
(2006) 01 AHC CK 0150

In the Allahabad High Court

Case No : Special Appeal Nos. 1321 with 1322-24, 1327, 1346-48, 1395, 1397, 679-682, 728, 747-751, 1396 and 1320 of 2005

Aligarh Muslim University, Aligarh

APPELLANT

Vs

Malay Shukla & Ors.

RESPONDENT

Date of Decision : 05-01-2006

Acts Referred:

Aligarh Muslim University Act, 1920 — Section 2(1), 5(2)(c)
Constitution of India, 1950 — Article 30

Citation : (2006) 01 AHC CK 0150

Hon'ble Judges : Ajoy Nath Ray, CJ and Ashok Bhushan, J

Final Decision : Disposed Of

Judgement

Ajoy Nath Ray, C.J.—The short basic issue in all these appeals is whether the Aligarh Muslim University is a minority Institution. The point arises because suddenly some eighty five years after incorporation, they chose for the first time to reserve a Muslim quota, by way of a 50% reservation of postgraduate course seats meant for qualified MBBS doctors. The judgment under appeal before us has been delivered by an Hon'ble Single Judge of our Court on the 4th of October, 2005. Both sides, to be more accurate, all parties, felt aggrieved, and came up in appeal. The appeals will all be disposed of by this common order.

2. On the one side, who spoke first, were, the Aligarh Muslim University, represented by Mr. S.S. Ray, leading Dr. Dhawan, the Union of India and the learned Attorney General on whose behalf Mr. Gopal Subramaniam addressed us, two individuals one of whom is a member of the Court of the University, which is its administrative body, the Minority Commission whose case was put forward by Mr. Ravindra Srivastava, and groups of Muslim students, admitted on quota, represented by two learned Counsel one of whom was Mr. Ashok Khare and another Mr. S.A. Shah.

3. On the other side were certain dissatisfied students whose case was put forward by Mr. Ravi Kant. Before we proceed any further, we make it clear that in

spite of the most elaborate expertise and painstaking arguments on the part of the University and its supporters, we felt so utterly unconvinced that Mr. Ravi Kant was called upon to speak for about two hours whereas the other side had amongst themselves addressed us for some five days or so. Those hearings were substantially full day hearings.

4. Although we cannot say the same thing about the various reasons given by Hon"ble the Single Judge and the orders passed by his Lordship, we have no hesitation in upholding his Lordship's main and primary decision in these matters, which is that Basha still holds the field and the 1981 Act must give way before it wherever the two come in conflict.

5. Basha is the case of Azeez Basha, a Five Judge Bench decision of the Supreme Court and the report of the case will be found at AIR 1968 SC 662. It ruled that the University is not a minority institution.

6. The 1981 Act is an Act of our Parliament, No. 62 of 1981 being Aligarh Muslim University (Amendment) Act, 1981, which received assent of the President of India on the 31st December, 1981 and was published thereafter on the same day.

7. In Basha, the Court spoke through the Hon"ble then Chief Justice K.N. Wanchoo; it is a decision running to about 12 pages of the All India Reporter.

8. That case has to be read by any reader of this judgment before proceeding any further herewith. On the simple principle of following higher and binding authorities, we have to give this case full and complete effect and none of the statements in this case can be discounted by us. It would be wrong for us to quote the case fully here and it would be a wholly unnecessary and unusual exercise; but the case should be treated as quoted herein fully and we must be understood hereafter as bearing in our minds all the time the basic and first principle that we in this Bench are forbidden to look behind the decision of a five Judge Bench of the Supreme Court of India.

9. The problem before us arose because Parliament, an equally binding source of law so far as we are concerned, chose to pass the amending Act of 1981 which, according to appellants, (by the appellants hereafter we shall mean the University and its supporters; we shall refer to the aggrieved non-Muslim students as the crossappellants hereafter), the said Act of 1981 changed the basis of Basha and that too to such an extent that today, we as the appropriate pronouncing authority must pronounce the Aligarh Muslim University as a minority Institution, the Basha case notwithstanding.

10. The task before the Hon"ble Single Judge was, and before us also is, to see whether the 1981 Act so altered the basis of the Basha case, legally and validly, as substantially to convert the Aligarh Muslim University into a minority Institution because, and only because, of the said amendment Act, or whether, if the Act by its words had succeeded in purporting to achieve that object, it, by that very reason, transgressed the permitted authority and limit of Parliament,

which cannot, simply like a superior Court, overrule the decision given by any Court of law, least of all the Supreme Court of India. The issue is, did the 1981 Act make such changes as Parliament was entitled to make, and thereby achieve the effect of altering the nonminority character of the Aligarh Muslim University, or did it seek to achieve that end by simply and substantially overruling the Supreme Court decision, for which it has no competence.

11. Although the Basha case is to be treated as quoted here by us, we must recount here some of the salient points mentioned in that judgment, in the manner we respectfully read it.

12. It took into account, in some detail, the early history leading to the setting up of the Aligarh Muslim University by an Act of the Indian Legislative Council in 1920. That Act received the assent of the Governor General on the 14th of September, 1920. Several, but not all, property of the University earlier belonged to one MAO College, the full form being the Mohammadan Anglo Oriental College and the Muslim University Association. These were Mohammadan Institutions no doubt. The inception of these came sometime in the latter part of the 1870's; one of the leading gentlemen, who took a prominent part in this, was one Sir Syed, father of the illustrious Hon'ble Judge of Allahabad High Court Mahmood, J., the short lived Barabankian from Olympus. The idea was to set up a University and the ambition was to go on the lines of the University of no less a status than Oxford, or Cambridge. An interesting fund was raised to as large an extent as Rs. 30 lac, even in those days, by collecting one rupee from every Mohammadan of the then British India. Whether this was followed to the letter or not, we need not inquire into.

13. Mr. S.S. Ray told us that a bare look at even some of the albums showing pictures of the Aligarh Muslim University would convince anybody of its deep green character. The architecture and the Quoranic inscriptions are all there.

14. Be that as it may, in the Basha case their Lordships went on to consider the effect of the Aligarh Muslim University Act of 1920 (XL of 1920). Their Lordships were considering the issue for judging the validity of certain amendments made to the Act in the years 1951 and 1965.

15. Although the Union of India through Mr. Subramaniam has been at pains to argue before us that the Aligarh Muslim University is a minority Institution, the stand of the Union of India before the Supreme Court was radically different. We cannot make much of this opposing stand because Parliament had intervened with the 1981 Act and the Union of India and the Attorney General are entitled to support the Acts of Parliament in Courts of law. Whether they will succeed in their support or not, is quite another matter.

16. Before the Supreme Court, the Union of India argued that the Aligarh Muslim University was a free Institution and not a minority one; as such the amendments made in 1951 and 1965 were all supported by the Union. The Supreme Court accepted the Union's contention and ruled in as clear terms as

possible that the Aligarh Muslim University was not a minority University; it is not necessary for us to enter again into details about the exact nature and scope of the 1951 and 1965 amendments. Suffice it for us to say that those dealt, amongst other things, with a recasting of the constitution of the Court of the University, which was originally dealt with amongst others by Section 23 of the Act of 1920. All the members of the Court in 1920 had to be Mohammadans; there was a clause in Section 23 by way of a proviso, that unless one were a Mohammadan one would not be entitled to be a member of the Court. These were substantially changed; the proviso forbidding nonMohammadans from becoming members of the Court was done away with, and Azeez Basha and some others were aggrieved, but to no effect. In ruling the Aligarh Muslim University to be nonminority, their Lordships considered several matters, but to our mind the most important one was about the grant of degrees, and incorporation of the University itself.

17. This matter must be dealt with specifically and in some detail. Prior to 1920, the MAO College was affiliated to the University of Allahabad; degrees were granted by the Allahabad University to students of this College; the College did not itself grant degrees then.

18. There has been some dispute raised before us whether in 1920 it would be possible for the Mohammadan community to found a University on their own, without intervention of an Act of the Legislature, for the purpose of granting degrees to their own students. In the Basha case, the Supreme Court has at least assumed that it would be possible for the Mohammadan community to set up a University on their own without any legislative Act. What the Supreme Court has said in this matter, we have to and we do accept. We only note that after 1956 and the passing of the University Grants Commission Act a University can only be set up by the appropriate legislature; on the basis of Yashpal's case, which was given to us by Dr. Dhawan, and paragraph 59 thereof [(2005) 5 SCC 420], the safest way to go about it, would be to have the State Legislature utilize their power under ListII Entry32. The University Grants Commission can of course make a deemed University as provided in the Act. It seems that even before the 1956 Act, and even way before we gained our Independence, the setting up of a University fair and square would need intervention of the Supreme Government. The word "University" might be referred to in this regard in Earl Jowitt's Dictionary of English law; the power of a University to grant degrees in general does not seem to be an exclusive right of theirs; there seems to be some doubt as the Encyclopedia Americana and also Jowitt's Dictionary seem to state that Colleges are as competent as Universities to grant degrees. The passage at 15 Halsbury 256 can also be referred to; it states there that the essential feature of a University seems to be that it is incorporated as such by the sovereign power; Blackstone is referred to there.

19. For us these authorities need not and perhaps should not be looked into; in Basha the Supreme Court opined that it would be possible for the Mohammadans

to set up a University on their own, but what they could not be certain about, in setting such an Institution up, would be the matter of recognition of the degrees.

20. It is not stated clearly in Basha what exactly this recognition means; however, with all due respect, we assume that the recognition of the degree would mean recognition by the sovereign power and all its subordinates of the validity and reliability of the degrees to be granted.

21. Basha clearly stated that the certainty of recognition of a University degree could be had by the Mohammadan community, if the University were brought into existence by the Legislature. In paragraph 26, on the left column of page 673 of the said report his Lordship the then C.J. said as follows :

?It seems to us that it must have been felt by the persons concerned that it would be no use bringing into existence a University, if the degrees conferred by the said University were not to be recognised by the Government?

It was later on said in the same left column :

?...it would not be possible for the Muslim minority to establish a University of the kind whose degrees were bound to be recognised by Government and therefore it must be held that the Aligarh University was brought into existence by the Central Legislature and the Government of India. If that is so, the Muslim minority cannot claim to administer it, for it was not brought into existence by it. Article 30 (1), which protects educational institutions brought into existence and administered by a minority, cannot help the petitioners...?

22. In our respectful reading this was the cornerstone of the Basha judgment. Their Lordships held the University to be different from the preexisting Mohammadan College; it is noted by their Lordships that there were long negotiations and a tussle between the Mohammadan community and the then Government; the Government did not wilt to the Mohammadan wish to have a Mohammadan institution for the benefit of the Mohammadan community, if not exclusively, at least substantially; this was not acceded to by the Government.

23. The Mohammadans gave way; they took what they got. In the affidavit before us the repeated requests made by the Mohammadan community for their own College are mentioned in several places. Mr. Subramaniam took us through those paragraphs to demonstrate that the wish of the community to set up a University of their own was indeed there, and they tried very hard, no doubt, to have their wishes granted.

24. India of 1920 is not same as the India of 2005 or 2006. Section 3 (28) of the General Clauses Act, 1897 as amended up to date clearly says that the India of 1920 is British India; we do not have to go to a General Clauses Act definition to know that it was not a country where there were different political parties of any real power or importance; it was not an India where one community could wait for a more supportive and sympathetic political party to come in power and then gain their objective; there was no democracy. What the British said, went. For

any public achievement the people of India, whether Mohammadans or not, had to be in the good books of the English people. Any other achievements had to be made underground. It was in this context that the University was set up by the then ruling Government; as soon as it was incorporated under the auspices of the English Government and the English Legislature, the University had all success and all support from the very beginning; the Mohammadan community chose the politically right path of inviting high English personages like Lord Lytton to be associated with their College; once they gave way to the manner in which the then Legislature desired to set up the University, the degrees of the University had full and 100% value. The degrees of a University, even if it could be set up independently then, which was in the bad books of the English Government, but wholly Mohammadan and wholly green, and perhaps wholly good, was of no practical value; it would either die or go underground. The other University, which was set up by the Act of 1920 started with a prospect of prosperity and prospered it has, right until date.

25. We are aware that their Lordships of the Supreme Court have not looked at the issue in the light that we have respectfully used above, but we feel confident, again respectfully, that we have not gone against what the Supreme Court has stated but only tried to support it, such support being necessary in the face of the current challenges.

26. It is on record that the finances of the Aligarh Muslim University became the headache of the Government after incorporation; it is on record that some 74 acres of extra land went to the Aligarh Muslim University as part of the prosperous setting up process; it is provided in the Act itself that the fund of Rs. 30 lac would be utilized for recurring expenditure; this means that the Muslim fund would help the University and die out and no Muslim nucleus would remain even in the accounts of the Aligarh Muslim University.

27. In the Basha case certain supervisory powers of administration were clearly pronounced as important, e.g., it is stated in paragraphs 7, 8 and 9 as follows.

28. Section 6, the degree section so to speak, laid down that degrees, diplomas and other distinctions of the University shall be recognized by the Government like those of any other University. Section 8 provided that the University shall be open to all persons of either sex and whatever race, creed or class. Section 13 provided that the Lord Rector shall have the right to cause an inspection to be made and also cause an inquiry to be made. The Court had to comply with these provisions; the Lord Rector could issue directions and after explanations were considered his directions had to be complied with by the Court of the University. Section 14 contained the provision for the visiting board which also had power to inspect; it had annulling powers; the Visiting Board also had overriding powers. Although the Court had to be composed in the beginning of Muslims only, their Lordships said in paragraph 9 of the Basha judgment that there was no condition that the Lord Rector had to be of the Muslim community.

29. A very great attempt was made before us to show that the Basha case, in any event, needed guarded reading in view of later Supreme Court cases.

30. It was said that in the PAI case (2002) 8 SCC 481, the Supreme Court has, in a much larger Bench than the Basha Bench gone into the issue of Governmental control of even minority Institutions. The argument therefore ran, that the administrative control by, say, the Lord Rector or the Visiting Board, would not be factors robbing the Aligarh Muslim University of its minority status today in the light of the PAI judgment. We are of the opinion that this views the coin from a side, which is seriously opposite and wrong. That a minority institution, for the purpose of stopping maladministration and gross unfairness, is subject to Governmental control does not mean that when it is to be decided whether an institution is a minority institution or not, the factors of Governmental control ought to be discounted altogether. That would be a complete misreading of PAI and it would be viewing PAI from the wrong and opposite angle; that minority institutions can be controlled does not mean that control of institutions by the Government does not tend to show an institution up as basically a nonminority institution; when one is considering the degree of control permitted for a minority institution, one assumes the minority status; when the minority status or the nonminority status is not admitted or assumed, the factor of administration and control by free or nonminority groups becomes not only important, but very important.?

31. Reference has been made to the St. Stephen's College case about the importance of administration in determining minority status. The report is at (1992) 1 SCC 558. Brother Bhushan in his Lordship's judgment has also dealt with the importance of administration as a determinative factor for judging minority status. I fully agree with his Lordship.

32. In answering Question 3 (a) in the TMA PAI case, Kripal C.J. said at page 587 of the report above mentioned as follows :

?Q. 3. (a) What are the indicia for treating an educational institution as a minority educational institution? Would an institution be regarded as a minority educational institution because it was established by a person(s) belonging to religious or linguistic minority or its being administered by a person(s) belonging to a religious or linguistic minority?

A. This question need not be answered by this Bench; it will be dealt with by a regular Bench?.

33. That the question has been left unanswered by the Bench does not mean that all earlier Supreme Court Cases of lesser strength are overruled; one has to read the earlier cases and the openness of the question all together. We in the Division Bench of the High Court are in the happy position that we have no problem in following St. Stephen's and the other cases.

