
(1977) 09 GUJ CK 0002
In the Gujarat High Court

Ahmedabad Kelavani Trust

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 27-09-1977

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 9
Constitution of India, 1950 — Article 19(1)(g)
Gujarat University Act, 1949 — Section 20(xx)

Citation : (1978) 19 GLR 671

Hon'ble Judges : D.A. Desai, J;A.M. Ahmadi, J

Bench : Division Bench

Judgement

D.A. Desai, J.—Turmoil in the academic world consequent upon the introduction of the new pattern of education both at the instance of the management, teachers and incidentally the Government has found its echo in this group of petitions. Though the point involved is very narrow, clear and precise, the matter has been argued on a much wider canvass most ably, but it has caused us no small concern and anxiety in reaching a correct, appropriate and legal solution. The question raised in each of these petitions is common and, therefore, a few facts of a representative nature may be drawn from the first petition, namely. Special Civil Application No. 955 of 1977.

2. This petition is filed by the Ahmedabad Kelavani Trust and one Shri Rasiklal C. Shah claiming to be the Managing Trustee of the trust, questioning the constitutional validity of what has been euphemistically described as guidelines issued by the Government of Gujarat as per its Resolution in Education Department dated 12th April 1977 by which the Colleges? In Ahmedabad were provided with guidelines for first adjudging the number of teachers who would be surplus, methodology of arriving at who would be surplus and in respect of whom protection extended by the Resolution of the Government of Gujarat dated 7th March 1977, would be applicable. In order to fall in line with the pattern of education all over India and with a view to streamlining the administration of Universities in Gujarat, a committee was appointed under the Chairmanship of

Mr. S.N. Dungerkeri, Registrar of the Bombay University for a number of years and the then Vice Chancellor of Maratbawada University. This Committee submitted a report and in order to give effect to the recommendations of this committee, extensive amendments were carried out in the Gujarat University Act, 1949. The Government thereafter appointed a committee headed by the Secretary, Education Department, Government of Gujarat to suggest ways and means of introducing the new pattern of education and on the report of the Secretary, decision was arrived at to introduce the new pattern of education effective from the academic year 1976-77. Briefly stated, the new pattern of education is that the education from 1st to 7th Standard would be treated as primary, from 8th to 10th Standard would be treated as secondary education and 11th and 12th Higher Secondary and three years of degree course to be conducted by the University. It is briefly known as 10+2+3. On the decision having been taken to introduce Higher Secondary Education, 11th Standard class as required by this pattern was introduced from June 1976 for the academic year 1976-77. As a corollary 12th Standard had to be introduced from the academic year 1977-78 effective from June 1977. The direct consequence of this introduction of the new pattern of the education is that Pre-University class would be abolished. Largest number of students used to be admitted to Pre-University class and on the abolition of Pre-University class in the colleges there was bound to be considerable fall in number of students attending colleges, consequently resulting in teachers in the Colleges becoming surplus. They had to be provided some alternative employment, but their employment with the College would come to an end, though they may be protected in some other manner; there was a feeling of insecurity in the academic world. Government of Gujarat by its Resolution dated 7th March 1977 provided that the College teachers who are rendered surplus as a result of reduction discontinuance of Pre-University classes should be provided with alternative employment in teaching posts in the higher secondary schools. It was further directed that the Government had also decided that the existing emoluments and pay-scales of such surplus college teachers should be protected on their absorption in higher secondary schools. In effect the Government undertook to protect not only pay-scales of surplus college teachers who would be provided alternative employment in higher secondary schools but by protecting pay also a sort of continuity of service was also protected. But the resultant situation had to be dealt with. There was bound to be surplus teachers in colleges because Ordinance 120A provides for requisite number of teachers who could be employed by the college. That of course is minimum. But any appointment above minimum would not be admissible for grant and below minimum the University would not permit because it is a condition of affiliation. Once Pre-University classes were required to be abolished, teachers were bound to be surplus. Colleges themselves made up their mind as to who should be surplus. An enquiry was made on 11th November 1976, by the Director of Education from the Principals of various colleges to inform him the number of Pre-University classes which were to be closed and the number of teachers likely to be rendered surplus from June 1977.

In the meantime, it appears that colleges started serving notices on teachers who according to their light would be surplus informing them that service will be terminated by the end of the next academic term. On 20th January 1977, the Director of Education addressed a communication to the Vice Chancellor of the Gujarat University that Government was contemplating a scheme for finding out alternative employment for the teachers who are likely to be rendered surplus and, therefore, requested the Vice Chancellor to write to the principals of the colleges not to issue termination notices and if any such notice was given, the Principals may be requested to withdraw the scale. Thereafter came the Government decision referred to above granting protection in pay-scales, yet the formula by which number of surplus teachers was to be worked out was not issued till 15th March 1977 and, therefore, again college managements started serving notices of termination to teachers, who according to their understanding, would be surplus. Government issued guidelines on 12th April 1977. By the guidelines. Government directed that the number of teachers to be declared surplus will be decided by the management of colleges on the basis of the regulations laid down by the concerned University in force on 7th March 1977, It further provided that where a trust or a registered society is running a number of colleges, the seniority of a teacher in these colleges should be determined from the date he joined any one of the colleges under the management of the trust or society, as the case may be irrespective of the fact that the teacher concerned was transferred to a college other than the one which he initially joined. It was also provided that where the trust or a registered society is running only one college, the seniority of a teacher should be determined from the date he joined the college where he was serving on the relevant date. Further limb of the guidelines was that in view of the fact that before introduction of the University Grants Commission (U.G.C. for short), salary scales (Fifth Five Year Plan) with effect from 1st January 1973, there were three categories of teaching posts in the affiliated colleges. They were: (i) Professors, (ii) Lecturers, and (iii) Tutors/ Demonstrators. It was provided in the guidelines that in declaring the teachers surplus, categories of professors and lecturers should be considered together and Professor should be considered senior to Lecturer. In the event two persons have same length of service, in the same category, it was provided that a teacher younger in age would be considered surplus. Management of colleges were directed to furnish list of surplus teachers both to the Director of Education and the concerned District Education Officer in the district; and if any teacher was aggrieved in this behalf, he can represent in writing to the Director of Education. It is this resolution of the Government which is impugned in this group of petitions on various grounds. To conclude the narration of facts, it must be stated that even with these guidelines before them, the petitioning college managements in this group of petitions stuck to their decision about who would be surplus and proceeded to give effect to the termination notices. In some cases, teachers who adversely affected approached the Director of Education as provided in paragraph (v) of the guidelines and Director of Education in each case examined the decision of the management whether it was consistent with

the guidelines or was not in conformity with it and if it was not found in conformity with it the decision was set aside. It is at this stage that the managements of various colleges filed present petitions.

3. Mr. S.M. Shah, learned advocate who appeared for the petitioner in Special Civil Application No. 1098 of 1977 led on behalf of the petitioners. He canvassed the following points for our consideration:

(1) Relationship between college management and the teachers of affiliated colleges is that of employer and employee and it is governed by the terms of contract of employment. Sub-limbs of the submission were;

(a) College Management is entitled to terminate service of teachers word-age in their colleges by giving a requisite notice as per terms of the contract of employment.

(b) Assuming that terms of contract of employment are not complied with and termination is found to be wrongful, the remedy of the teacher is by way of damages and not by specific performance of the contract of personal service. Reinstatement, therefore, cannot be ordered.

(2) Civil Courts alone have jurisdiction to adjudicate the dispute with regard to rightful or wrongful termination of service having regard to the provision contained in Section 9 of the Code of Civil Procedure. Jurisdiction of Civil Court can be taken away expressly or by necessary implication by legislative enactment. That being not done. Director of Education is not competent to adjudicate such dispute and direct reinstatement.

(3) In exercise of the executive power conferred by Article 162, the State cannot act in derogation of any statutory provision or in any manner detrimental to the rights of third parties or citizens. Even if there is such power, it cannot be exercised with restrospective operation so as to render valid termination of service invalid.

(4) Petitioners have fundamental rights of establish, maintain and administer education institutes of their choice under Article 19(1)(g) of the Constitution of India and in the field of education even Article 19(1)(a) would also be attracted. Restriction if any, on the exercise of the right can only be imposed by enacting law in conformity with Article 19(c).

(5) Impugned guidelines are in the nature of executive instructions and cannot be termed as law within the meaning of Article 19(6).

(6) Restrictions imposed by the impugned guidelines are unreasonable and arbitrary and are violative of fundamental rights guaranteed by Article 19(1)(g)

(7) Impugned guidelines are directory and not mandatory and non-observance thereof cannot vitiate the action taken by the-management.

(8) On merits, the orders issued by the Director of Education are bad in law and

not warranted by the fact and circumstances of each case.

4. Petition was resisted on behalf of the first respondent State of Gujarat. Mr. J.R. Nanavati, learned Assistant Government Pleader who appeared on behalf of the State Government urged that relationship between the affiliated colleges and its teachers is regulated by the Gujarat University Act, Ordinances or Resolutions made by the Executive Council under the said Act; and relationship is thus legal and not contractual. It was said that origin of employment of a teacher in affiliated college may be contractual but once appointment of a teacher is made by college, rights and obligations between them are not determined by contract but by the Act, ordinances or resolution made by the Executive Council (E.C. for short) under the Act. Proceeding from this angle, it was further urged that the affiliated college has no right to terminate services of a teacher except in accordance with the provisions contained in Section 51 A and Section 52 A of the Act, or Ordinances made under the said Act. If the affiliated college terminates service of a teacher contrary to the said provision, such termination would be ultra vires and of no effect, and Court can grant a relief that termination is nullity and the teacher continues in service. It was said that resolution of the Government dated 28th October 1975 laying down new educational structure having higher secondary education pattern and this resolution is purely administrative in character issued by the Government in exercise of the powers conferred by Article 162 of the Constitution and being not challenged must be taken to be valid one can be said to have been accepted by the college management. It was urged that resolutions dated 7th March 1977 and 12th April 1977 (guidelines) form integral part of the scheme of the new pattern of education contained in the resolution dated 12th April 1975 and these resolutions are issued in exercise of the executive powers of the State under Article 163 of the Constitution. It was urged that resolution dated 13th April 1977 does not prejudicially affect the rights of the petitioners and resolution is intended to protect the surplus teachers by providing them alternative jobs in higher secondary school. Protection of surplus teachers is in the interest of all concerned and cannot be regarded as prejudicial to the rights of the petitioners. It was urged that resolution dated 12th April 1977 is adopted by the E.C. by its resolution dated 4th June 1977 and as the said resolution was circulated to all the affiliated colleges the resolution of the E.C. dated 4th June, 1977 can be regarded as instructions in the matter of conditions of service of the teachers of the affiliated colleges by the E.C. made in exercise of the powers conferred upon it by Clause (xx) of Section 20 of the Gujarat University Act (hereinafter referred to as the Act) and the affiliated colleges were bound to comply with the same having regard to the provisions contained in Clause (5) of Section 33 of the Act. It was further said that E.C. has discretion to name Ordinances u/s 30 of the Act or to issue instructions under Clause (xx) of Section 20 regarding conditions of service and it is not obligatory on the part of the E.C to make every such provision by ordinances only. Repelling the contention that petitioners have fundamental rights to carry on business under Article 19(1)(g) it was said that

setting up of Education Institution by trust or registered society cannot be regarded as business of the trust or the society. Alternatively, it was said that conceding that such is the fundamental right, resolution dated 12th April 1977 is issued for the protection of teachers and it is in public interest and, therefore, even if it has restricted fundamental rights it is a reasonable restriction which would be saved by Clause (6) of Article 19 of the Constitution it was also said that the impugned resolution is issued by the State Government on the recommendations of the association of managements. Consequent upon introduction of the new pattern of education, 2750 teachers were declared surplus and the State Government provides alternative employment and absorbed almost all surplus teachers in higher secondary schools, except 12 teachers involved in this group of petitions and others have accepted the alternative employment offered to them without any demur and there remained other 13 teachers who would be provided alternative employment and therefore by and large guidelines have fulfilled the expectations made in it and Court should not at this stage disturb such a satisfactory properly worked solution. It was also said that all the managements except the petitioning managements have accepted the guidelines and followed it and have not made any grievance about its validity or implementation and that itself is enough to show its resultant reasonableness as having been issued in public interest.

