non-teaching staff are concerned, they are required to sign an agreement under Form 7-C for permanent appointees and Form 7-D for temporary appointees.

12. From the narration of above statutory provisions, it is evident that the Tamil Nadu Private Colleges (Regulation) Act, 1976 and the Rules framed thereunder are complete code insofar as establishment, administration, sanction of post, appointment of staff, grant-in-aid, withholding of aid, code of conduct to staff, closure of the course or college, etc.

13. In the light of the above statutory provisions, the Director of Collegiate Education cannot insist Private Aided College managements to get prior permission to fill up the vacant posts available in sanctions posts, by issuing circulars/administrative instructions.

14. The learned Advocate General heavily relied on the judgment reported in Kolawana Gram Vikas Kendra Vs. State of Gujarat and Others, . In the said judgment, the Government of Gujarat issued circular to seek prior approval of the State Government or the competent authority to verify whether there was vacancy as per the workload and whether the candidate possess minimum prescribed qualification. When the District Elementary Officer refused permission, the same was put to challenge, which was upheld by the Hon''ble Supreme Court holding that ''No Objection Certificate'' is required only to verify as to whether any vacancy of a teacher of a particular subject as per the workload fixed by the Board and whether a person is possessing minimum required qualification for the post in which he is appointed. Further, in the said circular one of the condition was that if any prior approval is requested within seven days, reply should be given by the Department. Considering the said factual aspects, that is to find out whether there is sufficient workload available and whether the candidate possesses minimum prescribed qualification, the Hon''ble Supreme Court upheld the said circular on facts.

15. The order of the learned single Judge of this Court, which is also relied on by the learned Advocate General in W.P. No. 20508 of 2007 dated 12.8.2011, has not become final as writ appeal filed against the said order is pending in W.A. No. 2225 of 2012. The learned single Judge further relied on the judgment of the Supreme Court reported in State of Tamil Nadu and Others Vs. Amala Annai Higher Secondary School, . In the said case, the issue was whether the Court was justified in giving direction to the Government to create additional post. In this case the management is not seeking for sanction of any additional post and the only issue is whether prior permission is required to fill up the existing sanctioned vacant post. Therefore the said judgment is clearly distinguishable. Thus, the said judgment of the learned single Judge cannot be relied on to sustain the arguments of the learned Advocate General.

16. A Division Bench of Madurai Bench of this Court in W.A.(MD) No. 462 of 2006, judgment dated 1.12.2006, considered the scope of Rule 11(1) of the Tamil Nadu Private Colleges (Regulation) Rules, 1976 relying upon the earlier order passed on 13.8.2006, and held that for filling up an existing post in a Private Aided College, no prior approval is necessary as any such appointment shall be subsequently approved by the Department, and at that point of time the Department would have an opportunity to consider the availability of such post and rejection of approval on the ground that no prior approval was obtained before appointment, was set aside. Same is the view taken in the following orders of this Court:

(i) W.P. No. 30618 of 2005, order dated 21.9.2005;

(ii) W.P. No. 28396 of 2004, order dated 29.3.2006;

(iii) W.A. Nos. 92 & 93 of 2008, judgment dated 6.1.2010;

(iv) W.P.(MD) No. 174 of 2009, order dated 27.4.2010;

(v) W.A. Nos. 140, 811/2006 & 805/2007, judgment dt. 21.10.2010;

(vi) W.A. No. 2858 of 2010, judgment dated 21.3.2011;

(vii) W.A.(MD) No. 1088 of 2011, judgment dated 19.10.2011;

(viii) W.A. No. 2345 of 2011, judgment dated 5.3.2012;

(ix) (2012) 5 MLJ 670 (Dr. S. Sukumaran v. State of Tamilnadu) rendered by one of us (NPVJ); and

(x) W.A. No. 474 of 2013, judgment dated 3.4.2013.

Thus, the issue regarding seeking prior permission for filling up the vacant post in aided College within the academic year was already settled in series of decisions and all the above said orders are implemented by the respondents 1 and 2. In such circumstances, it is not open to the respondents to again and again contend that only after getting prior permission from the Director of Collegiate Education, vacant sanctioned posts can be filled up by the management.

17. Finality of litigation was emphasised by the Hon''ble Supreme Court in the decision reported in M. Nagabhushana Vs. State of Karnataka and Others, . In the said judgment in paragraphs 13 and 21 the Supreme Court held thus,

13. That principle of finality of litigation is based on high principle of public policy. In the absence of such a principle great oppression might result under the colour and pretence of law inasmuch as there will be no end of litigation and a rich and malicious litigant will succeed in infinitely vexing his opponent by repetitive suits and actions. This may compel

the weaker party to relinquish his right. The doctrine of res judicata has been evolved to prevent such an anarchy. That is why it is perceived that the plea of res judicata is not a technical doctrine but a fundamental principle which sustains the rule of law in ensuring finality in litigation. This principle seeks to promote honesty and a fair administration of justice and to prevent abuse in the matter of accessing court for agitating on issues which have become final between the parties.