34. In our respectful opinion, the question of establishing and administering an

institution is infinitely the most relevant at the point of time of its coming substantially into being. Attention must be focussed at that point of time. Who established it? Who was then administering it? What was the purpose of establishing it? The answers to these questions will enable the Court to determine whether the institution is a minority one or not. We are of the respectful opinion that not one of these questions can be held to be irrelevant in the matter of ascertaining whether an institution is a minority one or not. More than this on this issue we do not have any courage to say.

35. The question of administration in 1920 after the Act came into being was gone into in Basha. The College and the Union however argued that the point of time for our inquiry is much before, perhaps even in 1870, when the M.A.O. College was founded. We do not agree; there is no doubt that the M.A.O. College, if it had remained as such would be a minority institution. The issue before us is not whether the MAO College was a minority College or not. The issue before us is whether the Aligarh Muslim University of 1920 is a minority institution or not. That certainly came into being in 1920. Whether it was established and administered by the minority community through the year 1920, is a question, which we must answer by taking into account both Basha and the 1981 Act. This brings us to the crux of the issue, i.e. whether the MAO College and the Aligarh Muslim University are one and the same thing and the process of the incorporation in 1920 is no more than something superficial, something procedural, some mere process, which cannot touch the substance of the matter.

36. We do not here again wish to set down under two tables the items in Aligarh Muslim University, which were green and the items in Aligarh Muslim University, which were free, so to speak, white. The Supreme Court has done so in Basha; the history of the Mohammadan tint has been considered; the passing of all property of the Muslim association and the Muslim College, the passing of all their bequests and receipts to the University have been considered by the Supreme Court; their Lordships have considered all factors and we simply have to follow them. In following them, we cannot escape the conclusion that their Lordships treated the MAO College and the Aligarh Muslim University as two different and distinct entities; one was set up by the Mohammadan community and the other by the Legislature; one was affiliated to the University of Allahabad and was unable to grant degrees of its own; the other was set up by an Act of legislature and a Section permitted it to grant degrees as recognised as those of any other University; the one had Mohammadans completely in control of administration; the other had serious supervisory control over the Mohammadan Court by, inter alia, the Board; one had building, property and some money; the other had, may be the same building, but much more property and unlimited English funds.

37. Their Lordships did not opine that the MAO College permeated into the Aligarh Muslim University, or that if it had changed anything, it had only changed into a dinner jacket from a Sherwani.

38. In the face of this, Parliament passed the said Act of 1981; the one and the most important subsection in the said Act is subsection (1), which reads as follows :

2.(1) "University" means the educational institution of their choice established by the Muslims of India, which originated as the Muhammadan AngloOriental College, Aligarh and which was subsequently incorporated as the Aligarh Muslim University?.

39. Several other amendments were made in 1981, but this subsection is the key to the lock. Is this subsection good? Can this and Basha subsist? These are the basic questions.

40. The University was at pains to submit that this subsection and Basha cannot subsist; if this subsection were before the Basha Court, according to them, the decision would have been otherwise; they relate to the test of Prithvi Cotton, (1969) 2 SCC 283. According to them Section 2(1) made all the difference; further according to them, this difference the Parliament was entitled to make.

41. Thus, we proceed on the basis that Section 2 (1) and Basha cannot subsist. We agree with the University to this extent, and to this extent therefore, we respectfully disagree with the Hon'ble Single Judge, who has read down Section 2 (1) only but not struck it down. But was Parliament entitled to insert Section 2 (1)? The point is the point of Parliament being disentitled to assume the role of a Court of appeal in regard to judgments of Courts of law. There are two ways, basically, a judgment can get overruled. First, it might be by direct appeal; that is not possible in Basha; in other matters, it might be that the same issue comes up before a Court of higher authority and the earlier precedent is disapproved. This is another equally effective way of overruling in law; if the High Court had said that X is a minority institution in one case and thirty years later, the Supreme Court had said no, X is a nonminority institution, the High Court's judgment would get substantially overruled, practically as effectively as an appeal then and there would have overruled it.

42. Either way of overruling a judgment is forbidden to Parliament. Several cases in regard to this resolution of conflict between Court cases and legislative Acts have been considered by the Hon'ble Single Judge and also cited before us. Brother Bhushan has also referred to those.

We mention only three below :

(i) 1989 (3) SCC 488, Ujagar Prints (II) v. Union of India.

(ii) 1997 (8) SCC 522, S.S. Bola & Ors. v. B.D. Sardana.

(iii) 1996 (7) SCC 637, Indian Aluminium Company v. State of Kerala.

43. We refer specifically however, to a case given by Dr. Dhawan, a very recent one, being the case of Virender Singh Hooda & Ors. v. State of Haryana & Anr., (2004) 12 SCC 588. At page 610 in paragraph 46, the following sentence occurs

in the beginning :

?It is equally wellsettled that the legislature cannot by a bare declaration, without anything more, directly overrule, reverse or override a judicial decision; it may, at any time in exercise of the plenary power conferred on it by the Constitution render a judicial decision ineffective by enacting a valid law on a topic within its legislative field, fundamentally altering or changing with retrospective, curative or neutralising effect the conditions on which such decision is based [I.N. Saksena v. State of M.P., (1976) 4 SCC 750: 1977 SCC (L&S) 36].?

44. This is the test that we apply. In our opinion, the test applies on all fours. Section 2 (1) is an enforced declaration of substantial identity. Even according to the University, on the basis of Section 2 (1) the minority status has to be declared. Thus, they themselves argue that the definition is a definition of substantial identity as between the Mohammadan College and the incorporated University.

45. The Supreme Court did not hold so; it held exactly otherwise; it was fully aware (said with the greatest of respect) of what it needs for an institution to qualify as a minority institution; it never said that incorporation and incorporation alone as a process was the sole factor why their Lordships were deciding the University to be a nonminority one; numerous factors were considered by their Lordships; by consideration of those factors, their Lordships reached a conclusion of separation, of distinctness, as between the minority College and the nonminority University.

46. What Section 2(1) does is that it both overrules the view taken by the Supreme Court of the situation prevailing in 1920 and it lays down, practically in so many words, that the University is an Article 30 establishment.

47. Why do we say that it does so? Because Section 2 (1) states that the University was only subsequently incorporated from and out only of the Anglo Oriental College, which was already there, and if that is so, and if there is no distinction between these two, then, because of the process of incorporation and the process of incorporation only, it is impossible to say that the minority institution has lost its minority character.

48. We have said that in Basha the Supreme Court took a view of the 1920 situation; the view was a reasoned view; there were many factors, which persuaded their Lordships to come to a final decision that the Aligarh Muslim University was different from the MAO College and was so substantially different as to make the one a free institution notwithstanding the other being a minority one. By Section 2 (1) the reasoning and the decision are directly ridden roughshod over by Parliament; it does away with the reasoning by enforcing by way of declaration that the MAO College became the Aligarh Muslim University by incorporation and that the one is the other excepting for incorporation and incorporation alone; at the same time it lays down in the definition a proposition;

the necessary corollary of which is a statement that the Aligarh Muslim University partakes of the same minority status as its substantially indistinguishable predecessor had, that predecessor being the MAO College. The necessary corollary is a very close second step and so close as to be practically indistinguishable from the definition itself. Section 2 (1) therefore seeks to state practically in stark terms that Parliament has overruled the Basha decision. This Parliament is not entitled to do.

49. We are again grateful to Dr. Dhawan for giving us authorities for the proposition that if a deemed provision is introduced by way of a statutory fiction or enactment, the Court must proceed consequently thereupon also, and not give the definition a truncated meaning by stopping with the definition and refusing to give it its due consequences also.

50. The root case is the House of Lords decision in the Finsbury Borough Council case, reported at 1952 Appeal Cases 109: (1951) All ER 587.

51. This was approved in the case of Arooran Sugars Ltd., (1997) 1 SCC 326, see paragraph 11.

52. The Supreme Court reproduced the following dictum of Lord Asquith :

?If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied itThe statute says that you must imagine a certain state of affairs. It does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs.?

53. The consequence therefore is, that the Court cannot stop from giving effect to the consequence of Section 2 (1). What is this consequence? The consequence is that Aligarh Muslim University becomes a minority institution. Is it a remote consequence? Not at all. Is it a direct consequence? Most certainly yes. Is it a proximate consequence? The answer is that it is so proximate that it is hardly possible to call it even a mere consequence of Section 2 (1); it was as if Parliament had said the Aligarh Muslim University is a minority institution, full stop.

54. The learned Single Judge in the Court below has opined that this case satisfied the test of Parliament seeking brazenly to overrule a judicial decision. We respectfully agree.

55. In the original 1920 Act, also, there was a definition. The definitions had not gone up to Section 2(1) at that time; Section 2 (h) of the 1920 Act originally defined the term University as follows:

?2 (h) `University" means the Aligarh Muslim University.?

56. This definition is changed; this Aligarh Muslim University is made to be

substantially indistinguishable in form and succession from the MAO College; the definition Section might be a small one, but it is a vital one. Parliament had no authority in the face of the Basha ruling to make this type of change and sit in appeal or sit in review over a five Judge decision of the Supreme Court. It was not a mere change of basis; the basis which prevailed in 1920 had been looked at by the Court and the view had been taken thereon. A deemed fiction changing that basis by way of a definition section is no different from saying that the decision is overruled and the view is not what the Supreme Court had taken but the view is, as we the Parliament now say it is. We are quite clear in our minds that Parliament overstepped its limits.

57. Just before 1981 there was another Amendment Act of 1972, which inserted Section 5 (9A), which defined the boundaries with respect to a University mosque. We think that this is neither here nor there. Even in the original statute Section 5 (2) as one of the object clauses laid down that the University would have powers to promote oriental and Islamic studies and give instruction in Muslim theology and religion and to impart moral and physical training. This type of mingling of Islamic study alongwith other matters does not at all alter the status of the University to a minority status.

58. Other changes than Section 2 (1) were also made in 1981, but those we will come to later. We must now more fully explain what it is exactly, in the practical world, that has compelled us to inquire into the free or minority of status of this University. There have been time gaps in the list of dates and years in the history of the Aligarh Muslim University, which would make Rip Van Winkle look like suffering from lack of sleep. From 1920 until 1947 or 1950, nothing much happened; it was a period of dormancy. There were amending Acts of 1951, 1965, 1972 and 1981; there was a Basha case in 1967⁶⁸; it was, so to speak just a little stirring in bed, but not really getting out of it, because the nonminority institution continued to be nonminority institution through the Basha decision. The 1981 amendments were made, but those remained in the book; it hardly touched anybody; at least it did not touch anybody badly enough for him to come to Court or raise any public issue in the media. Dr. Dhawan said that after the 1981 Act, the University was awaiting the PAI decision; it needed a decision for its stand on reservation. May be so, but it awaited in a state of complete dormancy. There might have been committees within the University thinking of what to do if it is a minority institution, but the waves never went out of the University pond. Then came 2004²⁰⁰⁵; examinations were held on the 31st of January, 2005 for the purpose of filling up 157 posts in the stream M.D., M.S., i.e. all Post Graduate Medical Courses. The qualification needed for these studies is that the students have to be already a qualified MBBS, i.e. a qualified practitioner. The Post Graduate Medical Course of the Aligarh Muslim University has been there for a long time and it is a reputed one. Many Post Graduate Doctors from the Aligarh Muslim University will be found in many a reputed Hospital and Nursing Home. We believe this to be so and our belief, in spite of our giving it expression during hearing, was not contradicted by anybody.

59. 50% of these 157 seats, (we shall not bother about the fraction) were attempted to be reserved for the Mohammadan students for the 2005 examinations.

60. The Mohammadan reservation there has never been for the last 85 years. The University was only in name a Muslim University. There were institutional reservations, but those are possible even for free institutions. The minority status might have been discussed in the private Halls of the University; we do not know about that. The claiming of a Muslim quota came for the first time for the Post Graduate Doctoral courses starting in the year 2005 and the gap is from 1920 to 2005.

61. Examinations were held; the Muslim quota has been given effect to; 50% seats have been filled up by Mohammadan students who have been given preference on the basis of their religion; students have felt aggrieved; they have come before the Court; criticism was made that only one or two came first, and then in groups, and mostly after the first interim order had been passed by the Court in a writ petition.

62. That might be so, but we are herein concerned with the claim of the Muslim reservation after long 85 years; we do not know what the practical effect of a change of a free post graduate doctoral course into a minority reserved post graduate doctoral course will be; it is not for us to inquire into the practicalities. It is for us only to note facts and to go about the law of the matter.

63. The Muslim reservation was claimed on the basis of and solely on the basis of the 1981 amendments; if there were no amendments in 1981, this litigation would not be on. Two other provisions entered in 1981 by way of amendment are, in our opinion, material, but the others, so far as this Court is concerned, can remain on the statute book.

64. The next amendment after Section 2 (1) is Section 5 (2) (c). This is set out below :

75 (2)(c) to promote especially the educational and cultural advancement of the Muslims of India?.

65. We are of the opinion that if the University is free, which according to our judgment it is, this subsection cannot survive. It is flatly discriminatory. If a clause like this were to be introduced into the Charters of the Banaras Hindu University directing that it should promote especially the educational and cultural advancement of the Hindus of India, it would be discriminatory. This new Section 5 (2) (c) is discriminatory for exactly the same reason. It would be a wrong view to take that by introducing just Section 5 (2) (c) the Act has so changed the basis or the whole situation as to cause the Court to take a different view from Basha. It would be placing an overmuch importance on a comparatively small thing. The main issue is Section 2 (1); the decision on that has to shape the decision on Section 5 (2) (c); we are of the clear opinion that it is not the other

way round.

66. The cross appellants in the Court below asked for striking down of Section 2 (1) and Section 5 (2) (c); they did not specifically ask for striking out of another amendment which is certainly related to the minority issue.

67. In the preamble of the 1920 Act, it is stated as follows :

?An Act to establish and incorporate a teaching and residential Muslim University at Aligarh?.

By the 1981 Act, the words "establish and" have been removed. The reason is very simple; Article 30 uses the word establish; if establishment and incorporation are even kept in proximity, there might be a doubt whether incorporation alone might rob the University of its minority status; incorporation is a single factor, but it is not an unimportant factor. It is a process, but it is a process of a very high order. It is only by incorporation that Universities could be brought into being in 1981, apart from a deemed status being given to it. Leaving the words "establish and incorporate" together would therefore militate with the object and purpose of introduction of Section 2 (1); it was therefore sought to be removed by the 1981 Act.

68. We are of the opinion that this removal is bad and must be struck down. The preamble of the Act must remain as it was.

69. The Supreme Court having taken a view that "incorporation and establishment" are connected and are importantly connected, that view taken in regard to the 1920 situation, cannot be summarily overruled by Parliament so as to bring into existence a new minority institution.

70. We are therefore of the opinion that alongwith Section 2 (1) Section 5 (2) (c) must also fall and there should be a restoration of the preamble as it was.

71. This brings us to a second point, which arose during the course of argument; it was not argued in the Court below, but the Court having felt the necessity of hearing views of both sides on it, put the query to them and answers came forth with all the usual compliance and learned expertise.

72. It is a point of legislative competence. We are concerned with a simple Act of Parliament of 1981. We are not concerned with a constitutional amendment or, as Dr. Dhawan prefers, an exercise of a constituent power by Parliament. Nor we are concerned with any such unprecedented thing as a referendum to the people of India and the change, or part breakdown as per Dr. Dhawan, of the Constitution on the basis thereof. These are different and higher matters. We are concerned only with a simple Act of Parliament, which cannot by itself amend the Constitution. The Aligarh Muslim University is not merely a University, but a field of legislative power. Entry 63 of List I of the 7th Schedule of our Constitution runs as follows :

?The institutions known at the commencement of this Constitution as the

Benaras Hindu University, the Aligarh Muslim University and the [Delhi University; the University established in pursuance of Article 371E;] any other institution declared by Parliament by law to be an institution of national importance?.