5. M/s. H.M. Mehta, N.J. Mehta and Girish Patel who appeared for some of the respondent teachers have clarified various facets and ramifications of the submission which we have broadly set out herein.

6. We will deal with the submissions ad seriatum. Now, before we start discussing the first submission which probably consumed lion share of time, it would be advantageous to have a clear, and comprehensive view of the provisions of the Act. Gujarat University Act was enacted and put on the statute book with a view to establishing and incorporating a teaching and affiliating University in the State of Bombay to be known as Gujarat University as a measure of decentralisation and reorganisation of University education in the State of Bombay. Section 2 defines various expressions used in the Act. Of importance for us are definitions of "affiliated college contained in Section 2(1) to mean a college affiliated under Sections 5 or 33, (2A) (IB) Autonomous College to mean a College which exercises the powers conferred on it u/s 38B. "Constituent College" means a University college or an affiliated college made constituent u/s 41, University is meant to be an incorporate body, having perpetual succession and a common seal and is entitled to sue and liable to be sued in its own name. It is competent to acquire and hold and dispose of property. Section 4 enumerates powers of the University. Amongst others they include power to make such provisions as would enable the affiliated colleges, recognised institutions and approved institutions to undertake specialisation of studies. It has power to appoint or recognise persons as professors, readers or lecturers, or otherwise as teachers of the University. It has power to lay down the courses of instruction for the various examinations, and also the power to

hold examinations or tests and confer degrees, and diplomas and grant certificates to persons who qualify for the same. It has power to associate or admit educational institutions with or to the privileges of the University by way of affiliation, recognition or approval. It has equally the power to withdraw or modify either in whole or in part, affiliation, recognition or approval of educational institutions. It has power to submit to the State Government proposals for conferment of autonomy on any affiliated college or a University college, and also a power to recommend to the State Government withdrawal of autonomy conferred on any affiliated college, recognised institution. Sub-section (21) confers power to lay down and regulate the salary scale, allowances and other conditions of service of the members of the teaching, other academic and nonteaching staff of the University. Sub-section (32) confers power in respect of teaching and non-teaching staff in the affiliated colleges. University has powers to regulate fees to be paid by the students in affiliated colleges. Sub-section (45) is a sort of a residuary clause which confers powers of the University to do all such other acts and things, whether incidental to the powers aforesaid or not, as may be requisite in order to further the objects of the University and generally to cultivate and promote Arts, Science and other branches of learning and culture. Section 5(1) prohibits any educational institution situate in the University area, from being associated in any way with, or seek admission to an privileges of, any other University established by law; and if there is any such privilege given to the educational institution from the University other than the Gujarat University such privileges stand withdrawn from Jibe specified date. Sub-section (3) of Section 5 is important. It provides that all educational institutions admitted in the privileges of the University of Bombay and situate within the University area shall be deemed to be admitted to the privileges of the University namely Gujarat University and the University shall, as far as may be possible, consistent with the Act, admit such institutions to all such privileges as they had from the University of Bombay immediately before such date. Section 5 in Chapter III sets out the officers of the University Section 15 in Chapter IV sets out various authorities of the University, and amongst others they include, Executive Council. Section 16 provides for composition of University Court and of importance to note in Clause (vii) of clause II-A. It provides representation to the governing bodies of colleges affiliated to the University in the manner specified in the statutes by granting them three seats on the University Court, election to be made" in the manner provided in the Statutes. Clause (viii) in clause II-A refers to representation granted to the teachers of affiliated colleges (excluding Dean of Faculties and Principals of Colleges). Both these categories have separate representation. It may be noted in passing that even the students and non-teaching stall of the University have also been provided representation on the Court. Section 19 provides for composition of the E.C. of the University. Court is a longer body and E.C. is a smaller body charged with a duty to carry on day to day administration of the University. E.C. will amongst others consist of the Vice Chancellor as Ex-offices Chairman the Provice Chancellor, if any, and the Director of Education. Clause (xii) of Sub-section (i) of Section 19 grants representation to the

governing bodies of affiliated colleges to enable them to elect one of its members sitting on the Court as members of the E.C. Section 20 prescribes powers and duties of the E.C. Some of them are important for our discussion and they may be referred to specifically. Clause (xx) confers power on the E.C. to arrange for, and to direct inspection of affiliated colleges recognised and approved institutions and hostels and to issue instructions for maintaining their efficiency and for ensuring proper conditions of employment, including salary scales and allowances for the members of their teaching, other academic and non-teaching staff. Clause (xxxix) confers power on the E.C. to lay down and regulate salary scale, allowances and conditions of service of the members of the teaching, other academic non-teaching staff of affiliated colleges and recognised or approved institutions. Clauses (xiii) and (xlili) are important for the present discussion. They read as under:

(xiii)...to exercise such other powers and perform such other duties as may be conferred or imposed on it by or under this Act, Statutes, Ordinances and Regulations.

(xlili).. to exercise all powers of the University not otherwise provided for in this Act or the Statutes and all other powers which are requisite to give effect to the provisions of this Act or the Statutes.

Sub-section (3) of Section 19 provides that the powers and duties under Clauses (xix) to (xxi) (xxvi) to (xxx), (xxxiii) to (xvii) and (xi) of Sub-section (1) shall not be exercised by the B.C. except upon the recommendations made by the Academic Council. This has some relevance because it was pointed out that Academic Council had not made any recommendations to the E.C for adoption of the guidelines dated 12th April 1977, and therefore, even if they have been adopted by a resolution of the E.C. on 4th June 1977, the same could not be styled as instructions issued in exercise of power of Clause (xx). We examine this submission a little while after. Section 21 provides for composition of Academic Council and Section 22 sets out the powers and duties of the Academic Council and Section 31 provides that Ordinances shall be made by the B.C. All the Ordinance made by the E.C. shall, except as provided by the Act have effect from such date as it may direct, but every Ordinance so made shall be laid before the Court and shall be considered by the Senate (sic) at its next succeeding meeting. The Court under Sub-section (4) has power by are solution to cancel or to refer back but not to amend any such Ordinances, chapter VI contains provisions for affiliation, recognition and approval. Section 33 prescribes the modality for seeking affiliation of college to the University. Sub-section (2) of Section 33 requires the E.C. to determine before recommending affiliation whether the proposed college will supply a need in the locality, having regard to the type of education intended to be provided by the college, the existing provision for the same type of education made by other colleges in the neighbourhood and suitability of the locality where the college is to be established. Therefore, need of a college has to be determined by-the E.C. meaning thereby that if the

applicant, even if he satisfies all conditions for getting affiliation may yet be told that proposed college cannot be affiliated to the university as the E.C. is satisfied that there was no need of a college in the locality in which it proposes to be established. This is a salutary check on the unhealthy competition amongst the persons who would like to run a college as part of business as was stated before us while making out a very determined bid about the alleged violation of fundamental right as enshrined in Article 19(1)(g) of the Constitution. It is the satisfaction of the E.C. that the proposed college will supply a felt need of the locality and this is a pre-requisite while deciding the application for granting affiliation. In other words, if it is felt that the college would not satisfy the need of the locality or there is such congestion of institutions in that locality that setting up of one more college in the neighbourhood would only promote or provoke an unhealthy competition, the University can put its foot down and reject the application for affiliation. This has to be kept in view while claiming unfettered right as was canvassed before us contending that the action of the State Government in issuing guidelines has impugned upon the fundamental rights of the petitioners. Section 33(5)(a) provides as a prerequisite that the proposed college (other than a Government college or a College maintained by the Government) shall within such period, as may be determined by the E.C. be under the management of a governing body which shall include amongst its members, the Principal of the College, a representative of the University to be nominated, by the Vice Chancellor and three representatives of the teachers of the college and at least one representative each of the members of the non-teaching staff and the students of the college, to be elected respectively from amongst such teachers, members of the non-teaching staff and students. There are other conditions which may be overlooked for the time being Section 33-A contains a mandatory provision. It requires every affiliated college to be under the management of governing body which shall include persons and representatives hereinbefore set out. It further directs that for recruitment of the Principal and members of the teaching staff of a college, there shall be a selection committee of the college, which again amongst others should include in the case of recruitment of the members of the teaching staff of the college a representative of the University nominated by the Vice Chancellor and the Head of the Department if any, concerned with the subject to be taught by such member. Sub-section (2) casts an obligatory duty on the college management to constitute or reconstitute governing body and selection committee as required by Section 33-A(1)(a) and (b). Sub-section (3) in terms provides that the provisions of Sub-section (1) shall be deemed to be a condition of application of every college referred to in Sub-section (1). The salutary affect of this provisions is that if there is failure to comply with Sub-section (1) namely to constitute or reconstitute governing body as therein directed, it will be a breach of the condition of affiliation which will enable the University to withdraw application which in turn would lead the college management to close down the college because of the result of the Act. We must point out that there cannot be an educational institution in the University area which can have independent

existence without it being affiliated to the University. If it undertakes to coach students and impart instructions for degrees to be conferred by the Gujarat University. Section 34 provides that where a college desires to add to the courses of instructions in respect of which it is affiliated, the procedure prescribed by Section 33 shall so or as may be followed, that is it has to go through the gamut as if it is seeking fresh-i affiliation. Section 36 casts an obligation in the affiliated college to furnish returns, reports and other information as E.C. after consulting the Academic Council may require to enable it to judge of the efficiency of the college or the institution. Section 37 confers power of withdrawal of affiliation. Section 38 in newly added Chapter VI-A confers power on the University to grant autonomy to certain colleges under certain circumstances therein set out. Section 41 provides that all colleges within the University area which are admitted to the privileges of the University under Sub-section (3) of Section 5 and all colleges within the said area which may hereafter be affiliated to the University shall be the constituent colleges of the University, if a resolution to that effect is adopted by the University Court, as provided by Section 40. Sections 51-A, 52-A and 53-A were introduced by Amending Act 6 of 1973. They provide for protection of the University teachers and the teachers of the affiliated colleges both against punitive termination or termination simpliciter. In the case of punitive terminative, it is obligatory to give reasonable opportunity of making a representation in respect of the proposed penalty and approval of the Vice Chancellor. In the case of termination simpliciter it is obligatory for the College Management to serve a notice and to obtain approval of the Vice Chancellor. Section 52-A provides for references of the dispute between the affiliated college and its staff member, to the Tribunal for arbitration consisting of one member to be nominated by the Governing body of the college, one to be nominated by the member concerned and umpire to be appointed by the Vice Chancellor. Section 53-A makes it obligatory upon the governing body of the affiliated college to make adequate provision for the benefit of the members of the teaching other, academic and non-teaching staff in the matter of insurance, pension and provident fund or for other benefits. It is in the background of this legislative scheme that we are required to examine the position and status of affiliated college.