21. Following all these principles a Constitution Bench of this Court in The Direct Recruit Class-II Engineering Officers" Association and others Vs. State of Maharashtra and others, laid down the following principle: (SCC p. 741, para 35)

35. an adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had decided as incidental to or essentially connected with subject-matter of the litigation and every matter coming into the legitimate purview of the original action both in respect of the matters of claim and defence. Thus, the principle of constructive res judicata underlying Explanation IV of Section 11 of the CPC was applied to writ case. We, accordingly hold that the writ case is fit to be dismissed on the ground of res judicata.

(Emphasis Supplied)

18. (a) The Division Bench decision reported in The Association of Managements of Private Colleges and Others Vs. The State of Tamil Nadu and Others, arose when an attempt was made by the Government to select 50% of seats in Private Self-financing Arts and Science Colleges by Government Agency. The said Government order was challenged and the Division Bench of this Court held that,

... the State Government over-stepped their power in issuing the impugned Government Order under Article 162 of the Constitution, as such power cannot be exercised over the subject occupied by law passed by the competent legislature, which is otherwise known as "theory of occupied field"

The Division Bench for arriving at the said conclusion relied on the judgment of the Supreme Court reported in R. Chitralekha and Another Vs. State of Mysore and Others, . In the said case the power of the University which granted affiliation to an aided college to select candidates for admission was question and the Supreme Court held that the University had no power to make admission to affiliated colleges although the University could prescribe necessary eligibility conditions for admission. In that decision it is further held that the Syndicate of the University could not interfere with the internal administration of the private colleges such as admission of students, by taking over the power from them. The Division Bench in the above referred judgment in paragraph 65 further held thus,

65. When the colleges were started on the basis of the permission granted subject to conditions mentioned in such permissions based on Government Order, and the

managements have started the colleges by investing huge amounts and putting lot of efforts on the basis of such permissions, as rightly contended by the learned counsel for the petitioners, the respondent cannot either make the 50% of the seats as Government seats in private unaided colleges or take away the right of admission of students to that extent, particularly so when as per section 14 of the Act, to carry on the general administration of the private college excluding the properties and funds of the private college, is one of the functions assigned to the college committee, and under Rule 9(5) the Principal is given the exclusive responsibility in the matter such as admission, examination, promotion of students and other academic matters. Hence the doctrine of promissory estoppel, in our view, comes to the aid of the petitioners." The contention of the Government was that Rule of reservation in admissions are followed or not can be verified only if power is given to the Government and the answer given was, there are enough provisions, power and machinery to take action against the colleges who do not follow the rule of reservation in filling up 50% of seats. The crux of the said judgment is that by way of an executive order, the Government cannot override any statutory provision. This judgment is cited to emphasis the proposition that without any statutory provision under the Act or Rules, the Director of Collegiate Education is not empowered to seek prior permission to fill up vacant post within a academic year.

(b) In the decision reported in B.N. Nagarajan and Others Vs. State of Karnataka and Others, the Hon''ble Supreme Court held that executive power of the State which have the effect of overriding the rules framed under proviso to Article 309 of the Constitution of India, is not permissible. Same view was reiterated in the decisions reported in V. Sreenivasa Reddy and others Vs. Govt. of Andhara Pradesh and others, and State of Karnataka and Others Vs. KGSD Canteen Employees Welfare Association and Others, .

(c) In S. Sivaguru Vs. State of Tamil Nadu and Others etc. etc., and Sarva U.P. Gramin Bank and Others Vs. Manoj Kumar Chak, it is held that executive instructions cannot supplant statutory rules and if statutory rule is not available, executive/administrative instructions/orders can be issued to supplement and if any circular for executive instructions are issued contrary to the statutory rule, the same is inoperative.

(d) In State of Jharkhand and Others Vs. Jitendra Kumar Srivastava and Another, the above said principle is reiterated.

In the light of the above findings as well as the decisions, we conclude this Judgment in the following manner:

(1) There is no requirement under the Tamil Nadu Private Colleges (Regulation) Act, 1976 and Tamil Nadu Private Colleges (Regulation) Rules, 1976, to seek prior permission to fill up any vacant post in an aided college, which has already been sanctioned for the academic year by the Director of Collegiate Education under Rule 11(1) of the Rules.

(2) If the appointment made by the College Committee in the sanctioned vacant post is in violation of any of the statutory provision, it is open to the Regional Joint Director of Collegiate Education to deny grant-in-aid to the said person appointed in the vacant post.

(3) The teaching staff appointed must be fully qualified, whose qualification is approved by the University to which the college is affiliated. Insofar as the non-teaching staff are concerned, the candidate must possess the qualification prescribed by the Government.

(4) The College Committee while filling up the vacant post, should follow the procedures stated in Rule 11(1A) to 11(4)(ii).

(5) If there is no rival candidate for any post, the appointment is bound to be approved for the purpose of payment of pay and allowances, by the Regional Joint Director of Collegiate Education.

The writ appeal is disposed of with the above directions. No costs.