73. Section 2 (1) of the 1981 Act defines the Aligarh Muslim University. It is a definition different from what prevailed on the date of adoption of the Constitution. The new purported definition is not mechanical or unsubstantial and not something to which the principle *de minimis non curat lex* is applicable. It is a substantially altered definition of an item mentioned in the Constitution. In our opinion, the definition of any word or item in the Constitution cannot be inserted by Parliament excepting by way of a Constitutional amendment. On this ground, the 1981 Act suffers from the lack of legislative competence.

74. See how this works out in practice. If the 1981 Act were not there, Parliament would be legislating for Aligarh Muslim University, although the State of Uttar Pradesh would be legislating for other Universities situated in the State of Uttar Pradesh under Entry 32 of List II. Parliament could not, say, in 1980, even purport to make a law or cause a subordinate legislation to come into being to the effect that 50% of the Aligarh Muslim University Post Doctoral seats would be reserved for Mohammadans. That is because Basha was holding the field. Aligarh Muslim University was a free University and 50% seats could be no more reserved for Muslims there than for Hindus in B.H.U. So Parliament could not do it in 1980. However, the 1981 Act then came into being. If it is good, then Section 2 (1) changes the free status of the University into a minority status, as a matter of definition and by force. And immediately direct consequences result. The University and its officials boldly put forward the Muslim reservation, which was incompetent even for Parliament to put forward in 1980. How has this power been purported to be assumed? Because of the 1981 Act and none other. So Parliament has given to a University a power to do something, which it was incompetent to do even by legislation; how has it given that power? It has given that power by simple legislation. If that legislation is valid, then it has succeeded in giving power beyond its own ordinary power as per the Constitution, to some other authority. This is absurd; the absurdity occurred because and only because Parliament has sought by a simple Act of Parliament to define a Constitutional institution and field.

75. Parliament is similarly incompetent from another point of view. A minority institution cannot be created by Parliament; only a minority can create it. Whether a minority has succeeded in creating an Article 30 institution of the Constitution or not, is in the peculiar province and jurisdiction of the Courts of law to declare. Parliament is incompetent to declare by, at least a simple legislation, an institution to be a minority institution. If it could do that then it could add to Article 30 by saying A,B,C,D, etc. will be Article 30 institutions. Parliament cannot do it, not at least by a simple Act of Parliament, if by anything else. When a dispute arises as to the minority status, parties come to Court and

the Court takes a view; the taking of this view either results in a declaration or otherwise of the minority status of the institution. In the instant case, the Court had taken a view. The view was taken on facts and on the effect of the rights, liabilities and duties attaching to the institution being the Aligarh Muslim University. It was within the province of the Court to take this view. Once this view is taken, it cannot be dislodged by an Act of Parliament; it cannot perhaps be dislodged by any means, and in this issue the point of changing the basis of the judgment, or brazenly overruling a Court's judgment is not involved. It is a point of incompetence of Parliament. It is only for a Court to decide whether an institution is a minority institution or not; the Court can take a different view at a different point of time, but Parliament has no authority to force the Court to take such a different view in a minority status matter. Just as a carpenter has no power to force the soil, air and sunlight to produce a tree, Parliament has no power to force on to a Society a minority institution. Politics is not permitted in this restricted constitutional field. We would strike down the aforesaid provisions of the 1981 Act on this separate ground alone, and we make it clear that in this and the earlier ground of Parliament directly overruling Azeez Basha, both of us have felt absolutely in agreement.

76. The reliefs, which we ought to grant, have now to be reasoned out; we have not fully heard out the admitted Mohammadan students on the basis of the quota, which we now declare to be invalid. We have heard their appeals and we take their appeals on record. These Post Doctoral courses last for a year or two. Those started in the beginning of the year 2005 and the year is over. We are unable to upset the study programme of these qualified Doctors, who have got in, so far as the records show, perhaps luckily but without any fault of their own. The fault might lie with the University because of its insufficient foresight and its insufficient publicity in taking in as many as 50% Mohammadan students when they were claiming the Mohammadan reservations after 85 years of the incorporation of the University for the first time, but we leave it to the conscience of the University and its key people and its advisors.

77. The University communicated with the Union of India before it claimed the reservation for itself and went ahead with the examinations. The concurrence of the Union was communicated to the University by its letter dated 25/2/2005. The concurrence therefore came far later than the examinations; the concurrence was rendered temporarily invalid within a fortnight by the passing of the interim order of Court. We cannot help saying that people in high positions should have thought a little more about the uncertainty they might be introducing in the career of students before they went ahead with a somewhat sudden claim of a Muslim minority quota.

78. We are unable to dislodge the students, who are studying and we are aware that this will have to be at the cost of the cross appellants, who are 34 in number. Dr. Dhawan was at pains to show how only a few of them might still, in any event, be said to somewhat aggrieved, but we are of the opinion that it will

not serve any useful purpose to enter into these details now, as we cannot grant them much relief. Even the locus standi of the students was challenged at first, but the issue of locus is such a narrow one that it would be impossible to say that none of the cross appellants had in any view of the matter any legal locus standi to challenge the Muslim quota. Locus on the part of the Minority Commission and the Union of India was also challenged by the cross appellants in their turn. We have found these objections to be not worthy of detailed, or even any, discussion in a heavyweight constitutional matter like this. The relief that we grant to the students, if relief those can be called, are spelt out below. Before the 50% claim of Muslim quota, the Aligarh Muslim University had 75% institutional reservation and 25% free admission on all India basis. Dr. Dhawan was at pains to argue that at present an institutional reservation above 50% is not possible. We are however not concerned with institutional reservation as a rule, but with moulding of relief for a year; the issues are thus, so far as we understand, slightly different.

79. On the above basis, the following orders are passed :

(i) The judgment and order under appeal is affirmed excepting to the extent indicated below.

(ii) The Aligarh Muslim University is declared to have always been and is a free institution and not a minority institution within the meaning of Article 30 of the Constitution and that the ruling in Basha is in no way touched.

(iii) Sections 2 (I) and 5 (2) (c) introduced in the Aligarh Muslim University Act of 1920 by the said 1981 Amendment Act are invalid and those insertions are struck out.

(iv) The removal of the words "establish and" from the preamble of the 1920 Act by the 1981 Act is invalid and those words are restored to the preamble.

(v) The claim of 50% Mohammadan quota for the post graduate medical courses by the University is declared as unconstitutional and impermissible and they shall make no claim of minority quota in like or other manner in future.

(vi) The Union's communication dated 2522005 vetting the purported minority status of the Aligarh Muslim University by permitting their claim of Muslim reservation is quashed and set aside.

(vii) The admission of Muslim students made on the invalidly claimed quota of 50% is maintained on account of pure practicality.

(viii) The University shall undertake an exercise of recasting the results of the examinations of 2005 and will ascertain thereby which of the cross appellants would have secured admission instead of which of the Mohammadan students admitted in the 50% quota; alternatively which of the 34 cross appellants would have obtained a more preferred choice of discipline according to their priorities, and instead, which Mohammadan students were permitted to have such

disciplines because and only because of the 50% quota. The exercise shall be made by way of recorded writing and preserved in the documents and records of the University and communication shall be made by the University in this regard to the cross appellants or their advocates on record within a period of a fortnight from the date of completion of judgment.

(ix) The above exercise will not mean that any of the Mohammadan students will be dislodged by any of the cross appellants; the exercise will however mean that if possible, the University will offer the newly seen to be entitled cross appellants disciplines more of their choice, if according to the University they will be able to complete such disciplines within the limited time available in a reasonable manner.

(x) Furthermore, if any of the so seen newly entitled candidates have not secured admission to the Aligarh Muslim University at all and take the examinations for the post doctoral course in 2006, then and in that event, the better result of the two years shall be counted in favour of such cross appellants; it is clarified that such better results will be counted only within the same institutional reservation.

80. In granting the above orders, we are aware that in the Court below the prayer for restoration of the preamble of the Act to its original form was not made; in this type of litigation, however, in our opinion, the procedure of amendment is infinitely less important than the arguments made on the relief, and the necessity of making as quickly as possible one full and compendious order, so far as one particular Court is concerned, at one and the same time.

Ashok Bhushan, J.I have advantage of listening to the judgment dictated by Hon"ble the Chief Justice; I am in full agreement with the order passed by Hon"ble the Chief Justice. However, looking to the issues involved in these appeals, I would like to record my reasons for the orders passed in these appeals.

82. All these appeals have been filed against the common judgment dated 4102005 passed in writ petition No. 15504 of 2005 and other connected writ petitions. The writ petitions were filed in this Court challenging the mode of admission in the Post Graduate Medical Courses of Aligarh Muslim University in so far as it provided for 50% Muslim quota for internal as well as external candidates. The claim of the petitioners before the writ Court was that Aligarh Muslim University is not a minority institution entitled for protection under Article 30 of the Constitution of India nor it can provide for Muslim quota of 50%. All the writ petitioners have passed their M.B.B.S.; they were desirous of seeking admission in P.G. course in the internal quota of the Aligarh Muslim University. The petitioners' further claim in the writ petition is that prior to the examination 2005 which took place on 3112005 there was no such Muslim quota of 50% in the University and in P.G. courses in fact prior to 2005 apart from 25% admission under all India quota 75% seats were filled up by examination conducted by Aligarh Muslim University. The petitioners have also claimed in the writ petition

that Section 2 (1) and Section 5(2)(c) as inserted by Aligarh Muslim University (Amendment) Act, 1981 (Act No. 62 of 1981) be struck down.

83. Notices were issued to the Attorney General since the vires of the Parliamentary Act was under challenge. The Aligarh Muslim University as well as Union of India contested the claim of the petitioners. Both the University as well as Union of India contended before the learned Single Judge that provisions of Aligarh Muslim University 1981 Act are not ultra vires and the Parliament had legislative competence to amend the provisions of Aligarh Muslim University Act, 1920. It was contended that although the Apex Court in Azeez Basha case had declared that Aligarh Muslim University is not a minority institution, the Parliament having legislative competence under Entry 63 of List I of VII Schedule to the Constitution of India was fully competent to change the basis of the judgment. The contentions raised before the learned Single Judge has been elaborately noted by the learned Single Judge in the impugned judgment, which need no repetition in these appeals.

84. We have heard Sri S.S. Ray, learned Senior Advocate, Dr. Rajeev Dhawan, learned Senior Advocate appearing for the Aligarh Muslim University and Sri Gopal Subramaniam learned Senior Advocate, who has appeared on behalf of Union of India and also represented the learned Attorney General of India. Sri Ravi Kant, Senior Advocate, assisted by Sri J.J. Munir and Sri Arvind Srivastava has been heard for the writ petitioners, who are respondents in the appeals filed by Union of India and Aligarh Muslim University. Sri Ravi Kant has also been heard in support of the appeals filed by the writ petitioners challenging the part of the impugned judgment. On behalf of the National Commission for Minority Educational Institutes, Sri Ravindra Srivastava, Senior Advocate, has been heard who has also filed an appeal against the judgment as intervenor. Another intervention application has been filed at the instance of two individuals for whom we have heard Sri S.G. Hasnain, learned Senior Advocate.

85. Sri S.S. Ray, learned Senior Advocate, submitted that Parliament, having legislative competence to legislate on Aligarh Muslim University by virtue of Entry 63 List I of VII Schedule of the Constitution of India, had amended the Aligarh Muslim University Act, 1920 by 1981 Amendment Act which entirely changed the basis of the Apex Court judgment in S. Azeez Basha & Anr. v. Union of India etc., AIR 1968 SC 662 (hereinafter referred to as Azeez Basha's case). The Amendment Act, 1981 is in consonance with the history of the establishment of the Aligarh Muslim University. Relying on the Apex Court judgment in Kaveri Water Disputes Tribunal's case reported in 1993 Suppl (1) SCC 96, it is submitted that the legislature under the Constitution of India had, within the prescribed limit, power to make laws prospectively as well as retrospectively. By exercise of those powers the legislature can remove the basis of a decision rendered by a competent Court thereby rendering the decision ineffective. It is submitted that by amendment brought by 1981 Act specially in definition of the University, i.e., in Clause (sic) 2(I) and amendments brought in Section 5(2)(c),

which are retrospective, the basis of the judgment of the Apex Court in Azeez Basha's case has gone and the University is a minority institution entitled to reserve 50% seats for muslim students. It is further contended that none of the writ petitioners are entitled for any relief by this Court since either they had already been admitted in Aligarh Muslim University or have joined other institutions or have not turned for Counselling except one petitioner, Dr. Naresh Agarwal, who did not appear in the entrance test. It is submitted that relevant history of the establishment of Aligarh Muslim University leads to only one conclusion that it was established by muslim minority. Reliance has also been placed on Paragraph 13.19 of the Constitutional Law of India (A critical commentary) Fourth Edition by H.M. Seervei. Reliance has also been placed on the Court of Appeal Judgment (1939)1 KB 363, Pratt v. Cook Son and Company (Sant Paul) Limited. For the principle that a legislature is fully competent to change the basis of a judicial decision to make the judgment ineffective, reliance has been placed on 1969(2) SCC 283, Sri Prithvi Cotton Mills Limited v. Broach Borough Municipality; 2003(5) SCC 298, Bakhtawar Trust v. M.D. Narain; and 2004(1) SCC 712, Dharam Dutt v. Union of India.

86. Dr. Rajeev Dhawan, elaborating the submissions on behalf of the Aligarh Muslim University, contended that writ petitioners are not entitled for any relief by this Court. It is submitted that appellants have no quarrel with the finding and ratio of Azeez Basha's case. It is submitted that parliament whose duty is to protect the fundamental rights of citizen, as a measure of positive intervention, brought 1981 amendment retrospectively amending 1920 Act to change the very basis of the judgment of the Apex Court in Azeez Basha's case. The parliament has every jurisdiction to disagree with a judgment of the Apex Court. The 1981 Act is not an usurpation of judicial power. The legislature may, by changing the basis of law or changing the basis on which the facts may be legally constitute or changing the date from which the law has application, make a judicial decision ineffective and in the present case changes brought in 1981 Act, specially changes brought in the definition of University in Section 2(1), has changed the very basis of Azeez Basha's case. Present is not a case in which there is usurpation of judicial power but it is a case where amendment in 1920 Act has been brought by legislation for which the parliament is fully competent. Dr. Dhawan has placed reliance on Prithvi Cotton Mills' case and also on several principles laid down by the Apex Court in Indian Aluminium Company v. State of Kerala, (1996)7 SCC 637. Reliance has also been placed on several other judgments of the Apex Court where basis of a judgment was changed by changing the definition in various fiscal statutes. Reference has been given of the judgment of the Apex Court in Udai Raj Sharma, (1968)3 SCR 41 (Deeming provision to cure a defect in a land acquisition case), Prithvi Cotton Mills (1969)2 SCC 283 (Rates under the invalidated Act redefined to make the validating Act valid), Hari Singh (1972) 2 SCC 239 (Meaning of public premises alter retrospectively), Trith Ram (1973)3 SCC 585 (accessing delegation cured by incorporating the notification under the Act), HMT (1975) Supp. S.C.R. 394

(changing the definition of A.P. Gram Panchayat case to validate the rates), Krishna Chandra (1975)2 SCC 302 (definition of luxury tax changed to validate the Act), Misri Lal Jain (1997)3 SCR 714 (validation by obtaining presidential consent), Hindustan Gum (1985) Supp. 2 SCR 630 (validation of Octroi), Utkal Contractors (1988)1 SCR 314 (change of basis to apply to Government forest), Bhooveshwar Singh (1994)6 SCC 77 (change in definition of sales price of stock for compensatory purposes), Orissa v. Gopal Chandra Rath, (1995) 6 SCC 242 (definition of selection committee change), P. Kannadasan (1996) 5 SCC 670 (parliament intervenes in mines matter to cure competence), Indian Aluminium (1996) 7 SCC 637 (basis of tax changed), Lt. Col. Savai Bhawani Singh (1996) 3 SCC 105 (legal incompetence cured), Mahe Beach Trading Company (1996) 3 SCC 741 (legal incompetence cured) and Meerut Development Authority (1996)11 SCC 462 (defect cured by changing the basis in land acquisition law).