7. We must remain fully aware of the very important fact that in this case we are concerned with not an employment in an industrial establishment, but in an institute of higher education. We are required, to examine the status, position and security of members of the-academic world, namely, highly qualified Professors, teachers and even demonstrators. And question is posed in the context of their status and position qua their employer. Submission on one hand is that relationship between college management and teacher employed by it is purely of master and servant, unadulterated and unallowed and that, therefore, at common law, master has unfettered unabridged and unbridled power of termination at its sweet will. On the other end of the-spectrum, the contention is that affiliated college is either a statutory body, Or one of the other authorities as

contemplated by Article 12 of the Constitution or a public body, and employment of a teacher in the college partakes the character of employment in a public utility service and therefore, even if it has its origin in contract, it ultimately confers upon the teachers status and therefore, a degree of irremovability except in accordance with statutory mandate and with the concurrence of some authority other than the employer namely the college management. These submissions vigorously canvassed on either side necessitates determination of position of affiliated college. Is it statutory body 7 Is it one of the other authorities contemplated by Article 12? Is it a public body suggesting employment in it as if in a public utility service, or is it purely in the realm of contract, between a master and a servant? Before we refer to the various decisions to which our attention was drawn we would-briefly point out some of the provisions of the Act which would clearly throw light on the position of an affiliated college.

8. The scheme of the Act as delineated by us clearly envisages that a college imparting instructions in higher education, so as to qualify students for appearing at examinations to be held by the University cannot operate in university area, unless it is affiliated to the Gujarat-University. The affiliation confers statutory privilege, privilege being to instruct the students which would enable them to appear at the degree examinations conducted by the university to qualify for the conferment of degrees. No one can say that it would set up a college that it would provide its own degree and that the students would qualify for the same. Students would join the college in the university area with a view to enabling them to appear at the examination to be conducted by the Gujarat University so as to qualify for the degrees, diplomas and other certificates conferred by the University. Obviously, therefore, affiliation of the university is a privilege. Now, it was very vigorously said that after all management of a college vests in a private body. These colleges are set up by some trust or society registered under the Societies Registration Act. Trustees managing the college or the body set up by the society can manage the college. It was said that this is a management by a group of private individuals deriving no authority nor management from any statute, law or regulation but by their own right which they acquire under the trust or under rules and by-laws of the society which sets up the college. If this submission could be made good, much can be said in favour of the contentions canvassed for by Mr. B.R. Shah. However, the submission is wholly devoid of merits. One has merely to have a glance at Section 33-A, which provides for setting up of governing body. It is obligatory both for the existing colleges when Section 33-A was introduced in the Act and for new colleges coming up after introduction and claim to have a governing body. Section 33-A provides that governing body shall consist of members including the Principal, a representative of the University nominated by the Vice Chancellor, three representatives of the teachers of the College and at least one representative each of the members of non-teaching staff, and the students of the College to be elected respectively from the members of the non-teaching staff and students. When the matter was

discussed, Mr. Shah very emphatically said that there is no worry if managements have power of nomination of unlimited members sitting on the governing body because the management would be in majority against the microscopic minority. He is right. The question really is what is the character of the governing body upon its constitution u/s 33-A. If for the time being the management has right of nominating "unlimited number of members with the sole object of keeping those who are really vitally interested in the maintenance of the image of the institution in microscopic minority we do not see a day far away when this can be easily curbed and controlled in the larger interest of academic freedom. Assuming that while constituting governing body with large number of nominees of the management yet it is incontrovertible that there would be persons with whom management would not like to participate in the management namely various representatives hereinabove discredited. We are not unaware of the fact that even the Principal a top man and highly qualified person namely teacher representatives would be on the governing body sitting in management with those management representatives who may not have any academic qualification. Those representative become members of governing body under a statutory provision. It was however countered by saying that management have no objection to some representatives of their own teachers or representatives of their own students or representatives of their own non-teaching staff to be with them on the governing body because they were described as insiders. In other words, they belong to the institute and can be said to be members of the family. If they are members of the family, why this hue and cry against the protection offered to them by statute. It must not however be overlooked that nominee of the Vice Chancellor who ought to be there on the governing body, can ever qualify for the distinction of being member of the family or an insider? Law imposes a duty that in every governing body to be constituted u/s 33-A there shall be nominated representative of the University by the Vice Chancellor and he is not an insider. He would be a rank outsider. Qualifications for these nominees are not prescribed. He can be an academician, he can be some one other than an academician, though we would assume that Vice Chancellor would certainly want academician to sit on the governing body of an affiliated college. But the matter does not rest at that. The claim is that there is power of hiring teachers subject, of course, to the qualification prescribed by the University in various statutes, but the choice is the choice of the management. Even this is untrue factually. It is now obligatory on every governing body also to set up a selection committee for the staff and that selection committee ought to have upon it a nominee of the Vice Chancellor. Therefore, power to hire, apart from the fact that it is hedged in by the requirement of qualification prescribed in Ordinances, is further controlled by the requirement that an outsider namely the Vice Chancellor's nominee shall have effective voice in the selection of the staff. Power of hiring is sufficiently controlled by this provision.

9. Question then is if this is going to be the prescribed character of the governing

body, which ought to be set up u/s 33-A and setting up of governing body is prescribed to be a condition of affiliation in Sub-section (3), meaning thereby, that its breach may result in withdrawal of privilege of affiliation, could such a private managerial body, formed by the managerial group as of its own? The answer is a firm "no". But it was said with some emphasis that such a statutory inclusion of certain insiders in the governing body would not change the character of the governing body. In *Vaish Degree College v. Laxmi Narain* AIR 1976 S.C. 888, the Court was concerned with the status and character of the executive committee of the college and position was examined in the context of Statute 14-A of the Agra University Hand Book. The statute provided for representation of the staff of the college on the executive committee by Principal and one representative of the teachers of the college to be appointed by rotation in order of seniority, who shall hold office for one academic year. The submission was that the executive committee should be styled as a statutory body. Negating this contention, it was observed that co-opting of Principal and representatives of the teachers would not have the effect of the executive committee losing its independent status, but it would continue to remain a non-statutory and autonomous body. In reaching this conclusion, the important aspect that was taken into consideration was that the relevant Statute was adopted by the managing committee which would mean that it became operative on its adoption by the managing committee and not by any other statutory provision *proprio vigore*. While reaching this conclusion reliance was also placed upon the decision in *Sabhajit Tewary Vs. Union of India (UOI) and Others*, in which status and position of Council, of Scientific and Industrial Research had come in for examination in the context of the submission that it is a statutory body. The Court negated the suggestion observing that merely because the Prime Minister is the president of the society, or that the Government appoints nominee on the governing body or that the Government terminates the membership will not establish anything more than the fact that Government takes special care for the purpose for which the body was set up. It is crystal clear that Council of Scientific and Industrial Research was not set up under any statute nor its continued existence was traceable to any statute. It appears to have been set up by some executive or administrative instruction and by the funds set apart by the Government. Therefore, one can easily say that such a body could not be said to be statutory, to *Vaish Degree College's* case, the distinguishing feature is that the University statute which was relied upon to show that executive committee was a statutory body became applicable by its adoption by the managing committee and nothing was pointed out to show that it was obligatory upon the managing committee to adopt such a statute. But assuming that this statute would apply on its own force, irrespective of the fact whether the managing committee adopts it or not, the fact remains that the managing committee included the principal and representatives of the teachers who both can safely be styled as insiders and there was no outsider, u/s 33-A of the Act, it is obligatory to appoint a representative of the Vice Chancellor both on the governing body as well as on the staff selection committee. In fact by

operation of Section 33-A the old management gets completely displaced and different agency is required to be set up under the relevant legal provision and it takes over management of the college. Merely because some member representing the management continue to be nominated on the governing body, does not mean that old governing body continues after inclusion of those who are required to be included u/s 33-A. Obligation is cast upon the management to set up a governing body as enjoined by Section 33-A. When such body is "set up it is a body set up under the statute as required by the statutory provision for the purpose of carrying out provisions of the statute, vis-a-vis the college. Miss V.P. Shah, in one of her submissions in this connection, urged that when college applies for affiliation, initially some body will have to make an application and that constitutes the governing body, and on the affiliation being granted, these who are required to be included u/s 33-A would be included but the governing body would be same with necessary inclusion and, therefore, case would squarely fall within the ratio of Vaish Degree College's case (supra). It is not possible to accept this submission. u/s 33 College may make an application for affiliation. As a condition for affiliation, it must set up a governing body as directed in Section 33-A in view of the provision contained in Section 33 (5)(&). Is not therefore, correct to say that there was a sponsor for affiliation and on affiliation it reconstituted governing body by including members as required by Section 33-A. In fact for affiliation such a governing body as required by Section 33-A must be first constituted for new college and for existing college it must as a mandate of law be reconstituted. If inclusion of some person is required by Section 33-A it is entirely a new body which displaces the old management and old governing body or the old managerial class and replacement is by a committee which must be composed of those whom the statute requires to be nominated upon. The conclusion that a governing body to be set up under fee. 33-A displaces the old management is no more res Integra because while examining the scheme of Section 33-A itself in the context of the fundamental right guaranteed by Article 30(1) the constitution bench of 9 Judges of the Supreme Court in The Ahmedabad St. Xavier's College Society and Another Vs. State of Gujarat and Another, , in terms held that the provisions contained in Section 33-A(1) (a) have the effect of displacing the management and entrusting it to a different agency and the autonomy in administration is lost, there being no indication and guidance in the Act to what types of persons should be nominated as representatives of the Vice Chancellor. This conclusion was reached in the context of the submission that Article 30(1) confers fundamental right on religious and linguistic minority to establish and administer educational institutions and it was held to have been violated by the provision contained in Section 33-A(i)(a) and in reaching this conclusion, it was said that the management agency has been wholly displaced. If that be so, could it ever be said in the context of the present discussion that same governing body continues, merely in a slight altered form and inclusion to some insiders? Therefore, it is unquestionably established that the governing body which would have to be set up u/s 33-A(i) (a) would be some thing other than the old

governing body and it is an agency or a body in whom the entire management to the college would vest and that it would owe its existence to statutory provision. This conclusion in our opinion is inescapable.