87. Dr. Dhawan has further submitted that 1981 Act is exercise of curative and corrective power of the parliament. The statute is declaratory and intended to be retrospective by the very nature of the amendment. The Aligarh Muslim University a pre constitutional institution, is fully entitled for the protection of Article 30 of the Constitution as laid down by the Apex Court in Right Rev. Bishop S.K. Patro, AIR 1970 SC 259 and St. Stephens (1992)1 SCC 558. The minority community had an intent to found the institution for the benefit of the minority being fully qualified for the benefit under Article 30 as per the Apex Court judgment in Very Rev. Mother Provincial, (1970)2 SCC 417. For identifying the minority character of an institution both purpose and presence test are fulfilled. It was founded by muslim resident in India, the impetus to found the institution came from the muslim community, the nucleus of the funds and other contributions came from the muslim community as also other sources, the transformation or conversion of the MAO College into a statutory framework would not by itself deprive the original MAO College of its minority character, there can be little doubt that the claim of MAO College and its successor Aligarh Muslim University was bona fides and not dubious or devious and the regulatory control was consistent with and not destructive of the minority character of the institution. The right to establish and administer under Article 30 are subject to reasonable regulations. Establish means to found the institution and the guarantee of the right to administer is to ensure the autonomy of the institution. Both establish and administer are separated in point of time as laid down in Very Rev. Mother Provincial case (supra). The regulatory control in 1920 Act does not destroy the minority character of the institution as laid down in T.M.A. Pai case, 2002(2) LBESR 933 & 1059 (SC) : (2002)8 SCC 481 : 2002(5) ESC 1. Such control is regulatory in nature and does not come in the way of character of the institution.

88. Dr. Dhawan, elaborating his submissions on locus of the writ petitioners and relief claimed, submitted that none of the writ petitioners belong to All India Merit candidates. The admissions having already made, the writ petitioners cannot be admitted nor can be allotted or reallotted courses in view of the

judgment of the Apex Court in *Madhu Singh*, 2000 (7) SCC 253 and *Mridul Dhar*, 2005 (2) SCC 65. Even if institutional quota is treated as 50%, the number of seats will come under the said quota as 77 and all the petitioners with ranks 1 to 77 has been given admissions. All the writ petitioners except one have filed the writ petition after declaration of the result and most of them filed the writ petitions when an interim order was granted by this Court in one writ petition on 11th March, 2005. The writ petitioners having appeared in internal examination, they have no right to challenge the examination process finding the result not of their liking. Reliance has been placed on the judgment of the Apex Court in *Chandra Prakash Tiwari*, (2002) 6 SCC 127 and *Om Prakash*, 1996 (Supp.) SCC 285. Dr. Dhawan further submitted that parliament was fully competent to amend 1920 Act and no constitutional amendment was necessary in facts of the present case.

89. Dr. Gopal Subramaniam, in support of the appeal on behalf of the Union of India, has raised almost similar contentions, as noted above. Sri Subramaniam contended that *Azeez Basha's* case having itself found that minority can establish University, the mere fact that MAO College was raised to level of an University by act of legislature shall not deprive the minority character of the institution nor the mere change of form of the institution shall have any significance. Sri Subramaniam submits that learned single Judge committed error in holding that rights under Article 30 cannot be claimed by the University which is a corporate body. The submission is that right under Article 30 is for members of the minority community which shall not be lost only because the University has been incorporated by 1920 Act. The existence of statute and the fact that the degrees will be recognised does not militate against Article 30 of the Constitution of India. 1981 Amendment Act was passed for recognition and restoration of character of the institution. The learned single Judge has not considered all the amendments in 1981 Act except Section 2(I). Learned Single Judge has read down the provisions of Section 2(I) whereas Section 5(2)(c) which was very material was not even touched. The deep green history of the institution has not been correctly looked into. The statute is only a vehicle for minority institution and the statute cannot annihilate the character of the institution. 1981 Act is corrective statute amending the provisions retrospectively, although Union of India in *Azeez Basha's* case has taken the different stand but it can take different view on the facts of the present case. The amendment has restored the continuity. Reliance has also been placed on the affidavits dated 27/5/2005 filed before the learned single Judge. Sri Subramaniam has referred to Vol.1 to 4 which has been filed before the learned single Judge containing various materials pertaining to history of establishment of Aligarh Muslim University, various letters written on behalf of the minority community and the addresses of the then Viceroy and Governor General of India. Right of administration under Article 30 can be claimed and reclaimed by minority. Section 2(I) of 1981 Act is declaratory definition, retrospective in character to complete the facts which were incomplete in 1920 Act. It is further contended that 1981 Act has to be read alongwith the

judgment of the Apex Court in T.M.A. Pai's case. All provisions of 1920 Act are part of regulatory provision which are permissible in a minority institution as held by the Apex Court in Ahmedabad St. Xavier's College Society v. State of Gujarat, (1994)1 SCC 717. The view of the learned single Judge that once administration is given away, the minority is lost is not correct. Azeez Basha's case says that control of Government disproves minority character whereas T.M.A. Pai's case accepts regulatory measures. T.M.A. Pai's case lays down comprehensive test for identification of minority. Minority also includes University. Articles 29(2) and 30 cannot jettison each other. There is ample evidence to show that what intended in 1870 was to establish a University. In 1920 Act there was only supervisory control which does not effect minority character. Sri Subramaniam has taken us to different materials of Vols. 1 to 4 filed in the writ petition before the learned single Judge to show that even in 1870 it was intended to establish an University. The first members of the Courts were all muslims. The figures of the Courts shows that there was muslim presence. The right of administration has to be looked into in accordance with the test as laid down by the Apex Court in St. Xavier's case and T.M.A. Pai's case. The fact that non muslims are also members of the Court does not effect the character of the minority. The parliament did not violate any judicial power by 1981 amendment. 1981 amendment was declaratory statute which cleared the ambiguity. In amendment of 1981 Act nonmention of administration is not of much consequence. The committee was in de facto administration. Right of administration followed from definition given in Section 2(l) of 1981 Act. The picture of 1920 Act has to be seen to judge establishment and administration. Sri Subramaniam submitted that 1981 Act is fully within the legislative competence of parliament and is not brazen overruling of Azeez Basha's case. By 1981 Act the basis of Azeez Basha's case has been changed. In view of 1981 Act the Aligarh Muslim University is entitled to be treated as a minority institution. The Aligarh Muslim University being autonomous body is fully entitled to formulate its procedure for admission. The approval of Union of India was not required for the admission policy in postgraduate course and only concurrence was accorded by the Union of India to the admission policy providing for 50% reservation for muslim students. The writ petitioners are not entitled for any relief under Article 226 of the Constitution of India.

90. Sri Ravindra Srivastava, Senior Advocate, has appeared on behalf of National Commission for Minority Educational Institutes as intervenor. It is contended by Sri Srivastava that ratio of Azeez Basha's judgment is in paragraphs 23 and 26 and the ratio is that since it was incorporated by the Act it cannot be held to be established by muslim minority. The reasoning of the learned single Judge that basis of the judgment is not changed is incorrect. He contended that either the duty of the Court was to declare 1981 Act ultra vires or to uphold the minority character of the Aligarh Muslim University. He submitted that nothing prevented the legislature to intervene and declare by amending the Act which required for changing the basis. The amendment in definition clause, i.e., Section 2(1)

embraces entire history of fact and history of legislation. It reenforced de facto establishment and dejure culminated the process of establishment. The incorporation is integral part of establishment without which no minority can qualify for protection under Article 30 of the Constitution. The character of the institution was always minority and incorporation was only affirmation and declaration. After 1981 the judgment of Azeez Basha's case has ceased to be relevant. It is not a case of brazen overruling but it is a case of change of basis.

91. Sri Ashok Khare, learned Senior Advocate, has appeared on behalf of the muslim students by filing special appeal against the impugned judgment as nonparty appellant. We have granted leave to the appellants to appeal against the judgment. Sri Khare submitted that the admission of the appellants has been quashed by learned single Judge without any notice to the appellant. He contended that the direction of learned single Judge to hold fresh examination was uncalled for. He submitted that there was only one single examination by Aligarh Muslim University from which both internal and muslim quota admissions were made. He submitted that for the next year, i.e., 2006 the examination has already been announced from February, 2006 and neither there is any time left for any fresh admission nor the admissions already made in February, 2005 can be disturbed at this stage. He submitted that appellants after being admitted in February, 2006 have been pursuing their postgraduate course and in view of the judgment of the Apex Court in *Medical Council of India v. Madhu Singh*, 2002(7) SCC 258, no midsession admission can be permitted. He submitted that order of learned single Judge directing for holding fresh examination cannot be carried out. He further submitted that minority quota of 50% was rightly earmarked for muslim candidates. He also submitted that Aligarh Muslim University is a minority institution which was fully justified in providing 50% minority quota for the muslim candidates.

92. Another application for intervention has been filed on behalf of two individuals on whose behalf Sri S.G. Hasnain, Senior Advocate, has appeared. One of the intervenor claimed to be former member of the Court. He has referred to the internal University Act, 2004 which, according to him, is a minority University incorporated in the State of U.P. by an act of State Legislature.

93. Sri Ravi Kant, Senior Advocate, appearing for the writ petitioners, refuting the submissions raised by Counsel for the Aligarh Muslim University and Union of India, submitted that the judgment of the Apex Court in Azeez Basha's case still holds the field. He submitted that the amendments made in Section 2(1) and Section 5(2)(c) are nothing but brazen overruling of the judgment in Azeez Basha's case. He submitted that judgment of Azeez Basha's case is judgment in rem declaring the status of University by which we all are bound. In *T.M.A. Pai's* case (supra) there was no issue of establishment. *T.M.A. Pai's* case does not overrule the judgment in Azeez Basha's case in any manner. Article 30 of the Constitution is a protective right. Government cannot endow that character to any institution. The finding in Azeez Basha's case that muslim had not

established the Aligarh Muslim University cannot be touched by parliament by any declaratory statute. The Government was never in doubt about the character of the institution. The word 'establish' as used in Article 30 has been used in several articles of the Constitution, namely, Articles 26(a) and 28(2) which means to bring into existence. The minority wanted University without control of the Government but they were given the University with full control of the Government. The parliament cannot introduce a friction for which it has no competence. Sri Ravi Kant further submitted that direction of learned single Judge for holding fresh examination requires modification since what appellants pray is not any fresh examination but fresh Counselling on the basis of the examination already held. He submitted that after quashing the 50% muslim quota fresh Counselling is required on the basis of same examination and the order of learned single Judge to that extent requires modification. In support of appeals filed by Sri Ravi Kant, he submits that the learned Judge committed error in only reading down the provisions of Sections 2(1) and 5(2)(c) instead of striking them out as ultra vires.

94. The principal issues, which emerge from the submissions raised by both the parties, are as to whether the Amendment Act, 1981 changes the basis of judgment in Azeez Basha's case so as to hold that Aligarh Muslim University is a minority institution and as to whether the amendment by 1981 Act in Sections 2(1) and 5(2)(c) are valid.

95. Learned Counsels appearing for Aligarh Muslim University as well as Union of India have referred to and relied on the previous history before the establishment of Aligarh Muslim University. It is submitted that MAO College was established by minority and since the establishment of MAO College the idea was to establish an University. The idea which was with the minority ultimately fortified in the establishment of the University. Sri Gopal Subramaniam has placed reliance on the affidavit of K.L Nandwani filed on behalf of Union of India before the learned single Judge containing various enclosures running into Vols. 1 to 4. Reliance has been placed on the scheme of proposed Mohammadan Anglo Oriental College which is at Page 38 of Vol.1. The proposed scheme of Muslim Anglo Oriental College mentioned that 'I think what we mean to found is not a College, but an University, and I hope the members will consent to my proposal that instead of the word College word University may be substituted?'. Reference is also made to the address dated 1811877 on behalf of Anglo Oriental College Fund Committee to Viceroy and Governor General Lytton in which address desire was also expressed that college may expand into an University. The various letters and addresses show that establishment of University was contemplated after establishment of the MAO College and the minority community was keen to establish the University. Serious efforts for establishing the University started since 1911. In the affidavit filed on behalf of the Union of India reliance has been placed on the extract from the 'Aligarh Movement (Origin and Early History)' by Mumtaz Moin' (Vol. 2 Pages 343 to 367). The extract shows that although members of the muslim community were desirous of establishment of a muslim

university but the then Government was not ready to give full control of the University administration to the muslim minority. The then Government wanted to have final decision as to the distribution of power within various University bodies and wanted to reserve final control with itself. Even amongst propagandists of the Muslim community two groups had emerged, one named as Aligarh Party which was agreeable to give control to the Government in the proposed University whereas the other group wanted full autonomy to the muslim minority. The aforesaid facts have been specifically noted at Page 353 (Vol. 2) of the aforesaid Aligarh Movement, relevant extract of which are quoted below :

?It may be mentioned that among the prominent workers of the University movement there had risen two schools of opinion. One group, often referred to as the Aligarh Party, was led by the Raja of Mahmudabad; among its chief representatives, the names of Ajtab Ahmad Khan, Ziauddin and Sheikh Abdullah may be mentioned specifically. They were in favour of giving wide powers to the Government in the constitution of the proposed University. In the other group, Mohamed Ali and Abdul Kalam Azad acted as leaders; they were against Government interference in the police and administration of the University and held that it should be fully autonomous?.

96. The Government insisted that charter of muslim university be in the line of Banaras Hindu University. The Foundation Committee on 19th April, 1915 took a decision that a charter on the lines of Hindu University should be accepted. Thus issue of the full autonomy with regard to University and extent of control by the Government was subject to long debate and deliberation even before the establishment of the University. The then Government was not agreeable to give muslim minority the full control on administration of the University. The above is also demonstrated from Pages 518 and 519 of Vol. 2 which is the presidential address by Hon"ble Justice Sir AbdurRahim in 29th Mohammadan Educational Conference at Pune on December 27/29, 1915. Extract of the address at Page 518 and 519 (Vol. 2) are quoted below :

?I have studied with some care the Benaras Hindu University Act and the correspondence on the subject of the Muslim University. The difficulty of the present position to my mind has arisen mainly from some unfortunate expressions in a letter addressed by Sir HarCourt Butler to the Raja of Mahmudabad on the 25th of September last. They were to the effect that he would meet a Deputation of the Muslim University Foundation Committee, only if they contented themselves with making a formal representation, simply applying for a charter on the basis of the decision on the questions of principle settled for the Hindu University. That has been understood to mean that although the Mahomedans were no party to the negotiations between the promoters of the Hindu University and the Government, although they had been moving for an University long before the Hindus appeared on the scene, and the interest that would be affected in their case as represented in the Aligarh College were larger

and more deep rooted than those of the Benaras College. They had to submit themselves unconditionally to the terms of the Benaras Hindu University Act, so that the section of the Act might be bodily transferred into the Muslim University Act. The position being so understood, the representatives of the community thought that they had been treated with scant consideration and were naturally reluctant to appear before the then Education Member with their lips sealed and their hands and feet bound. After that letter I believe there has been no further correspondence between the Foundation Committee and the Government?.

97. It is thus seen that issue of giving full autonomy to muslim minority was raked up and the then Government was not agreeable to give full control over the University to muslim minority and reserved final say with the Government in the affairs of the University. On insistence of the then Government charter of the muslim university in line of Banaras Hindu University was approved. For the purposes of the present case, the relevant is to see what was the nature and character of the institution which came into existence in 1920. The scheme of 1920 Act and the various provisions contained therein were consciously and deliberately incorporated with purpose and object. The above facts are clear from the previous history before establishment of the University as contained in the affidavits and materials filed by the Union of India before the learned single Judge.

98. It is relevant to have a broad view of the salient feature of 1920 Act before we proceed to examine the nature and character of the institution which came into existence in pursuance of 1920 Act. The preamble of the 1920 Act reads, ? An Act to establish and incorporate a teaching and residential Muslim University at Aligarh?. The most of the relevant provisions of the Act have been elaborately noted and considered by the Apex Court in Azeez Basha's case (supra) which shall also be shortly noticed while noticing the judgment in some detail. It is, however, relevant to refer to some of the provisions of the 1920 Act. Section 3 of the Act provided that first Chancellor, ProChancellor and ViceChancellor shall be the persons appointed by notification of the Governor General in Council. The University was enacted as a body corporate by the name of Aligarh Muslim University. Section 8 provided that the University shall subject to the provisions of the Act and ordinances be open to all persons of either sex and whatever race, creed, caste or class. Section 12(2) provided that with the approval of the academic council and the sanction of the Governor General in Council on the recommendation of the Visiting Board, the University may admit intermediate colleges and schools in the Aligarh District to such privileges of the University as it thinks fit. Section 13(1) provided that Governor General shall be the Lord Rector of the University. Section 13(2) provided that Lord Rector shall have right to cause inspection by such person or persons as he may direct. Section 13(5) gave power to Lord Rector to issue such direction as he thinks fit when the Court does not take within reasonable time the action with the satisfaction of the Lord Rector. Section 14 pertains to Visiting Board which had power to annul any proceeding. Section 15 provided that persons specified in the schedule shall be

Rector of the University. Statute¹ (i) provided that all heads of the local Government shall be rectors of the University and such rulers of State in India and princes and other persons as the Lord Rector may on his own motion or with the recommendation of the Court appoint. Chancellor also could have been appointed persons of eminent position as members on the recommendation of academic council. Section 19 provided that successor to the first ViceChancellor shall be elected by the Court which shall be subject to the approval of the Governor General in Council. Section 22 declared authorities of the University, namely, the Court, the Executive Council, the Academic Council and such other authorities as may be declared by the Statutes as authority of the institution. Section 23 provided that Court shall consist of the Chancellor, ProChancellor and ViceChancellor and other persons as may be specified in the Statute. It also contained a proviso that no person other than a muslim shall be a member thereof. Section 24 provided that Executive Council shall be executive body of the University. Section 28(1) provided that first statutes are those as Statute in the schedule. Section 28(2) provided that no new statute or amendment or repeal of existing statute shall be valid until it has been submitted through the Visiting Board to Governor General in Council and has been approved by the latter. Similar provision is with regard to ordinances in Section 30. Section 32 deals with admission to the University. Section 32(1) provided that admission of students to the University shall be made by an admission committee consisting of the ProChancellor, Principal of an Intermediate college who shall be selected by the Vice Chancellor and such other persons as may be appointed by the academic council. Section 36 related to conditions of service of officers and teachers. Section 36(2) provided that any dispute arising out of contract between the University or any of its officer or teachers shall at the request of the officer or teacher be referred to a Tribunal of Arbitration consisting of one member appointed by Executive Council, one member nominated by the officer or teacher concerned and an Umpire appointed by the Visiting Board. Section 40(1) of the Act provided that if any difficulty arises with respect to the establishment of the University or any authority of the University, Governor General in Council may by order make an appointment or do anything which appears to him necessary for the proper establishment of the University or any authority thereof. Statute 20 of the first statutes dealt with appointment of the teaching staff and other appointments.

99. The scheme of the Act as noticed above defines the nature and character of the institution which came into existence by Act No. XL of 1920. The amendments were made in 1920 Act after enforcement of the constitution, namely, Aligarh Muslim University (Amendment) Act, 1951 and the Aligarh Muslim University (Amendment) Act, 1965. The aforesaid amendments were challenged before the Apex Court in five writ petitions under Article 32 of the Constitution of India. In the writ petitions it was claimed that Aligarh Muslim University is a minority institution and the provisions of the amendment in so far as they effect and curtail the rights of minority to administer the institution under

Article 30 are ultra vires and liable to be struck down. The writ petitions were contested by the Union of India. The stand taken by Union of India in those writ petitions was that Aligarh Muslim University was not established by minority and it was established by the legislative Act. Those writ petitions were decided which is the Azeez Basha's judgment.

100. The main issue arose in Azeez Basha's case was as to whether the Aligarh Muslim University is a minority institution entitled for protection under Article 30. The Apex Court held that Aligarh Muslim University was neither established nor administered by muslim minority, hence the challenge to the aforesaid 1951 and 1965 Acts as ultra vires to Article 30 is unfounded. For purposes of this case it is necessary to know as to what is the basis of Azeez Basha's judgment in holding that Aligarh Muslim University is not a minority institution. In Azeez Basha's case (supra) the Apex Court considered the entire scheme of 1920 Act and the Statutes and also the previous history and after analysing the same it was held that Aligarh Muslim University is not a minority institution entitled for protection under Article 30. The main reasons and basis are clearly noted in the judgment itself. Several provisions of 1920 Act has been relied in extenso in various paragraphs of the judgment. It is relevant to note the main reasons and findings of Azeez Basha's case on the basis of which the Apex Court came to the conclusion that the Aligarh Muslim University is not a minority institution. Following are some of the main reasons given by the Apex Court in Azeez Basha's judgment for coming to the conclusion that Aligarh Muslim University is a minority institution:

(i) According to Section 8 of 1920 Act, the University shall be open to all the persons of either sex and of whatever race, creed or class. Relevant observation of the judgment are as follows :

“Section 8 provided that “the University shall subject to the provisions of this Act and the Ordinances, be open to all person of either sex and of whatever race, creed or class”, which shows that the University was not established for Muslims alone.”

(ii) According to Section 13 of 1920 Act the GovernorGeneral shall be the Lord Rector of the University. Section 13 gives power of inspection and enquiry to the Lord Rector and according to Section 13(5) he had power to issue direction as he thought fit and the Court was bound to comply with such directions. Following was held in paragraph 8 :

“Finally the Lord Rector was given the power where the Court did not, within reasonable time, take action to the satisfaction of the Lord Rector to issue such directions as he thought fit after considering any explanation furnished or representation made by the Court and the Court was bound to comply with such directions. These provisions clearly bring out that the final control in the matter was with the Lord Rector who was the GovernorGeneral of India.”

(iii) Section 14 of 1920 Act provided for Visiting Board of the University

consisting of Governor, the members of the Executive Council, the Ministers, one member nominated by the Governor and one member nominated by the Minister in charge of Education. The Visiting Board had the power to inspect the University. The Visiting Board was also given power by an order to annul any proceedings of the University. Following was held in Paragraph 9 of the judgment :

?The Visiting Board was also given the power, by order in writing, to annul any proceedings not in conformity with the Act, Statutes and Ordinances, provided that before making such an order, the Board had to call upon the University to show cause why such an order should not be made, and to consider such cause if shown within reasonable time. This provision, though not so all pervasive as the provision in Section 13 of the 1920Act, shows that the Visiting Board had also certain overriding powers in case the University Authorities acted against the Act, Statutes and Ordinances. There is no condition that the Lord Rector and the members of the Visiting Board must belong to the Muslim community.?

(iv) Sections 28, 29, 30, 32 and 40 were also referred to and relied. Section 28 provided that no new Statute or amendment or repeal of an existing Statute shall have any validity until it has been submitted through the Visiting Board and has been approved by the GovernorGeneral in Council. Similar provision was there in Section 30 (2) with regard to Ordinances. In event of any dispute between the Executive and the Academic Council regarding power to make Ordinances the matter was required to be referred to Tribunal consisting of three members. Section 32 provided for admission of the students in the University. Section 40 further give power to the GovernorGeneral in Council to issue necessary order or make any appointment if any difficulty arises with respect to the establishment of the University. Following was held in paragraph 11 of the judgment which is quoted below :

?11.....There is an important provision in Section 28 which laid down that no new Statute or amendment or repeal of an existing Statute shall have any validity until it has been submitted through the Visiting Board (which may record its opinion thereon) to the Governor General in Council and has been approved by the latter, who may sanction, disallow or remit it for further consideration. This provision clearly shows that the final power over the administration of the University rested with the GovernorGeneral in Council.....

Section 30(2) provided that ?the first Ordinances shall be framed as directed by the GovernorGeneral in Council and subsection (3) thereof laid down that ?no new Ordinance, or amendment or repeal of an existing Ordinance shall have any validity until it has been submitted through the Court and the Visiting Board (which may record its opinion thereon) to the GovernorGeneral in Council, and has obtained the approval of the latter, who may sanction, disallow or remit it for further consideration?. This again shows that even Ordinances could not be made by the University without the approval of the GovernorGeneral in Council). If any

dispute arose between the Executive and the Academic Council as to which had the power to make an Ordinance, either Council could represent the matter to the Visiting Board and the Visiting Board had to refer the same to a tribunal consisting of three members, one of whom was to be nominated by the Executive Council, one by the Academic Council, and one was to be a Judge of the High Court nominated by the Lord Rector. This again shows that in the matter of such disputes, the Court which is called the supreme governing body of the University, did not have the power to resolve it?.....

Section 32 provided for admission of students to the University and subsection (4) thereof provided that "the University shall not save with the previous sanction of the GovernorGeneral in Council recognise (for the purpose of admission to a course of study for a degree) as equivalent to its own degrees, any degree conferred by any other University or as equivalent to the Intermediate Examination of an Indian University, any examination conducted by any other authority?". This shows that in the matter of admission the University could not admit students of other institutions unless the GovernorGeneral in Council approved the degree or any other examination of the institutions other than Indian Universities established by law.

Section 40 is important and laid down that "if any difficulty arises with respect to the establishment of the University or any authority of the University or in connection with the first meeting of any authority of the University, the GovernorGeneral in Council may by order make any appointment or do anything which appears to him necessary or expedient for the proper establishment of the University or any authority thereof or for the first meeting of any authority of the University?". This again shows the power of the GovernorGeneral in Council in the matter of establishment of the University.?

(v) In the Act 1920 there is nothing which vests the administration of the University in the Muslim community. The following was held in paragraph 12 which is quoted below :

“(12) This brings us to the end of the sections of the 1920Act. There is nothing anywhere in any section of the Act which vests the administration of the University in the Muslim community. The fact that in the proviso to S.23 (1) it is provided that the Court of the University shall consist only of Muslims does not necessarily mean that the administration of the University was vested or was intended to be vested in the Muslim minority. If anything, some of the important provisions to which we have already referred show that the final power in almost every matter of importance was in the Lord Rector, who was the GovernorGeneral or in the GovernorGeneral in Council.?”

(vi) Strong reliance was placed on Section 6 of the Act. It was held that there was nothing in 1920Act which prevented Muslim community to establish an University but if it did so the degrees of such University were not bound to be recognised by the Government. Section 6 of the Act made the degree

recognisable by the Government. Following was held in paragraph 22 :

?Therefore when the Aligarh University was established in 1920 and by S. 6 its degrees were recognised by Government, an institution was brought into existence which could not be brought into existence by any private individual or body for such individual or body could not insist upon the recognition of the degrees conferred by any university established by it. The enactment of S. 6 in the 1920Act is a very important circumstance which shows that the Aligarh University when it came to be established in 1920 was not established by the Muslim minority, for the minority could not insist on the recognition by Government of the degrees conferred by any university established by it.?

(vii) The Aligarh Muslim University was brought into being by the 1920Act and must therefore, be held to have been established by the Central Legislature which by passing 1920Act incorporated it. Following was held in paragraph 23 which is quoted below :

?(23) It is true, as is clear from the 1920Act, that the nucleus of the Aligarh University was the M.A.O. College, which was till then a teaching institution under the Allahabad University. The conversion of that college (if we may use that express) into a university was however, not by the Muslim minority; it took place by virtue of the 1920Act which was passed by the Central legislature. There was no Aligarh University existing till the 1920Act was passed. It was brought into being by the 1920Act and must therefore be held to have been established by the Central Legislature which bypassing the 1920Act incorporated it. The fact that it was based on the M.A.O. College, would make no difference to the question as to who established the Aligarh University.....It may be that the 1920 Act was passed as a result of the efforts of the Muslim minority. But that does not mean that the Aligarh University when it came into being under the 1920Act was established by the Muslim minority.?

(viii) Statute 8 of the Statute framed under the Act was referred to and relied in holding that even though the members of the Court had to be Muslims, the electorates were not exclusively Muslims. The following was held in paragraph 28 which is quoted below :

?(28) It appears from paragraph 8 of the Schedule that even though the members of the Court had to be Muslims, the electorates were not exclusively muslims. For example, sixty members of the Court had to be elected by persons who had made or would make donations of five hundred rupees and upwards to or for the purposes of the university. Some of these persons were and could be nonMuslims. Forty persons were to be elected by the Registered Graduates of the University, and some of the Registered Graduates were and could be nonMuslims, for the University was open to all persons of either sex and of whatever race, creed or class. Further 15 members of the Court were to be elected by the Academic Council, the membership of which was not confined only to Muslims.?

(ix) There were other bodies like the Executive Council and the Academic Council

which were concerned with the administration of Aligarh University and there was no provision in the Constitution of these bodies which confined their members only to Muslims. The finding was recorded after analysing various provisions of 1920 Act that Aligarh Muslim University was neither established nor administered by Muslim minority. Article 30(1) of the Constitution does not apply to Aligarh Muslim University. Following was held in paragraph 29 which is extracted below :

“(29)..... We are therefore of opinion that the Aligarh University was neither established nor administered by the Muslim minority and therefore there is no question of any amendment to the 1920 Act being unconstitutional under Article 30(1) for that Article does not apply at all to the Aligarh University.”

101. The sheet anchor of the submissions on behalf of the Union of India and Aligarh Muslim University is the Aligarh Muslim University (Amendment) Act, 1981. On the basis of 1981 Act it has been contended that the basis of judgment has been changed and the Azeez Basha's judgment has been made ineffective by retrospectively amending the 1920 Act. To consider the submissions of the parties, it is necessary to look into relevant provisions of 1981 Act. Much emphasis has been laid down by Counsels appearing for Aligarh Muslim University and Union of India on amendment in preamble, long title of the Act, Section 2(1) and Section 5(2) (c) of the 1981 Act. The aforesaid provisions as were contained in original 1920 Act and as amended in 1981 Act are set out below.

102. The above provisions have been said to be declaratory in nature and retrospective in operation. Looking to the nature of the amendment the above amendments do appear to be retrospective in operation. The other relevant provisions as amended by 1981 Act are Sections 8, 16, 17, 18, 20A, 21, 22, 23, 26, 26A, 27, 28, 29, 31, 34 and 35. Section 8 as amended provides, “The ProChancellor shall be elected by the Court in such manner and for such term as may be prescribed by the Statutes”. Section 16 is not material. Section 17(1) as existed in 1920 Act reads, “The successor to the first Chancellor shall be elected by the Court”. To the similar effect there is amendment in Section 18(1). Both these sections cannot have any retrospective operation since according to Section 3 of 1920 Act the first Chancellor, the ProViceChancellor were appointed by notification by the Governor General in Council and which was so done. The above amendments uses the words “shall be elected” which clearly demonstrate that said amendments are for prospective operation. Section 20A relates to Honorary Treasurer. Section 22 contains some minor amendments which have no bearing. Section 23 on which much emphasis has been laid needs to be noted in full. Section 23 as it existed prior to amendment and as amended by 1981 Act are set out below.

103. Amendments in Sections 26, 26A and 27 are not material. Section 28 as amended provides for making new or additional statutes or amendment or repeal of the statutes. A new procedure for statutes has been provided which obviously

is to be followed for future. Amendment in Sections 29, 31, 34 and 35 are not material and those amendments basically are for prospective operation. The amendment of the Statutes contains amendment in constitution of the Court which reveals that different categories of members are to be in Court from different sources. The amendment in Statute 14 regarding constitution of the Court is also for prospective operation.