10. Briefly referring to some other provisions, bearing on the Subject, it may be mentioned that E.C. by Ordinances can prescribe requirement of building in which the college is to be housed. It can prescribe requisite qualifications of teaching staff. u/s 28(ix) pay of non-teaching staff will be governed by the conditions of service which may be prescribed by the University. University has power to prescribe pay scales for the teaching and other academic and non-teaching staff. University has power u/s 53-A to direct the management to provide for pension, insurance, provident fund, gratuity and other retrial benefits. Power to recognise the teacher for post-graduate instructions is in the University. It would be for the University to prescribe work-load of teachers. The Act does prescribe mode, method of termination of service both punitive and simple. If retrenchment of teaching staff has to be undertaken, it has to be according to the Ordinances. One need not recapitulate that course of instruction and syllabii will have to be prescribed by the University and should be implemented by the college. College can be inspected. Code of conduct for University teachers can be prescribed. It is obligatory upon the college teachers to undertake work of examination. While pointing out this aspects, Mr. H.M. Mehta, learned Advocate urged that if these teachers were to be the employees of the college management, how is it possible for the University to compel them to take up examination work without remuneration and that is a fact since the time when the Government compelled the colleges through the University to enforce UGC 5th F.Y.P. scales. If the teacher was an employee simpliciter of the college management, he is none-the-less at the command of the University. University prescribed statutes laying down standard for admission of students and regulation of fees, disciplinary action against the students, and last but not the least, power to withdraw affiliation may be taken note of. When we went through this exhaustive list, we were throughout wondering which part of the autonomy is now being enjoyed by these managements. They have no power to hire because there is selection committee consisting of a rank outsider, namely Vice Chancellor's nominee. Minimum qualifications are prescribed by the University. Any charge of nepotism favouritism or personal relationship has to be done away with and therefore. Vice Chancellor's nominee sits on the staff selection committee as a matter of right. Generic term conditions of service would include employment that is initial induction into service pay-scales, allowances, workload other benefits, retirement benefits security of tenure, protection against mala fide action and final retrial benefits. In any of these fields the college management has absolutely no say. Every thing is prescribed either by the Act or by Ordinances or by relevant Statutes. Management has no say on number of students to be admitted, qualification for admission, disciplinary action against students, their representation on the governing body, their representation on the B.C. and their representation on the Court. All this is prescribed by the Statutes.

We posed Mr. Shah one very pertinent question: for which part of managerial function which management undertakes while managing the affairs of a college it enjoys any freedom or autonomy? And frankly speaking we waited for the answer in vain. We find none.

11. Now, reverting to the question under discussion, we must pose to ourselves a question that an institution called a college, being managed by a body set up under the statute and entitled to exist because of privilege conferred by statutory affiliation and can be almost compelled to close down, if privilege is withdrawn according to the statute, namely, the Act, could it ever be said to be a private institution, or a private body, or a body which is a master, who employs his servants? And at this stage, who are those servants? Our attention was drawn to the relevant literature on the subject and if we were to reproduce it, it would add to the length of this judgment. However, we must say the academic freedom in its primary sense, is the freedom claimed by a college or university professor to write or speak the truth as he sees it, without fear of dismissal by his academic superiors or by authorities outside his college or university, (vide International Encyclopaedia of Social Sciences p.4). Bertrand Russell in "Why I am not a Christian" has observed that the essence of academic freedom is that teachers should be chosen for their expertness in the subject they are to teach, and that the judges of (his expertness should be other experts. Whether a man is a good mathematician, or physicist or chemist, can only be judged by other mathematicians, or physicists, or chemists. By them, however, it can be judged with a fair degree of unanimity. Nowhere the celebrated author refers to management deciding expertise of the teacher. It would be an exercise in futility and one should attach no importance to it even if it is undertaken. The Gujarat University Act has provided for the inspection of colleges, which would include inspection of college teaching staff and it is to be periodically undertaken by a small committee to be set up by the E.G. of the University, that would be composed of representatives of academicians of repute. It is in the background of this academic system which we are striving to set up in this country where slowly and gradually educational institutions are being brought by process of development of law from the grip of purely private managerial class to management by statutory bodies of which there shall be those who constitute the soul of the institution. After all in a college what are those vital constituents one must not overlook. They are teachers and students. We are prepared to visualise a situation where there is no managerial class and nothing is going to happen even if they are eliminated. Well it would be impossible even to conceive that there is a college without students or teachers. And they can be trusted to carry out their obligations which they would be expected to discharge in public interest. The Act by the recent amendment took next forward step of compelling management to enlist Principal, representatives of teachers, representatives of students, representatives of non-teaching staff and overall the Vice Chancellor to participate in the management. The fountain head of the university either himself sits on the governing body or he nominee can represent him on the governing

body. It is the status of this body that we are called upon to examine and we have very little doubt in reaching our conclusion on this point.

12. It was however, said that in Vaish Degree College, ratio of which has been followed in Arya Vidya Sabha, Kashi and Another Vs. Krishna Kumar Srivastava and Another, , the executive committee was not held to be statutory body. We have minutely examined the provisions of the Agra University Act and compared them with the various provisions of the Gujarat University Act and we are satisfied that the situation is materially different. And this has been judicially noticed in St. Xavier's case (supra), which has been further noted in The Gandhi Faiz-E-Am College, Shahjahanpur Vs. University of Agra and Another, , where Krishna Iyer J. speaking for the majority has observed that the menacle regulations of the Gujarat University Act are telltale, its metamorphic impact is best summed up in the terse words of Ray C.J. The minority character of the college is lost. Minority institutions became part and parcel of the University. Why? Because the provisions contained in Section 33A(1) (a) of the Act recite that every college shall be under the management of a governing body which shall include amongst its members, a representative of the University nominated by the Vice Chancellor and representatives of teachers, non-teaching staff and students of the college. We may point out here that in Arya Vidya Sabha case Krishna Iyer J. himself was of the opinion that the executive committee of the college affiliated to Agra University was not a statutory body and even with that view in mind, while examining the Act, Ordinances, Statutes, and Regulations under the Gujarat University Act it was found that because of Section 33-A the minority character of the college is lost because minority institution by such provisions loses its identity and becomes part and parcel of the University; What meaning should be attached" to the expression "part and parcel of the University". It only means it is a limb of the University or an integral part of the University. No one through this long discussion ever doubted that University is a statutory Corporation. Even if we were to keep dicta of Ray C.J. in Sirsi Municipality by its President Sirsi Vs. Cecilia Kom Francis Tellis, the statute and is of necessity a Statutory body and after Krishna Iyer J. speaking for the majority held that the menacle regulations of the Gujarat University Act are telltale, and made the college a part and parcel of the University; one can confidently reach the calculation that both in view of the statutory provision, Ordinances and Statutes, conditions of affiliation and various relevant consideration, the affiliated college is as statutory in character as the University itself.

13. Add to this provision those contained in Sections 40 and 41. We are referring to them because an argument was submitted to us that University cannot close down the college. University has power both to take over college or close down the college. If we refer to the scheme of Sections 40 and 41 on a resolution by Court, affiliated college can be converted into a constituent college. Governing body has no say in this matter. Management has no place in this discussion the Court can pass a resolution and on such a resolution being made, consequence is that affiliated college becomes constituent college and no body can deny that

constituent college is part and parcel of the University itself. On the other hand, if affiliation is withdrawn, the college loses its character, namely, a right to coach instructions to their students for being eligible for appearing at the examination to be held by the University. Therefore, viewed from either angle on the constitution of the governing body and on affiliation, college becomes a statutory body. But even if college does not become statutory body, governing body does become statutory body and governing body is management. Since introduction of Section 33-A no one can recognise any management of any college outside governing body it is the governing body which represents the college and this governing body is a statutory body. If the governing body is statutory in character, the college set up by it is none-the-less statutory in character. Therefore, indisputably governing body is statutory in character.

14. It is at this stage that we should first examine the impact of our conclusion that governing body is statutory in character and the governing body is the management and hence an employer. Teachers of the college are employees. What is the nature of employment of the teachers? It was said that it is contractual in character. Indisputably it would be so because at the inception it should be contractual in character. The governing body through its staff selection committee would select and employ teachers subject to relevant Ordinances. Between two equals there is still a power of choosing. But once employed under a contract, it would be employment in a statutory. It would start with contract and it would end in status. It would be some thing analogous to employment under the government or public authority or the local authority. Examining the position of government servants, it was said that it is contractual in character. It may start in contract but legal relationship is something entirely different, something in the nature of status. It is much more than a purely contractual relationship voluntarily entered into between the parties. The duties of status are fixed by the law and in the enforcement of these duties society has an interest. In the language of jurisprudence status is a condition of membership of a group of which powers and duties are exclusively determined by law and not by agreement between the parties concerned, vide *Roshan Lal Tandon Vs. Union of India (UOI)*, . Apply this test and result follows as an inevitable corollary. Once a teacher is selected by the management and management, again to be clear, with the nominee of the Vice Chancellor, conditions of service which will include all conditions of service from beginning to and all other relevant consideration, such as work-load, his position qua University, all this would show that every thing is governed by law. Here by law we mean Gujarat University Act and Ordinances framed thereunder. Now when status is implied, it carries with it a degree of irremovability. That in law, would mean master cannot tell the servant that he should go that his services are no more required, that his service can has teriftioued it will. Section 51-A and Section 52-A when read togeth of clearly takes, away power even from the governing body to terminateservice at its will. Even the statutory body is further controlled by the approval of its intended action by the Vice Chancellor. Even though on the governing body there is

nominee of the Vice Chancellor and government body pay initiate action for termination of service, yet, when intended action is proposed to be taken, again there shall be an approval of the Vice Chancellor. The Vice Chancellor is outside the governing body for the purpose of Section 51-A and power to terminate service is controlled not by the procedural requirement which incorporates the rules of natural justice, namely right of being heard when punitive action is intended to be taken but even in case of termination *impliciter*, Governing body, cannot terminate service unless proposed termination is approved by the Vice Chancellor. Now, if the body which claims to be employer which inhere a right to terminate service cannot terminate service and power of terminating service is controlled and curtailed by the statutory provision, to which it owed continued existence, namely, the character of affiliated college, it would unmistakably show that employment of the teacher even if it emanates in contract, it results in status and status is status of irremovability because the removability is subject to approval by the outside authority. Frankly that outside authority is Vice Chancellor who is one of the authorities of the University. This conclusion is reinforced by a decision of the Supreme Court in *Kumari Regina Vs. St. Aloysius Higher Elementary School and Another*, . The appellants in that case was working as Head Mistress in the respondent school. She was served with a chargesheet and after her reply, an order was made reducing her to the post Of Assistant Teacher. Her appeal to the District Education Officer failed. She then filed a suit praying for restoration of her status as Head Mistress. The trial Court decreed the suit, but in the First Appeal, District Judge took a different view. She carried the matter in Second Appeal to the High Court. High Court was of the opinion that granting relief to her would be specific enforcement of the contract of personal service which High Court would not do and accordingly, her appeal was dismissed. That is how she brought the matter before the Supreme Court. This school was governed by the Madras Elementary Education Act and Grant-in-Aid Code. Submission before the Supreme Court was that relations between school and teacher would be governed by contract of employment and therefore, even if a breach is committed, it would not be specifically enforced. While examining this contention, observation has been made which is pertinent. It reads as under:

Ordinarily the relations between the management of an elementary school and the teachers employed in it would be governed by the terms of the contract of employment and the law of master and servant in the absence of any statute controlling or abrogating such a contract of employment and providing to the contrary. The mere fact that such a school has obtained recognition and aid from the education department would not mean that the relationship between its management and its employees has ceased to be governed by the contract of employment under which the employees are recruited and by the law of master and servant unless there is some provision in the Act overriding that law as one finds In statutes dealing with industrial disputes and similar other matters.

The ratio would be that if there is any statute which abrogates law of master and servant namely right to select and right to fire, then certainly relationship could

not remain in the realm of contract but would be governed by the statute. We have already pointed out that both as to appointment and as to termination, provisions of the Gujarat University Act, clearly apply to governing body and therefore, if there was any master servant relationship pure and simple, it stands abrogated by the provisions hereinbefore discussed. Therefore, teacher of an affiliated college qua the management is not governed purely by one of master and servant relationship but the teacher holds the status.

15. There were two other limbs of this submission which may be now examined in passing. Mr. J.R. Nanavati, learned Assistant Government Pleader contended that governing body is one of the other authorities as envisaged by Article 12 of the Constitution. He drew our attention to entry 25 in the Concurrent List in 7th Schedule which reads:

Education, including technical education, medical education and universities, subject to the provisions of entries 63, 64, 65 and 66 of List 1, vocational and technical training of labour.

We need not refer in detail to entries 63, 64, 65 and 66 of the Union List because they broadly refer to Benaras University, Aligarh University and institutions for scientific or technical education financed by Government of India, union agencies and institutions for professional, vocational or technical training, including the training of police officers and co-ordination and determination of standards of institutions for higher education or research and scientific and technical institutions. After referring to these entries it was submitted that responsibility for providing centres of higher education rests on the State Government. It is the duty of the State Government to set up a University. It is the duty of the State Government to set up centres of higher education. If the trusts and other societies do not come forward to set up colleges, the State Government will have to set up colleges. If the colleges were to be set up by Government, they would obviously be other authorities as envisaged in Article 12. He further drew our attention to the detailed observation in the judgment of Mathew J. in *Sukhdev Singh, Oil and Natural Gas Commission, Life Insurance Corporation, Industrial Finance Corporation Employees Associations Vs. Bhagat Ram, Association of Clause II. Officers, Shyam Lal, Industrial Finance Corporation, and onwards*. What constitutes "State" in its various ramifications has been examined in details. The test formulated in paragraph III, was whether such a corporation is an agency or instrumentality of the government for carrying on a business for the benefit of the public. In other words, the question is, for whose benefit was the corporation carrying on the business? Having minutely gone through various tests, prescribed, it is difficult for us to hold that governing body of the college would be other authority as envisaged by Article 12. Once college is set up, its affairs are controlled and regulated by statute. Under the statute. University is setup. University itself is a statutory body. Therefore, it is not possible to say that college, which is affiliated to the university would be other authority as envisaged by Article 12. At any rate, even though it is operating in the field of

education, providing centre for higher education, which State could have done and conceding that State gives grant to it, yet it is difficult for us to say that college is agency or instrumentality of the Government for carrying on certain functions and activities which State was bound to carry on. If the trust or society had not come forward to set up a college, it is possible that Government of welfare State may have set up colleges. In fact there are still old Government colleges in our State but on that account alone, it cannot be said that colleges as they are constituted and manner in which they are controlled, they can be said to be other authority within the meaning of Article 12. But urged Mr. Nanavati that it has been clearly ruled by the Supreme Court in *Rajasthan State Electricity Board, Jaipur Vs. Mohan Lal and Others*, that State as defined in Article 12, is comprehended to include bodies created for the purpose of promoting the educational and economic interests of the people. The court in that case was concerned with the character of Electricity Board and it was held that Rajasthan Electricity Board would be included within other authorities as envisaged by Article 12. In reaching this conclusion undoubtedly an observation is made that body created for the purpose of promoting Educational and economic interest of the people would be comprehended in expression "State" as defined in Article 12. But we feel that this has reference to the position of the University and not of various colleges set up by the trust or society. Therefore, it is not possible to accede to the submission that the affiliated college is other authority within the meaning of the expression "State" in Article 12.

16. Second limb of this submission is that this college is a public authority. Now, this aspect developed because of an emphasis on three well recognised exceptions to the general rule, that contract of personal service, ordinarily shall not be specifically enforced. It is so provided by Specific Relief Act and even though concept has undergone a basic change, this concept of law still survives that contract of personal service shall not be specifically enforced. Apprehension against enforcement of such contract stems from the belief that it will ordinarily be sought by dismissed or discharged employees in whom employer may have lost confidence and who may be imposed back upon the employer who would not like to have him. But there was another facet of the problem that if it can be specifically enforced, contract of personal service is likely to generate in to contract of slavery. This apprehension was voiced in the hey day of *laissez faire*. Classic of Fry Lord Justice in *De Francesco v. Barnum* (1890) 45 Ch.D. 430, is always relied upon, wherein he specifically voiced an apprehension that Courts are bound to be jealous in this behalf lest Court should turn contract of service into contract of slavery. It also proceeded on the assumption, valid in other country, though certainly not valid in our country, that parties negotiated a contract from position of equality and freely entered into contract acceptable to both. But should this assumption continue to hold the field in these days of mounting unemployment? Even to this defectum that contract of personal service is not specifically enforced there are three well recognised exceptions which have been taken note of in *Indian Airlines Corporation Vs. Sukhdeo Rai*, and *Executive*

Committee, U.P. Warehousing Corporation Vs. Chandra Kiran Tyagi, . These three well recognised exceptions are: (1) a public servant who has been dismissed from service in contravention of Article 311, (2) reinstatement of dismissed workers under industrial law by Labour Court or Industrial Tribunal, and (3) statutory body when it acted in breach of mandatory provisions imposed by statute. We requested the parties to discuss as to ascertain as to on what principle three exceptions are founded. We were told that where office is a public office, charged with certain duties to be rendered and where power of termination is controlled, featured or regulated by statute, applicable to the employer and the employee alike, and termination is brought about in blatant violation of statutory provisions, what the Court in such circumstances, would be doing, would not be enforcing contract of personal service but in fact it declares void or invalid, action contrary to statute. In the case of public servant. Article 311, by constitutional mandate provided mode, method and manner of termination of service. It however takes not of only punitive termination. In the field of industrial law, the provision contained in Employees Standing Orders Act comparable to Gujarat University Act, Ordinances and Statutes, fetter the power of the employer to terminate service except in the manner as provided in the statute. In respect of the statutory body, if statute creating the body provides for termination of service, and it casts a mandatory obligation, violation of mandatory obligation invalidates the action. In all these three cases euphemism is that Court by granting relief do not enforce contract of personal service but merely declares action in contravention of mandatory provisions of law as invalid.

17. But this does not explain the problem as to on what principle the exception is founded. The exception cannot be arbitrary and examination of this branch of 13W reveals that exceptions were founded on four valid principles: (1) damages, would not provide adequate compensation, (2) difficulty of supervision by Court, (3) want of mutuality; and (4) discernible public policy namely on humanitarian ground, where the contract of personal service on being enforced is not converted into a contract of a slavery in these days of mounting unemployment. A glance at the development of law, starting from the classic of Lord Fry where employer more or less was concerned with such servants as cook, driver and valet, who, if master is unwilling to retain him in employment is foisted back in service, personal life of master would become miserable, we reach the watershed in the industrial revolution. Society encompassing small employers slowly gave way and there came to be established giant under taken the situation has undergone a sea change. The element of person alservito the Master in the contract of service disappeared with hierarchy of officers in management of industry and with it disappeared the negotiated contract because private contracts were superimposed by statutory provision to wit: Factories Act, Minimum Wages Act and Industrial Employees (Standing Orders) Act, Provident Fund Act, etc. With population explosion jobs became scarce and loss of job was treated tantamount to deprivation of property, result in situation being starvation, agony and misery for the employees and his depilated. In such a

situation, when law stepped into grant security against arbitrary termination of service, to say that damage would provide an adequate compensation is to shut one's eye to reality. Therefore, when it was found that damage would not provide an adequate compensation for the loss of job, the Courts developed first exception and altered the law that rein statement can be ordered even though contract would still fall within euphemistic expression of personal service. Add to the belief that where contract is specifically enforced, its continued performance may be supervised by Court. If a man is directed to be reinstated and the employer deals with him in one or other manner but not in consonance with the spirit of the Court's order, it would become difficult for Court to provide continuous supervision. Contrary is not true in that, if a worker is reinstated, he is not required to supervise the work of the master. Third limb was that contract to be effective must have an element of mutuality. But where contract of employment is in a large undertaking, element of mutuality as we understand as element of law is totally abused. Employment contracts are more or less governed-by statutory provisions. There is very little or practically no scope for working out and negotiating contract. Take for instance this very case. Even if management were to choose teachers there was nothing to be negotiated amongst themselves. Emoluments were fixed by Ordinances, qualifications for selection were prescribed, hours of work and workload, are prescribed, retirement benefits are prescribed, protection against arbitrary termination is prescribed by law, both statutory and by subordinate legislation. If a college management and Professor were to sit down with the assistance of attorney at law to draft out a contract of service there would be nothing for negotiation. They would call in aid the booklet polished by Gujarat University. Therefore, while mutuality ought to be there in a contract, mutuality is forced upon the parties through the statute. And the last reason on which exception is founded is that, the contract of personal service, is enforced, at the instance of Master it would generate into one of slavery which apprehension is fast becoming unfounded in these days. Where conditions of service are not left to negotiation between the parties and the statute or subordinate legislation has stepped in to provide various limbs of the contract, such a contract when treated as non-terminated because of invalid termination and "declaration that man continues in service is granted, there is lurking public policy behind it namely in a democratic policy arbitrariness in all walks of life is to be eschewed. When we take note of all the principles behind three exceptions, they become clear, understandable and meaningful. It is this approach to the problem which has been the subject matter of concurring judgment of Bhagwati J. in Vaish Degree College (supra). It was pointed out that it is quite possible to take the view that in case of employment under a statutory body or a public authority, where there is ordinarily no element of personal service, employee may refuse to accept repudiation of the contract of employment by statutory body or public authority and seek reinstatement on the basis that repudiation is ineffective and contract is continuing thereafter. Therefore, we will examine whether the college can be said to be a public authority or a public body governed by certain statutory regulations. We have