104. From the various provisions of the Act as amended by 1981 Amendment Act, it is clear that retrospective operation at best can be given to provisions amending the preamble, long title, Section 2(1), Section 5(2)(c) and Section 8, most of other provisions are for prospective operation regarding constitution of various authorities and other allied matters. The provisions which are of prospective nature can have no effect on the basis of Azeez Basha's case (supra) in the present case. The issue to be answered in the present case is as to whether the Aligarh Muslim University was established by minority community in the year 1920 and administered by it after its establishment. What is to be seen and to examine is as to what was the nature and character of the body which came into existence in 1920 and whether it qualified for protection under Article 30 of the Constitution.

105. The submission on the strength of 1981 Amendment is that the amendment Act, 1981 changes the very basis of the judgment of Azeez Basha's case by retrospectively amending 1920 Act and had the Amendment Act, 1981 was before the Court deciding the Azeez Basha's case, the decision would have been otherwise. It is submitted that although the Legislature cannot overrule a judicial decision but it can always change the basis on which the decision is given to make the judgment ineffective. The submission is that 1981 Act is declaratory in nature and has been enacted in exercise of curative power of the Parliament. The Parliament has legislative competence with regard to Aligarh Muslim University by virtue of Entry 63 List I Schedule VII of the Constitution of India. It has been contended that 1981 Act cannot be termed as brazen overruling of the Azeez Basha's judgment.

106. Our federal Court long back in *Mt. Atiq Begum & Anr. v. United Provinces*, AIR 1941 F.C. 70, held that the power of validation must be taken to be ancillary or subsidiary to the power to deal with the particular subjects specified in the Lists. There are numerous incidences of passing a validating statutes to cure invalidity or illegality found by a judicial decision in taxing statutes and other statutes. The oft quoted and most celebrated enunciation of principle in above regard was laid down in 1969 (2) SCC 282, *Sri Prithvi Cotton Mills Ltd. v. Broach Borough Municipality & Ors.*. In the said case the Validation Act, namely, Gujarat Imposition of Taxes by Municipalities (Validation) Act, 1963 was passed to remove the basis of the judgment of the Apex Court in *Patel Gordhandas Hargovindas v. Municipal Commissioner, Ahmedabad*, (1964) 2 SCR 608. The provisions of Municipal Borough Act, 1925 provided for rate on buildings or land at certain percentage of the capital value. The Apex Court in the *Patel*

Gordhandas" case had held that the word "rate" has acquired a special meaning in English Legislative history and practice and also in Indian Legislation and it meant a Tax for local purposes imposed by local authorities. The basis of such tax was the annual value of the lands or buildings. After the judgment of the Apex Court the Validation Act, 1963 was passed and in that context considering the provisions of Section 3 of the Validation Act the principles were laid down in paragraph 4 of the judgment. Paragraph 4 of the said judgment is extracted below :

¶4. Before we examine Section 3 to find out whether it is effective in its purpose or not we may say a few words about validating statutes in general. When a Legislature sets out to validate a tax declared by a Court to be illegally collected under an ineffective or an invalid law, the cause for ineffectiveness or invalidity must be removed before validation can be said to take place effectively. The most important condition, of course, is that the Legislature must possess the power to impose the tax, for, if it does not, the action must ever remain ineffective and illegal. Granted legislative competence, it is not sufficient to declare merely that the decision of the Court shall not bind for that is tantamount to reversing the decision in exercise of judicial power which the Legislature does not possess or exercise. A Court's decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances. Ordinarily, a Court holds a tax to be invalidly imposed because the power to tax is wanting or the statute or the rules or both are invalid or do not sufficiently create the jurisdiction. Validation of a tax so declared illegal may be done only if the grounds of illegality or invalidity are capable of being removed and are in fact removed and the tax thus made legal. Sometimes this is done by providing for jurisdiction where jurisdiction had not been properly invested before. Sometimes this is done by reenacting retrospectively a valid and legal taxing provision and then by fiction making the tax already collected to stand under the reenacted law. Sometimes the Legislature gives its own meaning and interpretation of the law under which tax was collected and by legislative fiat makes the new meaning binding upon Courts. The Legislature may follow any one method or all of them and while it does so it may neutralise the effect of the earlier decision of the Court which becomes ineffective after the change of the law. Whichever method is adopted it must be within the competence of the legislature and legal and adequate to attain the object of validation. If the legislature has the power over the subjectmatter and competence to make a valid law, it can at any time make such a valid law and make it retrospectively so as to bind even past transactions. The validity of a Validating Law, therefore, depends upon whether the Legislature possesses the competence which it claims over the subjectmatter and whether in making the validation it removes the defect which the Courts had found in the existing law and makes adequate provisions in the Validating Law for a valid imposition of the tax.?

107. The Apex Court after considering the Validation Act took the view that faced

with the situation the Legislature exercised its undoubted power of redefining "rate" so as to equate it to a tax on capital value and convert the tax purported to be collected as a "rate" into a tax on land and buildings. The Legislature not only equated the tax collected to a tax on lands and buildings, which it had the power to levy, but also to a rate giving a new meaning to the expression "rate" and while doing so it put out of action the effect of the decisions of the Courts to the contrary.

108. In (1976) 4 SCC 750, I.N. Saxena v. State of M.P., the Constitution Bench of Apex Court again considered the validating statutes retrospectively changing the law thereby rendering the adverse judicial decision ineffective. It was held by the Apex Court that Legislature cannot by a bare declaration, without more, directly overrule, reverse or override a judicial decision, it may, at any time in exercise of the plenary powers conferred on it by Articles 245 and 246 of the Constitution render a judicial decision ineffective by enacting a valid law on a topic within its legislative field fundamentally altering or changing with retrospective, curative or neutralising effect the conditions on which such decision is based. Following was laid down in paragraphs 22 and 23 of the said judgment :

?(22) While, in view of this distinction between legislative and judicial functions, the legislature cannot by a bare declaration, without more, directly overrule, reverse or override a judicial decision, it may, at any time in exercise of the plenary powers conferred on it by Articles 245 and 246 of the Constitution render a judicial decision ineffective by enacting a valid law on a topic within its legislative field fundamentally altering or changing with retrospective, curative or neutralising effect the conditions on which such decision is based. As pointed out by Ray, C.J. in Indira Nehru Gandhi v. Raj Narain, the rendering ineffective of judgments or orders of competent Courts and tribunals by changing their basis by legislative enactment is a wellknown pattern of all validating Acts. Such validating legislation which removes the causes for ineffectiveness or invalidity of actions or proceedings is not an encroachment on judicial power.

(23) In Hari Singh v. Military Estate Officer, a Bench of seven learned Judges of this Court laid down that the validity of a validating law is to be judged by two test. Firstly, whether the legislature possesses competence over the subjectmatter, and, secondly, whether by validation the legislature has removed the defect which the Courts had found in the previous law. To these we may add a third: whether it is consistent with the provisions of Part III of the Constitution.?

109. Again the principles have been elaborately considered and laid down by the Apex Court in (1996)7 SCC 637, Indian Aluminium Co. & Ors. v. State of Kerala & Ors.. Following tests were laid down in paragraph 36 for judging the validity of the Validating Act:

(i) whether Legislature enacting the Validating Act has competence over the subjectmatter;

(ii) whether by validation, the Legislature has removed the defect which the

Court had found in the previous law; and

(iii) whether the validating law is inconsistent (sic consistent) with the provisions of Chapter III of the Constitution.

110. Again in paragraph 56 of the said Judgment the Apex Court summed all the principles after considering the various other decisions of the Apex Court on the subject. Paragraph 56 of the said judgment is quoted below :

?(56) From a resume of the above decisions the following principles would emerge:

(1) The adjudication of the rights of the parties is the essential judicial function. Legislature has to lay down the norms of conduct or rules which will govern the parties and the transactions and require the Court to give effect to them.

(2) The Constitution delineated delicate balance in the exercise of the sovereign power by the Legislature, executive and judiciary.

(3) In a democracy governed by rule of law, the legislature exercise the power under Articles 245 and 246 and other companion articles read with the entries in the respective lists in the Seventh Schedule to make the law which includes power to amend the law.

(4) Courts in their concern and endeavour to preserve judicial power equally must be guarded to maintain the delicate balance devised by the Constitution between the three sovereign functionaries. In order that rule of law permeates to fulfil constitutional objectives of establishing an egalitarian social order, the respective sovereign functionaries need free play in their joints so that the march of social progress and order remains unimpeded. The smooth balance built with delicacy must always be maintained.

(5) In its anxiety to safeguard judicial power, it is unnecessary to be overzealous and conjure up incursion into the judicial preserve invalidating the valid law competently made.

(6) The Court, therefore, needs to carefully scan the law to find out; (a) whether the vice pointed out by the Court and invalidity suffered by previous law is cured complying with the legal and constitutional requirements; (b) whether the Legislature has competence to validate the law; (c) whether such validation is consistent with the rights guaranteed in PartIII of the Constitution.

(7) The Court does not have the power to validate an invalid law or to legalise impost of tax illegally made and collected or to remove the norm of invalidation or provide a remedy. These are not judicial functions but the exclusive province of the Legislature. Therefore, they are not encroachment on judicial power.

(8) In exercising legislative power, the legislature by mere declaration, without anything more, cannot directly overrule, revise or override a judicial decision. It can render judicial decision ineffective by enacting valid law on the topic within

its legislative field fundamentally altering or changing its character retrospectively. The changed or altered conditions are such that the previous decision would not have been rendered by the Court, if those conditions had existed at the time of declaring the law as invalid. It is also empowered to give effect to retrospective legislation with a deeming date or with effect from a particular date. The Legislature can change the character of the tax or duty from impermissible to permissible tax but the tax or levy should answer such character and the legislature is competent to recover the invalid tax validating such a tax on removing the invalid base for recovery from the subject or render the recovery from the State ineffectual. It is competent for the legislature to enact the law with retrospective effect and authorise its agencies to levy and collect the tax on that basis, make the imposition of levy collected and recovery of the tax made valid, notwithstanding the declaration by the Court or the direction given for recovery thereof.

(9) The consistent thread that runs through all the decisions of this Court is that the Legislature cannot directly overrule the decision or make a direction as not binding on it but has power to make the decision ineffective by removing the base on which the decision was rendered, consistent with the law of the Constitution and the legislature must have competence to do the same.?

111. Again in (1997) 8 SCC 522, S.S. Bola & Ors. v. B.D. Sardana & Ors., laid down that when a particular Rule or the Act is interpreted by a Court of law in a specified manner and the lawmaking authority forms the opinion that such an interpretation would adversely affect the rights of the parties and would be grossly inequitable and according a new set of rules or law is enacted, it is very often challenged as in the present case on the ground that the Legislatures have usurped the judicial power. In such a case the Court has a delicate function to examine the new set of laws enacted by the Legislatures and to find out whether in fact the Legislatures have exercised the legislative power by merely declaring an earlier judicial decision to be invalid and ineffective or the Legislatures have altered and changed the character of the legislation. Following observations were made in paragraph 174 of the judgment :

?(174) The function of the judiciary is to interpret the law and to adjudicate the rights of the parties in accordance with law made by the legislature. When a particular Rule or the Act is interpreted by a Court of law in a specified manner and the lawmaking authority forms the opinion that such an interpretation would adversely affect the rights of the parties and would be grossly inequitable and according a new set of rules or law is enacted, it is very often challenged as in the present case on the ground that the legislatures have usurped the judicial power. In such a case the Court has a delicate function to examine the new set of laws enacted by the Legislatures and to find out whether in fact the legislatures have exercised the legislative power by merely declaring an earlier judicial decision to be invalid and ineffective or the legislatures have altered and changed the character of the legislation which ultimately may render

the judicial decision ineffective. It cannot be disputed that the legislatures can always render a judicial decision ineffective by enacting a valid law on the topic within its legislative field fundamentally altering or changing its character retrospectively as was held by this Court in the case of *Indian Aluminium Co. v. State of Kerala*. What is really prohibited is that the legislature cannot in exercise of its plenary power under Articles 245 and 246 of the Constitution merely declare a decision of a Court of law to be invalid or to be inoperative in which case it would be held to be an exercise of judicial power. Undoubtedly under the scheme of the Constitution the Legislature does not possess the same. Bearing in mind the aforesaid principles it is necessary to examine the legality of the Act in question.....?

112. From the propositions as laid down by above cases of the Apex Court, it is clear that curative and validating power of the Legislature can be utilised only when the basis is capable of being removed. There is no such principle of law that basis of a judicial decision is always capable of being removed. If such a broad proposition is accepted then every judicial decision is liable to be overturned by Legislature. In *Madan Mohan Pathak & Ors. v. Union of India*, 1978(2) SCC 50, the seven Judge Bench of the Apex Court did not accept the broad submission that whenever any factual or legal situation is altered by the legislation the judicial decision rendered by the Court on the basis of such factual or legal situation prior to the alteration would straightaway without more cease to be effective and binding on the parties. Following is extracted from paragraph 9 of the said judgment :

?(9) We do not think this decision lays down any such wide proposition as is contended for on behalf of the Life Insurance Corporation. It does not say that whenever any factual or legal situation is altered by retrospective legislation, a judicial decision rendered by a Court on the basis of such factual or legal situation prior to the alteration, would straight away without more, cease to be effective and binding on the parties.?

113. In *Madan Mohan Pathak's* case (supra) a settlement had taken place between the L.I.C. and its associates on 24th January, 1974 relating to terms and conditions of service including bonus payable to them. The L.I.C. by circular dated 25th September, 1975 informed all its offices that since the question of payment of bonus was being reviewed in the light of the Bonus Ordinance dated 25th September, 1975, no bonus should be paid to the employees. The AllIndia Insurance Employees' Association filed a writ petition in Calcutta High Court. A learned single Judge allowed the writ petition and issued mandamus to make payment of bonus and other directions were also issued. An Act was passed, namely, Life Insurance Corporation (Modification of Settlement) Act, 1976 providing for modification of the settlement dated 24th January, 1974. The Act did not set at naught the entire settlement but merely rendered without force and affect the provisions of the settlement in so far as they related to payment of annual cash bonus to ClassIII and ClassIV employees. In the said judgment Apex

Court observed following in paragraph 9 :

?(9)Here the judgment given by the Calcutta High Court, which is relied upon by the petitioners, is not a mere declaratory judgment holding an impost or tax to be invalid, so that a validation statute can remove the defect pointed out by the judgment amending the law with retrospective effect and validate such impost or tax.....?

114. The Apex Court held that the said Modification Act is constitutionally not valid and observed that judgment of the Calcutta High Court was to be given effect to. There are other decisions of the Apex Court in which the validating statute was not found valid capable of removing the basis of a judicial judgment by a legislative Act. In (1983)2 SCC 33, *State of Gujarat & Anr. v. Raman Lal Keshav Lal Soni & Ors.*, the Gujarat Legislature enacted Gujarat Panchayat Act, 1961 to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of selfGovernment. By Section 11(1) of the Act a panchayat organisation was constituted. After enforcement of the Act several set of rules were promulgated and orders were issued directing that panchayat service shall consist of District Cadre, Taluqa Cadre and Local Cadre. The Gujarat Panchayat Service (Absorption, Seniority, Pay and Allowances) Rules, 1965 provided for equivalence of posts, fixation of pay scales and allowances. The State Government did not issue any order regarding staff in the Local Cadre and in spite of their scale of pay the benefit of revision of pay was not accepted which was made on the basis of recommendation of the Pay Commission. The employees of the Local Cadre filed a writ petition which was allowed directing holding that the members of the panchayat service belonging to the local cadre were Government servants and directed for fixation under Gujarat Panchayat Service (Absorption, Seniority, Pay and Allowances) Rules, 1965 and some other relief. To overcome the judgment of the High Court, Gujarat Panchayat (Third Amendment) Act, 1978 was enacted. Section 11(1) was omitted to get over the judgment that panchayat service is State service. A further clause (c) was introduced after clauses (a) and (b) of Section 102(1). An appeal was filed against the High Court's judgment and writ petition was also filed challenging the Gujarat Panchayats (Third Amendment) Act, 1978. While considering the writ petition the Apex Court declared the Third Amendment Act, 1978 as unconstitutional and following was laid down in paragraph 52 :

?(52) The Legislature is undoubtedly competent to legislate with retrospective effect to take away or impair any vested right acquired under existing laws but since the laws are made under a written Constitution, and have to conform to the dos and don'ts of the Constitution, neither prospective nor retrospective laws can be made so as to contravene fundamental rights. The law must satisfy the requirements of the Constitution today taking into account the accrued or acquired rights of the parties today. The law cannot say, 20 years ago the parties had no rights, therefore, the requirements of the Constitution will be

satisfied if the law is dated back by 20 years. We are concerned with today's rights and not yesterday's. A legislature cannot legislate today with reference to a situation that obtained 20 years ago and ignore the march of events and the constitutional rights accrued in the course of the 20 years..... Today's equals cannot be made unequal by saying that they were unequal 20 years ago and we will restore that position by making a law today and making it retrospective. Constitutional rights, constitutional obligations and constitutional consequences cannot be tampered with that way. A law which if made today would be plainly invalid as offending constitutional provisions in the context of the existing situation cannot become valid by being made retrospective laws.....?

115. Again in AIR 1996 SC 2930, Delhi Cloth & General Mills Co. Ltd. v. State of Rajasthan & Ors., validity of Kota Municipal Limits (Continued Existence) Validating Act, 1975 was in question. The villages namely, Raipur and Ummedganj of district Kota were sought to be included in the Kota Municipality under the provisions of Rajasthan Municipalities Act, 1951 but subsequently the proposal was dropped out but the Kota Municipality continued to realise octroi from the appellants. The appellants filed suit praying for recovery of the Octroi illegally collected by Kota Municipality. Faced with the above, the State Government initially issued ordinance in 1975 which became Kota Municipal Limits (Continued Existence) Validating Act, 1975. The learned single Judge has struck down the provisions which was reversed by the appellate Bench. Thereafter the matter was taken to the Apex Court. The Apex Court held that the defects pointed out were not removed and without removing the defect the Validating Act cannot achieve the object. Following observations were made in paragraphs 16 and 17 of the said judgment :

?(16) In validating Act provides that, notwithstanding anything contained in Sections 4 to 7 of the 1959 Act or in any judgment, decree, order or direction of any Court, the villages of Raipura and Ummedganj should be deemed always to have continued to exist and they continue to exist within the limits of the Kota Municipality, to all intents and for all purposes. This provision requires the deeming of the legal position that the villagers of Raipura and Ummedganj fall within the limits of the Kota Municipality, not the deeming of facts from which this legal consequence would flow. A legal consequence cannot be deemed nor, therefrom, can be events that should have proceeded it. Facts may be deemed and, therefrom, the legal consequences that follow.

(17) Sections 4 to 7 remained on the statute book unamended when the Validating Act was passed. Their provisions were mandatory. They had admittedly not been followed. The defect of not following these mandatory provisions in the case of the villages of Raipura and Ummedganj was not cured by the Validating Act. The curing of the defect was an essential requirement for the passing of a valid validating statute, as held by the Constitution Bench in the case of Prithvi Cotton Mills Ltd. (AIR 1970 SC 192). It must, therefore, be held

that the Validating Act is bad in law and it must be struck down.?

116. Before applying the propositions as laid down by the Apex Court in the above cases, in the present case to know as to whether 1981 Act changes the basis of Azeez Basha's case, it is necessary to recapitulate the concept of minority institution under Article 30 of the Constitution of India and to look into as to what are the essential ingredients for qualifying protection under Article 30.

117. Article 30(1) of the Constitution of India reads, "All minorities whether based on religion or language, shall have the right to establish and administer educational institutions of their choice". Article 30(1) uses the words "establish and administer". One of the issue in this case is as to whether an institution claiming to be a minority institution has to prove both factors i.e., establishment and administration by it for qualifying the benefit under Article 30 or as to whether automatically the right of administration shall follow if it is proved that institution was established by minority. It is relevant to note that one of the questions before the Apex Court in T.M.A. Pai's case (supra) was Question No.3(a) which is extracted below :

3(a). What are the indicia for treating an educational institution as a minority educational institution ?? Would an institution be regarded as a minority educational institution because it was established by a person(s) belonging to a religious or linguistic minority or its being administered by a person(s) belonging to a religious or linguistic minority??

118. The Bench in T.M.A. Pai's case (supra) did not answer the aforesaid Question No. 3(a). However there are binding precedences which have relevance on the issue. It is now well settled by the Apex Court that preconstitution institutions are entitled for protection under Article 30 of the Constitution. This has been held in the judgment reported in AIR 1970 SC 259; Right Rev. Bishop S.K. Patro v. State of Bihar is relevant. In the above case the institution which was claiming benefit of Article 30 was also a institution founded before enforcement of the Constitution. In paragraph 8 of the judgment it was held that protection under Article 30 is available to the institutions which have been established before the constitution and continued to be administered by the minorities, paragraph 8 of the judgment is quoted as below :

(8)The guarantee of protection under Article 30 is not restricted to educational institutions established after the Constitution: institutions which had been established before the Constitution and continued to be administered by minorities, either based on religion or language qualify for the protection of the right of minorities declared by Article 30 of the Constitution. In In Re : The Kerala Education Bill, 1957, 1959 SCR 995 : (AIR 1958 SC 956), Das, C.J., observed at p. 1051 (of SCR) : (at p. 978 of AIR):

"There is no reason why the benefit of Article 30(1) should be limited only to educational institutions established after the commencement of the Constitution. The language employed in Article 30(1) is wide enough to cover both

preConstitution and postConstitution institutions. It must not be overlooked that Article 30 (1) gives the minorities two rights, namely, (a) to establish, and (b) to administer, educational institutions of their choice. The second right clearly covers preConstitution schools just as Article 26 covers the right to maintain preConstitution religious institutions.?

119. What is the concept of administration has been subjectmatter of consideration by several cases of the Apex Court. The question was answered in 1974(1) SCC 717, Ahmedabad St. Xavier's College v. State of Gujarat & Anr.. It was held by the Apex Court that the right to administer is said to consist of four principles. The first is the right to choose its managing or governing body. It is said that the founders of the minority institution have faith and confidence in their own committee or body consisting of persons selected by them. Second is the right to choose its teachers, third is the right not to be compelled to refuse admission to students and fourth is the right to use its properties and assets for the benefit of its own institution. Paragraph 19 of the said judgment is extracted below :

?(19) The entire controversy centres round the extent of the right of the religious and linguistic minorities to administer their educational institutions. The right to administer is said to consist of four principal matters. First is the right to choose its managing or governing body. It is said that the founders of the minority institution have faith and confidence in their own committee or body consisting of persons selected by them. Second is the right to choose its teachers. It is said that minority institutions want teachers to have compatibility with the ideals, aims and aspirations of the institution. Third is the right not to be compelled to refuse admission to students. In other words, the minority institutions want to have the right to admit students of their choice subject to reasonable regulations about academic qualifications. Fourth is the right to use its properties and assets for the benefit of its own institution.?

120. Again in T.M.A. Pai's case the concept of administration came for consideration and five components have been held to be comprised in administration, i.e., to admit students, to constitute a governing body, to appoint staff (teaching and nonteaching) and to take action if there is dereliction of duty on the part of any employees. Paragraph 50 of the judgment is extracted below :

?The right to establish administer broadly comprises the following rights:

- (a) to admit students;
- (b) to set up a reasonable fee structure;
- (c) to constitute a governing body;
- (d) to appoint staff (teaching and nonteaching); and
- (e) to take action if there is dereliction of duty on the part of any employees.?

121. Another case which lend support to the interpretation that minority

institution for seeking protection under Article 30 has to prove both establishment and administration is St. Stephen's case reported in 1992(1) SCC 558. The St. Stephen's case (supra) was also a case of preconstitution institution. The Apex Court in the said judgment held that the words 'establish and administer' used in Article 30 are to be read conjunctively. While considering the question as to whether St. Stephen's case (supra) qualifies for protection under Article 30, the Apex Court examined in details the character of the institution, the administration and finding was recorded that the Constitution as it stands today maintains the essential character of the college as Stephen college without compromising the right to administer it as educational institution of its choice. Ultimately in paragraph 46 it was observed :

'From these facts and circumstances it becomes abundantly clear that St. Stephen's College was established and administered by a minority community.'

122. Thus the above authorities do lay down that for seeking protection under Article 30 an institution has to establish both conditions, i.e., it has been established by minority and it has been administered by minority. An institution which might have been established by minority but was never administered nor even claimed to have been administered cannot be clothed with the character of a minority institution as contemplated under Article 30 of the Constitution. If the interpretation is accepted that every institution established by minority irrespective of the fact whether it is administered by the minority will be minority institution then that interpretation shall lead to inequitable and incorrect results. Under Article 19(1)(g) of the Constitution of India every citizen has right to establish an educational institution. The right under Article 19(1)(g) having been given to every citizen, this right is also available to a citizen belonging to a minority. The right to establish and administer educational institution of their choice as guaranteed under Article 30 is special and additional right to the minorities. Interpreting Article 30 the Apex Court in AIR 1970 SC 2079, *State of Kerala v. Very Rev. Mother Provincial* held as follows in paragraph 8 :

'(8) Article 30(1) has been construed before by this Court. Without referring to those cases it is sufficient to say that the clause contemplates two rights which are separated in point of time. The first right is the initial right to establish institutions of the minority's choice. Establishment here means the bringing into being of an institution and it must be by a minority community. It matters not if a single philanthropic individual with his own means, founds the institution or the community at large contributes the funds. The position in law is the same and the intention in either case must be to found an institution for the benefit of a minority community by a member of that community. It is equally irrelevant that in addition to the minority community others from other minority communities or even from the majority community can take advantage of these institutions.....'

123. Thus for protection of Article 30, it is also to be proved that the institution was established by minority community for its benefit although extending the benefits to others is not destructive of the minority character. A citizen belonging

to minority community can as well establish an institution for the benefit of public in general irrespective of benefits to his own community or any other community. There cannot be any restriction on the rights of the citizens belonging to minority community in establishing a normal, i.e., a free educational institution for the benefit of all. The character of such institution established by member of minority will entirely be different and different rights and obligations will follow with regard to the admission, condition of service of teachers and other rights. Thus it cannot be held that whenever a member of the minority community establish an institution the same shall be necessarily a minority institution irrespective of the fact as to whether it was contemplated to be a minority institution or an institution for the benefit of all sections of the society. This can be further illustrated by giving an illustration. A member of the minority community establishes an institution which is open to all sections of the society without reserving any right of administration in the persons founding the society. The institution is administered as a normal institution following the rules and regulations applicable to normal institution. The selection of teachers is made by selection board established under the Act. Can after lapse of several decades suddenly the institution claim to the benefit of minority character on the ground that it was established by minority member and claim right of administration of the institution as a minority. The answer will be obviously no because the character of the institution which came into existence was not a minority nor it was administered by minority. The right of all citizens to administer educational institution under Article 19(1)(g) has also been recognised by the Apex Court in T.M.A. Pai's case. Following was laid down in paragraph 18 of the judgment :

“(18)Article 19(1)(g) and Article 26, therefore, confer rights on all citizens and religious denominations to establish and maintain educational institutions. There was no serious dispute that the majority community as well as linguistic and religious minorities would have a right under Articles 19(1)(g) and 26 to establish educational institutions. In addition, Article 30(1), in no uncertain terms, gives the right to the religious and linguistic minorities to establish and administer educational institutions of their choice.”

124. Thus administration of the institution by minority is also one of essential factors before claiming right under Article 30 of the Constitution.

125. In Azeez Basha's case (supra) the Apex Court after considering the various provisions of 1920 Act has categorically held that the institution was not being administered by the minority. It found that the administration of the Aligarh Muslim University was not with the minority and was vested in the authorities and officers as noted in the judgment. There being categorical finding in Azeez Basha's case (supra) that the institution has not been administered by the minority, one of the requisite condition for qualifying the protection under Article 30 of the Constitution is lacking, the Aligarh Muslim University is not entitled for protection under Article 30 of the Constitution.

126. 1981 Amendment does not change any of the basis of Azeez Basha's case

(supra) with regard to administration. In 1981 Amendment Act only provisions which have been emphasised are Section 2(l) and Section 5(2)(c). These two provisions has nothing to do with administration. The other amendments by 1981, as noted above, were prospective in nature and can have no effect on the administration of the institution. The basis of the Azeez Basha's case in so far as administration is concerned having not been even touched, there is no question of accepting the submission that basis of judgment has been changed to make the judgment ineffective. The Azeez Basha's judgment still holds the field with full force and the judgment of the learned single Judge holding that Aligarh Muslim University is not a minority institution is liable to be upheld on this finding alone.

127. One more submission which has been raised both by Dr. Dhawan and Sri Gopal Subramaniam is that in Writ Petition No. 5457 of 1981 (AnjumaneRahmania & Ors. v. District Inspector of School & Ors.), the Supreme Court vide its order dated 26th November, 1981 noted the doubts expressed on the correctness of the Azeez Basha's case and by the said order matter was directed to be placed before Hon''ble the Chief Justice for being heard by a Bench of seven Judges which writ petition was ultimately decided by order dated 11th March, 2003 with following observations :

?These matters are covered by the decision of a Constitution Bench of this Court in Writ Petition No. 317/1993, T.M.A. Pai Foundation & Ors. etc. v. State of Karnataka & Ors. etc. and connected batch decided on 31st October, 2002.

All statutory enactments, orders, scheme, regulations will have to be brought in conformity with the decision of the Constitution Bench of this Court in T.M.A. Pai Foundation's case decided on 31102002. As and when any problem arises the same can be dealt with by an appropriate Forum in an appropriate proceeding.

The Writ Petitions are disposed of accordingly.?

128. It has thus been submitted that present dispute requires consideration in the light of the judgment in T.M.A. Pai's case (supra). It is submitted that this case has again reiterated that there can be regulatory control over the minority institution and regulatory control itself does not amount in any manner destructive of the minority character of an institution. It is submitted that control and supervision in 1920 Act is only regulatory in nature and in the light of T.M.A. Pai's case the minority character of Aligarh Muslim University has to be declared. The answer to the above submissions are two fold. Firstly the judgment in Azeez Basha's case has considered all the provisions of 1920 Act and the Statutes framed thereunder and considering the scheme of the Act the Azeez Basha's judgment held that minority community has not been administering the institution. As observed above, the basis of the judgment of Azeez Basha's case regarding administration by minority has not even touched by 1981 Amendment Act, it is no more open for us to consider the submission that minority is administering the Aligarh Muslim University and it be declared as a minority

institution. Secondly even if we look the question of administration in the light of judgment in T.M.A. Pai's case (supra), the result will be the same. As noted above in St. Xaviers College's case (supra) in paragraph 19 four principles have been laid down which are comprised in right of administration. In T.M.A. Pai's case also five principles have been laid down which comprises the administration, as noted above. The first factor mentioned in T.M.A. Pai's case is to admit students. Relevant provisions regarding admission of the students in 1920 Act are contained in Sections 29, 30 and 32. Section 29 reads as under :

“(29) Subject to the provisions of this Act and the Statutes, the Ordinances may provide for all or any of the following matters, namely :

(a)

(b)

(c) the conditions under which students may be admitted to the degree or diploma courses and to the examinations of the University, and shall be eligible for degrees and diplomas.

(d) the admission of students to the University;

.....?