just above pointed out that in Rajasthan Electricity Board case (supra). Supreme Court observed that body created for the purpose of promoting educational and economic institutions of the people may as well fall within the extended definition of word "State" in Article 12. We would not say that college would be a public body for the purpose of higher education by Government. But in Nagpur Corporation N.E.L. and P. Company. Corporation of the City of Nagpur Vs. The Nagpur Electric Light and Power Company Ltd., Court directed a writ of mandamus to issue against an incorporate company, observing that the statutory duty devolving on public utility concern is a public duty, and mandamus can issue. In reaching this conclusion, reliance was placed on 73 Corpus Juris Secundum 988, wherein it is observed that as a general rule, a public utility has the duty to give the public reasonable and adequate service at reasonable rates and without delay; and that failure can be corrected by a mandamus. In *McMillan v. Guest* (1942) A.C. 561, question arose in the context of taxing statute to ascertain whether a person who in the relevant year Was not reading in United Kingdom but held a public office of profit is liable to pay tax. Person concerned was director of a private company and contention was that director of private company does riot hold any public office of profit. Negating this contention, it was said that the Act of Parliament imposes duty on the office itself and its holder for the time being; and as these obligation are imposed in the public interest that some public control over its organization and activities may be obtained. It was held that office was a public one. In *Malloch v. Aberdeen Corporation* (1971)2A. E.R. 1278, Lord Wilberforce in his judgment points out that relationship of master and servant may be one in which all requirements of or observance of rules of natural justice re-execute and this would mean cases in there is no element of public employment or service, no support by statute, nothing in the nature of an office or a status which is capable of protection: If any of these elements exist, then, whatever the terminology used, and even though in some inter parte aspects the relationship may be called that of master and servant, there may be essential procedural requirements to be observed and failure to observe them, may result in a dismissal being declared to be void. Bearing this principle in mind, we may briefly state that employment if any can be said to be by governing body and governing body has no discretion with regard to various terms of contract and body itself is created by statute, its position, power and functions and obligations are statutory. Further, this is a case where if the statutory body or public authority has to terminate services, it must be according to the procedure prescribed in Section 51-A. Therefore such an employment could never come within the compass Of what is called pure master and servant relationship; and where protection is by statute, any termination in violation of the mandatory provisions of the statute can be declared void by Court. In so doing Court does not enforce contract of personal service, but merely declares an action in violation of mandatory provisions of a statute as invalid. Corollary would be that contract is not at all terminated and contract continues to subsist. When it is said that contract of personal service cannot be specifically enforced, it means that even wrongful termination may have the

effect of terminating contract and party must be left to fend for damages. Where termination is in contravention of mandatory provisions of "a" statute, by which party is bound, it cannot be said that there is wrongful termination, because there is no termination in law and law does not look upon with favour its flagrant and blatant violation. Law steps in merely to state what has been done contrary to law. That is the position here. Therefore, it is not possible to accept the first submission in either of its limbs and it must be Negatived.

18. Second submission can merely be referred to in passing and briefly disposed of. It was urged that Civil Courts leave jurisdiction to adjudicate dispute with regard to rightful or wrongful termination of service having regard to the provisions contained in Section 9 of the Code of Civil Procedure. It was said that jurisdiction of Civil Court can be taken away expressly or by necessary implication by legislative enactment. That having not been done. Director of Education is not competent to adjudicate such a dispute and direct reinstatement. Mere narration of the submission would show that it is not correct. It is indisputable that Civil courts have jurisdiction to adjudicate upon dispute which falls within Section 9 of the Code of Civil Procedure. Contracts can be enforced through Court. It must be conceded that there is no provision which expressly bars jurisdiction of the Civil Court to decide the dispute that may arise between the employer and employee save, where jurisdiction is conferred upon Industrial and Labour Courts. That is not the situation here. For the present discussion, we would keep out of consideration Tribunal as envisaged by Section 52-A. But submission is that Director of Education is constituted an authority under the guidelines issued by the State Government in its resolution dated 12th April 1977 and that has the effect of transgressing upon the jurisdiction of the Civil Court. Guidelines do not exclude, jurisdiction of the Civil Court. Director of Education does not arrogate to himself jurisdiction posed by Civil Court in entertaining dispute as envisaged by-Clause (v) of the guidelines. Director of Education does not supplant the Civil Court nor does it exclude the jurisdiction of the Civil Court. It would be open to any party to go to the Civil Court and invoke its jurisdiction. But it would be incorrect to say that wherever there is jurisdiction to resolve a dispute in Civil Court, conceivably there cannot be any other Tribunal, which can resolve the dispute. Therefore, submission that by constituting Director of Education an authority to decide dispute arising out of enforcement and implementation of the guidelines, jurisdiction of the Civil Court is trenchd upon, is utterly incorrect and need not be examined further.

19. Next submission is that executive power of the State Government under Article 162 of the Constitution is co-extensive with its legislative power, but still in exercise of executive powers. State cannot act in derogation of any statutory provision. It was said that relevant Ordinance 120-B and 120-C provide for strength of staff of each affiliated college and 120-G provides for retrenchment of surplus staff and that these Ordinances have been enacted in exercise of the statutory power conferred by Section 31. The two Ordinances provide for determining the strength of the staff and on the reduction of number of students

or classes staff becoming surplus, the manner and method of the retrenchment of the staff. These Ordinances buying the force of subordinate legislation field for the purpose of determining surplus staff find mode and method of retrenchment being fully occupied, guidelines could not be enacted, enforced and, implemented by, the State Government in exercise of its executive powers because apart from the fact that State Government could not issue guidelines, so as to trench upon right of the management to terminate services of its teachers at its sweet will, they have directly trenched upon Ordinances and as the field is occupied guidelines cannot exist and would have no validity. Frankly speaking submission of occupied field left us little guessing. Guidelines have been issued by the State Government as would be presently pointed out as the conditions of grant and whether they are unconstitutional or not would also be examined. No attempt is made by guidelines to trench upon the powers which the management may have either under the contract or under the statutory provision, and this concept of occupied field developed in the context of concurrent legislation on subject found in the concurrent list would hardly be attracted. When Parliament legislates upon the subject in the concurrent list. State Government, field being occupied, cannot legislate upon it and if both legislate upon it Central will prevail to the exclusion of the State unless otherwise provided. This concept cannot be brought in the field of University Ordinances. As part of providing various conditions of service. University in exercise of the power set out in Section 4 may enact Ordinances through the E.C. under the implied power set out in Section 20 (xxxix) and 20 (ix). Those Ordinances if validly enacted would be binding on the affiliated colleges, but there was no intention to occupy the whole field. Therefore the submission is that field being occupied, executive power under Article 162 cannot be exercised. It is incorrect to say that State Government issued guidelines with a view to supplanting relevant Ordinances bearing on the subject. In fact, we will presently point out that both the Ordinances and Guidelines can co-exist. Therefore, there is no substance in the submission that by executive fiat State Government is trying to trench upon the rights of third parties.

20. In this very context, we would like to point out that Government resolution setting out guidelines was adopted by E.C. at its meeting held on 4th June 1977 and the guidelines became the instructions issued by the E.C. in exercise of its own power. In this connection, Mr. B.R. Shah had two fold submission to make. First submission was that E.C. cannot act except by making Ordinance and where E.C. wants to lay down a binding rule of conduct, it must act through the Ordinances. Both the limbs are fallacious which we would presently point out Section 31 confers power on the E.C. to make Ordinances. It can make ordinances in respect of the powers and functions conferred upon it by Section 20. But in respect of matters referred to in Clauses (i), (iii), (iv), (vi) of Section 20, before making ordinances, its draft shall be proposed by the Academic Council (vide Section 31(1) proviso). Similarly Sub-section (3) of Section 20 provides that powers and duties under Clauses (xix), (xx), (xxvi), (xxvii), (xxviii), (xxix), (xxx), (xxiii), (xxxiv), (xxxv), (xxxvi), (xxxvii) and (ix) of Sub-

section (1) of Section 20 shall not be exercised by the E.C. except upon the recommendations made by the Academic Council. Sub-clause (xx) confers powers on the E.C. to arrange for and to direct, the inspection of affiliated colleges, recognised and approved institutions and to issue instructions for maintaining their efficiency and for ensuring proper conditions of employment, including salary scales and allowances for the members of their teaching, other academic and non-teaching staff. We have already pointed out that executive power of the Executive Council extends to the entire power conferred on the University by Section 4. That is made clear by Clause (xi) of Section 20. Even apart from this powers of wide amplitude, this specific power conferred by Sub-clause (xx) enables the E.C. to issue instructions for ensuring proper conditions of service including salary and allowances of the members of the teaching staff. Mr. Shah however, urged that any instruction on this subject can be issued only upon the recommendations of the Academic Council and if guidelines issued by Government were which adopted by the E.C. has reference to some conditions of service in respect of which instruction can be given in Clause (xx), it can only be done upon the recommendations of the Academic Council. Factually also it was attempted to be pointed out that Academic Council had requested the State Government to issue guidelines. Therefore, when guidelines were issued and Academic Council did not object to that it would mean that it was on the recommendations of the Academic Council. But even if we do not take up such a technical view of the matter, under Clause (xxxix), the Executive Council is empowered to lay down and regulate the salary scales, allowances and conditions of service of the members of the teaching staff and it was not disputed for a moment that guidelines to some extent do provide for some conditions of service because protection or security against termination is covered by the generic expression conditions of service. Now undoubtedly, the Executive Council can issue Ordinances but there is nothing in the scheme of the whole Act which says that it cannot act except by Ordinances. In fact reading each plenum of Section 20 at various stages it had to be conceded that Ordinances need not be enacted. A democratically set up body unless, compelled by the statute to act in a certain manner, can act by its resolution. The principle is that it must be a majority resolution because that is the will of the democratically elected body. Once it passes a resolution, it is of that body and it would bind the people upon it has power to impose binding code of conduct prescribed unless it is shown by some other statutory provision that it shall act in prescribed manner and none else. It is true as was sought to be pointed out that when power is given under the statute to do a certain thing in a certain way the thing must be done in that way or not at all (vide *Taylor v. Taylor* (1875) 1. Ch. D. 426). But this postulates that the statute requires a thing to be done in that manner. There is nothing in the scheme of the Gujarat University Act which requires that for every thing to be done by the E.C. there shall be an Ordinance. In fact as pointed out earlier, there were various clauses of Section 20 which consistently point to the fact that in respect of them, no Ordinance need be enacted and yet power conferred by those clauses can be exercised by E.C.

21. But Mr. Shah urged that if a rule binding on large body of persons is to be enacted by the E.C. it shall be only by Ordinance. Ordinarily it should be so but it does not mean that necessarily it should be so. Let us point out here two important facts. Mr. N.J. Mehta, learned Advocate appearing for some of the respondent teachers pointed out that the Association of Managements, whereof the petitioning Managements was a Member had invited the Government to formally declare guidelines for the purpose of declaring surplus teachers, pursuant to the new pattern of education and the petitioner Managements had not objected to the jurisdiction of the Director of Education, and when the Academic Council requested the Government to issue guidelines, it can be said that Government acted at the behest of the management. Undoubtedly it is true that inviting guidelines would not preclude (he management to challenge its vires. But the background cannot be lost sight of Now, if the management invited guidelines, it was at least conscious of the fact that if and when issued and if the E.C. adopts and directs them to be implemented, a rule of bidding nature is bound to emerge. It would, therefore, not be fair to say that as guidelines provide a binding and lawful direction, which can be violated on the pain of suffering some consequence, it can only be by Ordinances. We may point out only one fact here that meeting of the Academic Council of the Gujarat University was held on 16th March 1977 presided over by the Vice Chancellor. Their last resolution was that on the introduction of the Pre-university classes in colleges, college teachers were likely to be rendered surplus and in order to determine who would be surplus, Government be requested to determine principles of seniority as early as possible and intimate the same to all concerned. If any recommendation was necessary for powers conferred by Clause (xx) to be exercised by the E.C. the same was made by this Resolution of the Academic Council dated 16th March 1977. Pursuant to it, on 12th April 1977, Government issued guidelines and by its resolution the E.C. adopted the same on 4th June 1977. Therefore, we find no substance in the contention that E.C. cannot enforce guidelines.

22. It was next contended that guidelines issued by the State Government on 12th April 1977, restrict the fundamental rights of the petitioner under Article 19(1)(a) and 19(1)(g) of the Constitution and that web restriction can be imposed only by law and not by executive instructions. Therefore, and also, because guidelines impose restrictions which are unreasonable and arbitrary, they are invalid. We have already pointed out above guidelines and we need not repeat them. We would like to point out certain things. We would first examine the perspective of the submission before we deal with various limbs of the submission. Fundamental right claimed here is right to establish, maintain and administer educational institutions by the petitioners of their choice; and it was said that in the context of educational institutions, Article 19(1)(g) is attracted. We would straightway concede without further discussion that in the case of educational institutions Article 19(1)(a) would also be attracted as this can be said to be freedom of thought (vide Bennett Coleman and Co. and Others Vs.

Union of India (UOI) and Others, . Emphasis was placed on Article 19(1)(g) namely right to establish, maintain and administer educational institution. Mr. Shah laboured to point out that setting up of colleges by trust or society would tantamount to carrying on business and that this is a fundamental right which cannot be restricted Unless restrictions are reasonable and would be saved by Sub-Article (2) or (g) of Article 19. To some extent Mr. Shah was on defensive, when we enquired whether he would be seriously contending that setting up a college would be carrying on business within the meaning of Article 19(1)(g)? Our attention was drawn to different dictionary meanings assigning different connotations of expression's business (we do not propose to look into them". We would proceed on the assumption that somewhere this activity may be covered by extending the meaning of the word "business". But we may point out that such a suggestion has been negated in the context of educational institutions by the Supreme Court in *Sidhrajibhai v. State of Gujarat* AIR 1963 S.C. 540. At p-544, it has been observed that right to establish administer and manage educational institution could not be said to be right of the petitioner to practice any profession, or to carry on any occupation, trade or business guaranteed under Article 19(1)(g).

23. Assuming that setting up of a college would amount to carrying on business. Let us see whether such a regulatory measure as protecting and guaranteeing security of service or providing humane conditions of service not left to arbitrary will of the employer would amount to unreasonable restriction on the fundamental right to carry on business. Now, in this context we would first like to point out that as we are examining the ambit of the fundamental right under Article 19(1)(g) in respect of the institution set up for providing higher centre of learning, namely, "colleges, it would be advantageous to refer to Article 30(1) conferring fundamental right on the religious and linguistic minorities to establish, administer educational institutions of Their choice. Let us pinpoint the ambit of right. Article 30(1) comprehends not merely establishing educational institutions but administer the same. And today we are concerned with the allegation of fettering right of management namely right of hire and fire teachers without any inhibition. Minority educational institutions have a fundamental right not only to set up but to administer educational institutions. Right to establish educational institution guaranteed by Article 19 may be controlled by majority and therefore Article 30(1) was enacted. If the right to administer such institution in absolute terms is not guaranteed the right to establish becomes meaningless. Now in the context of Article 30(1) the fundamental right conferred by it is in absolute terms and is not subject to restrictions, as in the case of rights conferred by Article 19 under which reasonable restrictions could be imposed, (vide *Khanna J. in St. Xavier's case* (supra) While examining the ambit of such right absolute in its width it was held that right to administer does not carry with it right to maladminister. Caution may be uttered that the observation which we are going to reproduce is in the context of absolute right of college guaranteed by Article 30(1). Ray, J. starts with a cryptic observation that right to administer does not

carry within its sweep right to maladminister. Question was examined whether protection granted to teachers against arbitrary termination, in respect of conditions of service which include pay-scales, work-load and other conditions of service and retrial benefits by the Ordinances or relevant provisions under the statute interfere or restrict the fundamental right to establish and administer educational institution. Examining the fundamental right it was observed that there is no fundamental right of a minority institution to affiliation to a University. When a minority institution applies to a University to be affiliated it expresses its choice to participate in the system of general education and courses of instruction prescribed by that University. It agrees to follow the uniform courses of study. Affiliation is for regulating the educational character and content of the minority institutions. These regulations are not only reasonable in the interest of general secular education but also conduct to the improvement in the statute and strength of the minority institutions. Therefore, measures which will regulate the courses of study, the qualifications and appointment of teachers, the condones of employment of teachers, the health and hygiene of students, facilities for libraries and laboratories are all comprised in matters germane to affiliation of minority institutions. These regulatory measures for affiliated are for uniformity, efficiency and excellence in educational courses and do not violate any fundamental right of the minority institutions under Article 30. Such a regulatory measure would not violate absolute right guaranteed under Article 30(1). No one dare say that right under Article 19(1)(g) is absolute. This view has been consistently followed. Even in *Sidhrajabhai's case* (supra), as early, as in 1962 it has been in terms held that the regulations made in the true interest of efficiency of instruction, discipline, health, sanitation, morality, public order and the like may undoubtedly be imposed. In that case. Their Lordships Beg and Dwivedi JJ. have stretched the regulatory power further. Even the majority held that it is anguishing of the minority to claim absolute immunity. Just as regulatory measures are necessary for maintaining the educational character and interest of minority institutions, similarly regulatory measures are necessary for ensuring orderly, efficient and ground administration. It thus appears well settled that such regulatory measures as protecting conditions of service which include protection against arbitrary termination of service has always been found to be reasonably good condition of affiliation which even minority institution must ensure in order to get affiliation. What then is the position of a college which does not claim to be minority institution. In their case such a regulatory measure could never be said to trench upon any fundamental right. In view of the fact that such regulatory measure as prescribing conditions of service of the teaching staff of college even in respect of a minority instruction is not held to restrict to absolute right under Article 30(1), it may be taken as well settled that in case of Article 19(1)(g) such regulatory measures could never be said to fetter or restrict fundamental right of the present "petitioners both under Articles 19(1)(a) and 19(1)(g).

24. In view of our conclusion as herein indicated, it would not be necessary to

examine the submission that such restriction can only be imposed by law, which should be valid and not by executive action. We, therefore, do not propose to examine that limb of the submission that as guidelines are issued as executive instructions and as they restrict fundamental right, guidelines would be invalid. However, the power of the Government to issue guidelines is required to be examined in a very different context. We need not decide whether guidelines impose unreasonable restriction because they contain regulatory measures protecting conditions of service which are not held to restrict the fundamental right. Incidentally, we may point out two facts which have a bearing on the subject and provide relevant consideration for issuance of guidelines. As a direct impact of Government decision Pre-University classes were required to be closed. That rendered teachers surplus. That was the situation which arose at the commencement of the academic year 1977-78. University faced it, Government faced it. There was apprehension of large scale educated unemployment. In a welfare State, expansion of jobs is one of the functions of State so that unemployment can be reduced to a minimum. In the present situation, spectre of unemployment was hanging over highly educated persons. Talent would be wasted, if no effective and adequate steps were taken. These steps had to be taken to meet the contingency which arose on Government decision which the welfare State must resolve and accordingly Government came out with a bold suggestion that closure of the Pre-university class would not result in unemployment, in that surplus teachers would be protected in respect of their pay-scales and they would be provided with alternative employment and colleges would be paid 100% grant, meaning thereby balance arrived at after giving credit for the fees received from the amount of expenses. Government came forward to shoulder its own responsibility. Government came out with a bold declaration that it would protect teachers so that spectre of unemployment which was hanging over large number of talented teachers in this part of Gujarat could be effectively shielded. Now, if such a policy decision is made. Government has to work out its details. Government must know as to how many teachers are to be rendered surplus and who are rendered surplus. Government would also like to provide what would be method of working out surplus. We do not suggest for a moment that situation provided the management a handle for eliminating inconvenient teachers. That is not our suggestion but approach is bound to be there Government, therefore, at the invitation of the Association of the Managements of colleges, and with the concurrence of the Academic Council issued the guidelines. What did it provide by guidelines? Government said that protection would be extended to surplus teachers in respect of their pay scales and they would be provided alternative employment. In order to find out who should be surplus, Government came out with a suggestion that where trust or the society administers more than one college, total length of service under the common employment will be the guideline for determining surplus. It was then said that where a trust or society administers one college, length of service in the institution would determine seniority. And the principle of last come first go should be applied for retrenchment of surplus teachers. Now, Mr. B.R. Shah

contended that this is an inflexible rule of choosing which leave no room for choosing talent and deny pragmatism. According to him in respect of the college merely continuous officiation by length of service could not be said to be reasonable test for determining surplus. There might be job requirements, there might be department requirement and older teacher may not be that competent as the man who came on later. It was said that all these pragmatic factors must enter the verdict in ascertaining surplus and not the seniority measured by length of service only. First clause of the guidelines provides that number of surplus teachers shall be determined according to the regulations laid down by the concerned university. That has direct reference to Ordinance 120-G. And Ordinance 120-G takes account of qualification) replacement, subject requirement and various other relevant considerations. By incorporation Ordinance 120-G became part and parcel of the guidelines. But after taking into consideration all these relevant factors arbitrariness in choosing one or the other is to be regulated by saying that length of service shall be criterion for the time being. Number of Law Courts have said that principle of seniority depending upon continuous officiation is a principle valid according to Article 16 of the Constitution. If that principle is followed in the field of public employment, how does it become invalid in the field of University employment. It was then said that after introducing principle of seniority, guidelines must be restored to for declaring surplus teacher whose service in college must be terminated. This is not a new principle devised, Sub-clause (5) of Ordinance 120-G provides that termination of service of teacher or teachers concerned shall be followed in strict order of seniority so as to ensure that the junior most teacher is retrenched first and no teacher is retrenched in suppression of the junior colleagues. Principle of last come first go has been recognised and incorporated in Ordinance 120-G. And what grievance can there be against that principle. We feel, it is not merely rule of law but it is a principle of justice and fairplay. If you want to eschew arbitrariness decision must conform to some principle and principle here is well recognised. Principle in the field of industrial jurisprudence is last come first go. Behind this principle lies a very healthy guideline namely experience is not only recognised and respected but an old man may find difficulty to fend for himself while a young man has full energy to fend for himself. So viewed from either angle, this principle has been enforced by Law Courts as rule of justice. It has been statutory recognised in Section 25-G of the Industrial Disputes Act. But Mr. Shah urged that even Section 25-G does not make it inflexible, because it permits a discretion to adopt different method for reasons to be recorded by the employer. It may be so, so far as Section 25-G is concerned. Ordinance 120-G which is incorporated in the guidelines when read with Ordinance 120-G, three considerations relevant to retrenchment emerge, indispensability of teacher, college requirement and pursuit of excellence. If all these three relevant principles are taken care of, rule of last come first go can be justly applied in the case of retrenchment and termination of surplus staff. However, our attention was drawn to *M/s. Swadesamitran Limited v. Their Workmen* AIR 1960 SC 792, wherein it has been held that Section 25-G being statutory, it has to be

followed and if employer wants to depart, he has to record his reasons for the said departure. That is of course true-because where person is required to record reason for a decision, it would have to be plausible one and reasons can be tested. Such flexibility is inherent in Ordinance 120-G.

25. Same view was affirmed by the Supreme Court in *Om Oil and Oil Seeds Exchange v. Their Workmen* 1966 11 L.L.J. 326. Therefore, it cannot be said that rule is inflexible or lacks pragmatism or works hardship for the management.

26. Reverting to the point under discussion. Government had issued guidelines in exercise of its executive powers. Mr. J.R. Nanavati made no bone of contention that these guidelines have been issued unmistakably in exercise of the executive power under Article 162. It was said that they were conditions of grant and they could not be said to be unconstitutional conditions, h is, true as has been held in *St. Xavier's* case that if the conditions annexed to the grant are unconstitutional in the sense they have imposed unreasonable restrictions on the fundamental right, the condition would go and grant would continue because State cannot pick and choose people for its munificence. The doctrine of unconstitutional conditions means any stipulation imposed upon grant of a Governmental privilege to relinquish some constitutional right. The person complaining must demonstrate that it is unreasonable in the special sense that it takes away or abridges the exercise of a right protected by an explicit provision of the Constitution (vide *St. Xavier's* case (supra) para 158). The conditions afford protection and are not shown to be unreasonable. Grant is privilege to which Government annexed condition. If the conditions are not unreasonable, party will have to take grant with condition and in this case, Director of education as nominee of the Government has not made any order calling upon the management to reinstate teacher, but merely says that termination of service is not consistent with the guidelines. As pointed out earlier, guidelines were invited by all the concerned parties and Government did not rest content with merely issuing guidelines. It incurred obligation also of 100 per cent grant" Therefore, where rules which govern the terms on which Government would grant recognition and aid Government can enforce these rules upon the management (Vide *Regina's* case (supra)). In this case guidelines were conditions of grant and guidelines could be enforced on the management because management has come to the Court for seeking relief.

27. Mr. Shah however urged that these guidelines provide a different mode of ascertainment of seniority than one provided in Ordinance 120-D and, therefore, there is inherent conflict between Ordinance and guidelines. Apparently argument is attractive. Relevant Ordinance provided principles of seniority as continuous officiation in one college. Guidelines provide that where more than one college has been set up by the trust or society principle of seniority will be length of service in one or other institution and not in the last institution where the man served. Principle is a principle of employment under a common master. Now, if in this special contingency, government as a condition of grant,

suggested a principle, it cannot be said that principle is unworkable. Ultimately, when some teachers were likely to lose jobs, if not salary, and status of college teacher, those having longest service under a common master should have preference over those who has shorter service. It is here that the principle enunciated in Sant Ram Sharma Vs. State of Rajasthan and Another, would assist us in holding that principle of continuous officiation is valid rule of seniority even in the context of Article 16. Possibly this approach stems from general apprehension that if any other criterion is taken, the right of the employer to transfer teachers in colleges under common management when exercised, a teacher of fairly long standing can be junior most by mere order of transfer. To arrest this possible exigency Government framed this rule of seniority. It is another facet of protection eschewing arbitrariness in determining who should be surplus with a view to extending protection only, and, therefore, it cannot be said to be unreasonable. Therefore, having examined this submission from its various limbs, we are satisfied that these regulatory measure regulating conditions of service do not restrict any fundamental right. In fact setting up of an institution like the college does not amount to carrying on business under Article 19 (1)(g) and at any rate, right to administer would not carry within its sweep right to maladminister. The widely accepted principle of length of service that last come first go which appears to be more a rule of justice has been given effect to and, therefore, we are unable to accede to the submission that in any" manner fundamental right of the petitioner under Article 19(1)(g) has been violated or restricted by the guidelines.

28. Having examined the submission both on principle and authority we must state our surprise that the contention should come from Management and not affected teachers. More than 2500 teachers who would be directly affected by this principle have ungrudgingly accepted the same. Only 25 remain to be settled and they are not the petitioners. The management is least competent to challenge that part of the guidelines except for retaining a power to throw out inconvenient teachers under the grab of surplus.

29. Last submission was that these guidelines cannot be retrospective but must be prospective. Any termination of service before 12th April 1977 could not be said to be invalid merely because termination is inconsistent with the guidelines. We have pointed out above that an earlier attempt to terminate service by the management was rejected and Director of Education requested the Vice Chancellor to issue instructions to the college management to withdraw notice but undoubtedly thereafter around 15th March 1977 again termination notices were served by the petitioners and various other college managements. Guidelines were promulgated on 12th April 1977 and E.C. adopted, them on 4th June 1977. But we must not forget that the academic term started from 15th June 1977. Termination does not become effective on issuing notices. It becomes effective on the date ,on which effective termination is directed. Therefore, to say that these guidelines are operating retrospectively is not correct and termination which was about to take effect can be put an/end to. An offer was

made that if any expenses were required to be incurred by the colleges, where Government did not accept termination as directed by the management on the ground that it is not consistent with the guidelines, consequent expense of extra teacher would be admissible towards grant. If there was any injury it has been fully remedied and, therefore, submission has to be rejected.

30. And now the last which we ought to have taken first. What is the grievance of these colleges, we fail to understand. Fundamental right claimed by them is one which simplified cannot stand scrutiny. We asked them which fundamental right is violated when we look at the problem in its pith and substance. The answer they would not give but we understood it to be the right, unbridled, unfettered, not circumscribed and non-peripheral, of hire and fire without rhyme or reason at their sweet will and fancy. Should Court be a party to it at this stage and when management did not stand to lose anything? They are fully protected. In the course of discussion we posed a question to the leading Counsel Mr. B.R. Shah that if you do not want grant, guidelines would not be applied to you and would not quote the answer because his answer necessitated lengthening of the judgment. Their grievance was against last come first go principle, which we have pointed out to be rule of justice. Therefore even with this elaborate discussion we must say in one word that there is no substance in the claim made on behalf of these managements.

31. They have come With soiled hands in the sense that they have claimed discretionary relief under Article 226 after committing flagrant breach of Section 61-A with impunity. They terminated service without approaching the Vice Chancellor which is a statutory provision totally binding on them. It is these people who now tell us that some fundamental right of theirs is violated. They may be disentitled to relief by their conduct but when such relevant issues were brought to Court, we examined them, though they should have been rejected at the threshold.

31.1 In the case of Special Civil Application No. 955 of 1977 Miss V.P. Shah fairly conceded that this problem does not survive this year because according to Mr. H.M. Mehta, notices of termination have been withdrawn admitting continuity in service. Miss Shah on the other hand, says that as college started Pre-university classes for those who passed standard 11th this year with the concurrence of the University, no teacher would become surplus, and therefore, problem does not arise. We only take note of these two rival submissions, because it is not necessary to decide the same in this petition.

32. In respect of the remaining petitions, we are not examining the question on merits for two reasons, the affected teachers are not before us and we do not want to allow the promoters of the management to canvass their case. But more important part is when Director of Education said that the very termination is not consistent with the guidelines, he did not say who should be declared surplus and whole service should be terminated. That has yet to be worked out. In working it out it would be open to the Director of Education to examine various

relevant requirements that we understand have to be kept in view. While enforcing the guidelines, it would be open to the Director of Education to examine this question as and when necessary and with this observation, we would dismiss all these petitions and discharge rule in each case with no order as to costs.

33. We would be failing in our duty if we do not put on record very valuable assistance rendered to us by all appearing in these matters. Matter was argued extensively, intelligently and with full preparation.

34. At this stage. Miss V.P. Shah learned Advocate on behalf of the petitioners made an oral request for a certificate to appeal to the Supreme Court under Article 133(1) of the Constitution. This is a matter which involves substantial question of general importance as to the status, position and character of employment in affiliated colleges and power of the Government to prescribe conditions annexed to the privilege of grant and in our opinion, these questions do need to be decided by the Supreme Court. But we were told that while granting certificate, matter will be delayed and teachers whom Director of Education have wrongfully declared surplus are not paid either by Government or by the management. We, therefore, direct while granting certificate that State Government shall pay the teachers such salary to which they were entitled from the date when they are not paid by the college management and deduct the amount from the grant admissible to the college.

35. Certificate to issue accordingly. Orders accordingly.