129. Section 30 provided that the Executive Council or in academic matters, the Academic Council may make Ordinances. Subsection (2) of Section 30 provided that first Ordinances shall be framed as directed by the Governor General in Council and shall receive such previous approval as he may direct. Subsection (3) provided that no new Ordinance, or amendment or repeal of an existing Ordinance shall have any validity until it has been submitted through the Court and Visiting Board to the Governor General in Council, and has obtained approval of the latter. Subsection (4) again provided that if any question arises between the Executive and the Academic Council as to which has power to make an Ordinance, either Council may represent the matter to the Visiting Board who shall refer the same to a tribunal consisting of three members, one of whom shall be nominated by the Executive Council, one by the Academic Council, and one shall be a Judge of a High Court nominated by the Lord Rector. Section 30 makes it clear that power to make ordinances vests in the Executive Council and the first ordinances were made under the direction of the Governor General in Council. Further making of ordinances are subject to prior approval of the Governor General at the relevant time. The Court which is claimed to be supreme governing body of the University is not vested with any power to make even ordinances for regulating admissions.

130. Section 32 deals with the admission and examinations. Section 32 provided that admission of students to the University shall be made by admission committee consisting of the ProViceChancellor, the Principal of an Intermediate College who shall be selected by the ViceChancellor and such other persons as may be appointed by the Academic Council. The said provision again makes it

clear that power of admission is not vested in the minority which claim to have established the institution nor even it is vested in the Court which is claimed to be supreme governing body. Thus the factor regarding admission of students is not present and militates against the claim of the Aligarh Muslim University of its minority character. The second factor given in T.M.A. Pai's case is to set up a reasonable fee structure. Section 29(h) provides :

29. Subject to the provisions of this Act and the Statutes, the Ordinances may provide for all or any of the following matters, namely

(a)

(b)

.....

(h) the fees to be charged for courses of study in the University and for admission to the examinations, degrees and diplomas of the University;

.....?

Again with regard to fee structure power is not vested in the Court which is claimed to be supreme governing body of the Aligarh Muslim University.

131. The third factor in T.M.A. Pai's case is to constitute a governing body. It is now well settled that to constitute the governing body of a minority institution is the most important right vested in the minority. The supreme governing body is claimed to be Court. Statute 8 of the Statutes provides for constitution of the Court. There are four categories of members in the Court. Class I ExOfficio members, Class II Foundation Members, Class III Life Members and Class IV Ordinary Members. The Chancellor, the ProViceChancellor and the Vice Chancellor for the time being shall be ExOfficio Members. The Foundation Members are those whose names are mentioned in the Schedule. Every person who has contributed to the Mohammadan Anglo Oriental College, Aligarh, the Muslim University Association or the Muslim University Foundation Committee a donation of one lac of rupees or upwards or has transferred property of like value shall be the life member. There are several category of life members. There are nominations by States by the Chancellor. Election of forty members from registered graduates of the University. Statute 8 reveals that electorate for electing the members of the Court do not necessarily belong to minority community. The constitution of governing body according to the scheme of the Act and the Statutes is not wholly vested with the members of the minority who claimed to have established the institution. The question regarding the constitution of managing body/governing body by the minority came for consideration before the Apex Court in several cases. In AIR 1970 SC 2079, State of Kerala v. Very Rev. Mother Provincial. Section 48 of the Kerala University Act, 1969 came for consideration. Sections 48 and 49 deal with governing body for private colleges and managing council for private colleges under corporate management. The 11 members of the governing body as contemplated by

Section 48 were, (i) the principal of the private college; (ii) the manager of the private college; (iii) a person nominated by the University in accordance with the provisions in that behalf contained in the Statutes; (iv) a person nominated by the Government; (v) a person elected in accordance with such procedure as may be prescribed by the Statutes of the University from among themselves by the permanent teachers of the private college; and (vixi) not more than six persons nominated by the educational agency. The Apex Court found the provisions of Section 48 violative of rights under Article 30. The Apex Court held that after the election of the governing body or the managing council the founders or community has no hand in the administration, they are not answerable to the founder in the matter of administration. Their power and functions are determined by the University laws. However desirable it might be to associate nominated members of the kind mentioned in Sections 48 and 49 with other members of the governing body or the managing council nominees, it is obvious that their voice must play a considerable part in management. Situations might be conceived when they may have a preponderating voice. In any event, the administration goes to a distinct corporate body which is in no way answerable to the educational agency or the corporate management. The founders have no say in the selection of the members nominated or selected except those to be nominated by them. It is, therefore, clear that by the force of subsections (2), (4) and (6) of Sections 48 and 49, the minority community loses the right to administer the institution it has founded. Relevant observations from paragraphs 14 and 15 of the judgment are extracted below :

?(14) These sections were partly declared ultra vires of Article 30(1) by the High Court as they took away from the founders the right to administer their own institution. It is obvious that after the election of the governing body or the managing council the founders or even the community has no hand in the administration. The two bodies are vested with the complete administration of the institution. These bodies have a legal personality distinct from educational agency or the corporate management. They are not answerable to the founders in the matter of administration. Their powers and functions are determined by the University laws and even the removal of the members is to be governed by the Statutes of the University. Subsections (2), (4), (5) and (6) clearly vest the management and administration in the hands of the two bodies with mandates from the University.?

?(15)The Constitution contemplates the administration to be in the hands of the particular community. However desirable it might be to associate nominated members of the kind mentioned in Sections 48 and 49 with other members of the governing body or the managing council nominees, it is obvious that their voice must play a considerable part in management. Situations might be conceived when they may have a preponderating voice. In any event, the administration goes to a distinct corporate body which is in no way answerable to the educational agency or the corporate management. The founders have no say in the selection of the members nominated or selected

except those to be nominated by them. It is, therefore, clear that by the force of subsections (2), (4) and (6) of Sections 48 and 49, the minority community loses the right to administer the institution it has founded.....?

132. From the above case, it is clear that the managing body which had several nominees and other persons not appointed by the founder was held to be violative of right of the minority under Article 30. The next case which is relevant is St. Xaviers College's case (supra) in which Section 33A(1)(a) of Gujarat University Act, 1949 came for consideration. According to Section 33A(1)(a) 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 ViceChancellor and representatives of the nonteaching staff and students of the college. The Apex Court held that autonomy in administration means right to administer effectively and to manage and conduct the affairs of the institutions. The provisions of Section 33A(1)(a) were found to be offending Article 30 of the Constitution. Section 33A(1)(a) as quoted in paragraph 65 of the same judgment is extracted below :

33A. (1) Every college (other than a Government college or a college maintained by the Government) affiliated before the commencement of the Gujarat University (Amendment) Act, 1972 (hereinafter in this section referred to as 'such commencement')

(a) shall be under the management of a governing body which shall include amongst its members the Principal of the college, a representative of the University nominated by the ViceChancellor, and three representatives of the teachers of the college and at least one representative each of the members of the nonteaching staff and the student of the college, to be elected respectively from amongst such teachers, members of the nonteaching staff and students; and

(b) that for recruitment of the Principal and members of the teaching staff of a college there is a selection committee of the college which shall include

(1) in the case of recruitment of the Principal, a representative of the University nominated by the ViceChancellor, and

(2) in the case of recruitment of a member of the teaching staff of the college, a representative of the University nominated by the ViceChancellor and the Head of the Department, if any, concerned with the subject to be taught by such member.

(2) Every college referred to in subsection (1) shall,

(a) within a period of six months after such commencement, constitute or reconstitute its governing body in conformity with subsection (1), and

(b) as and when occasion first arises after such commencement, for recruitment of the Principal and teachers of the college, constitute or reconstitute its selection

committee so as to be in conformity with subsection (1).

(3) The provisions of subsection (1) shall be deemed to be a condition of affiliation of every college referred to in subsection (1).?

Relevant observations were made in paragraphs 40 and 41 which are extracted below :

?(40) The provisions contained in Section 33A(1)(a) of the Act state 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 ViceChancellor and representatives of teachers, nonteaching staff and students of the college. These provisions are challenged on the ground that this amounts to invasion of the fundamental right of administration. It is said that the governing body of the college is a part of its administration and therefore that administration should not be touched. The right to administer is the right to conduct and manage the affairs of the institution. This right is exercised thorough a body of persons in whom the founders of the institution have faith and confidence and who have full autonomy is that sphere. The right to administer is subject to permissible regulatory measures. Permissible regulatory measures are those which do not restrict the right of administration but facilitate it and ensure better and more effective exercise of the right for the benefit of the institution and through the instrumentality of the management of the educational institutions and without displacing the management. If the administration has to be improved it should be done through the agency or instrumentality of the existing management and not by displacing it. Restrictions on the right of administration imposed in the interest of the general public alone and not in the interests of and for the benefit of minority educational institutions concerned will affect the autonomy in administration.

(41) Autonomy in administration means right to administer effectively and to manage and conduct the affairs of the institutions. The distinction is between a restriction on the right of administration and a regulation prescribing the manner of administration. The right of administration is day to day administration. The choice in the personnel of management is a part of the administration. The University will always have a right to see that there is no maladministration. If there is maladministration, the university will take steps to cure the same. There may be control and check on administration in order to find out whether the minority institutions are engaged in activities which are not conducive to the interest of the minority or to the requirements of the teachers and the students. In *State of Kerala v. Very Rev. Mother Provincial, etc.* (supra) this Court said that if the administration goes to a body in the selection of whom the founders have no say, the administration would be displaced. This Court also said that situations might be conceived when they might have a preponderating voice. That would also effect the autonomy in administration. The provisions contained in Section 33A(1)(a) of the Act have the effect of displacing the management and entrusting it to a different agency. The autonomy in administration is lost. New

elements in the shape of representatives of different types are brought in. The calm waters of an institution will not only be disturbed but also mixed. These provisions in Section 33A(1)(a) cannot therefore apply to minority institutions.?

133. Justice Mathew in his concurring opinion laid down following in paragraph 181 :

?(181) We think that the provisions of subsections (1)(a) and (1)(b) of Section 33A abridge the right of the religious minority to administer educational institutions of their choice. The requirement that the college should have a governing body which shall include persons other than those who are members of the governing body of the Society of Jesus would take away the management of the college from the governing body constituted by the Society of Jesus and vest it in a different body. The right to administer the educational institution established by a religious minority is vested in it. It is in the governing body of the Society of Jesus that the religious minority which established the college has vested the right to administer the institution and that body alone has the right to administer the same. The requirement that the college should have a governing body including persons other than those who constitute the governing body of the Society of Jesus has the effect of divesting that body of its exclusive right to manage the educational institution. That it is desirable in the opinion of the legislature to associate the Principal of the College or the other persons referred to in Section 33A(1)(a) in the management of the College is not a relevant consideration. The question is whether the provision has the effect of divesting the governing body as constituted by the religious minority of its exclusive right to administer the institution. Under the guise of preventing maladministration, the right of the governing body of the college constituted by the religious minority to administer the institution cannot be taken away. The effect of the provision is that the religious minority virtually loses its right to administer the institution it has founded. ?Administration? means `management of the affairs" of the institution. This management must be free of control so that the founders of their nominees can mould the institution according to their way of thinking and in accordance with their ideas of how the interests of the community in general and the institution in particular will be best served. No part of this management can be taken away and vested in another body without an encroachment upon the guaranteed right.....?

134. Thus the nature and character of the Court which is claimed to be supreme governing body is not in the line of the characteristic of administration by a minority. The scheme of the Act spells out that the minority character was never clothed by the Act nor body which came into existence was contemplated as a minority institution. Apart from the Court the right of administration under 1920 Act is vested in other authorities of the University constituted by the Act itself. Executive Council, according to Section 24, is the executive body of the University which has right of administration in several respects as laid down in the Act and the Statutes itself. As noted above, the Lord Rector has overriding

power over even the Court. The Visiting Board under Section 14 has right to annul any proceeding of the University. The first Chancellor, ProViceChancellor and ViceChancellor were appointed by the Governor General. The ViceChancellor has wide administrative power under the Act. From the above scheme of the Act, it is clear that the administration was not vested in the Court which is claimed to be supreme governing body but the administration was vested on the administrative authorities of the University including the ViceChancellor on whom the founder cannot claim to have any control.

135. The fourth factor mentioned in T.M.A. Pai's case is to appoint staff (teaching and nonteaching). The power to appoint staff is not vested in the founder minority community, even the Court has no power to appoint staff. The power of appointment of officers is given to the Court by virtue of Section 23 but the officers of the Court are defined in Section 16 and they are not the teaching or nonteaching staff. Power to appoint staff is provided in Statute 20. Statute 20 provided that subject to the general control of the Court, all appointments on the teaching staff shall be made by the Executive Council from a list of persons recommended as suitable therefor by a Committee of Appointment consisting of the ProViceChancellor, the Chairman of the Department of Studies concerned and three other persons appointed by the Academic Council. Other appointments, unless otherwise provided for, shall be made by the Executive Council. The power of appointment is not vested with the founder nor is vested in the Court which is claimed to be supreme governing body. Power of appointment can be made by recommendation of the committee of appointment in which there is no person of Court or founders. The appointment committee is statutorily provided. The Court has only general control with regard to appointment of teaching staff. With regard to other appointments the sole power is given to the Executive Council. Statute 20 of the Statutes which gives power to make appointment is extracted below :

?(20) Subject to the general control of the Court, all appointments on the teaching staff shall be made by the Executive Council from a list of persons recommended as suitable therefor by a Committee of Appointment constituting of the ProViceChancellor, the Chairman of the Department of Studies concerned and three other persons appointed by the Academic Council. Other appointments, unless otherwise provided for, shall be made by the Executive Council.?

136. The Apex Court in St. Xavier's case (supra) had occasion to consider Section 33A(1)(b) of Gujarat University Act, 1949 as amended by Gujarat University Amendment Act, 1972. The said provision provided for constitution of selection committee for recruitment of principal and members of the teaching staff. Section 33A(1)(b) is quoted as below :

?33A. (1) Every college (other than a Government college or a college maintained by the Government) affiliated before the commencement of the Gujarat University (Amendment) Act, 1972 (hereinafter in this section referred to

as `such commencement")

(a).....

(b) that for recruitment of the Principal and members of the teaching staff of a college there is a selection committee of the college which shall include

(1) in the case of recruitment of the Principal, a representative of the University nominated by the ViceChancellor, and

(2) in the case of recruitment of a member of the teaching staff of the college, a representative of the University nominated by the ViceChancellor and the Head of the Department, if any, concerned with the subject to be taught by such member.?

137. The Apex Court in St. Xavier's case (supra) declared Section 33A(1)(b) as violative of the right of the minority. Section 33A(1)(b) has been noted in paragraph 42 of the St. Xavier's judgment which has already been quoted above. In paragraph 45 of the judgment it was held that Section 33A(1)(b) violates the fundamental rights of the minority institution. In the Statute 20 of the Statutes, as quoted above, in the selection committee which is to make appointment of the teaching staff there is no person who can be said to be representative of the minority community. The Committee of Appointment consists of ProViceChancellor, the Chairman of the Department of Studies concerned and three other persons appointed by the Academic Council. Thus the minority community has no say in the selection. This provision militates against the minority character of the Aligarh Muslim University.

138. The fifth factor as mentioned in T.M.A. Pai's case is power to take action if there is dereliction of duty on the part of any employees. The power to take action normally vests in the authority who makes appointment. As noted above the power of appointment is not vested in the Court which is claimed to be supreme governing body and is vested in the Executive Council. Section 36 of the Act is relevant in this context. Section 36 is with regard to condition of service of officers and teachers. Section 36(1) provided that every salaried officer and teacher of the University shall be appointed on a written contract, which shall be lodged with the University. Section 36(2) provides that any dispute arising out of a contract between the University and any of its officers or teachers shall, at the request of the officer or teacher concerned, be referred to a tribunal of arbitration consisting of one member appointed by the Executive Council, one member nominated by the officer or teacher concerned and an umpire appointed by the Visiting Board. Even in resolving the disputes pertaining to any staff of the college the Court which is claimed to be the supreme governing body has no role.

139. Section 36 of the 1920 Act, as noted above, provides as under :

?36. (1) Every salaried officer and teacher of the University shall be appointed on a written contract, which shall be lodged with the University and a copy of which

shall be furnished to the officer or teacher concerned.

(2) Any dispute arising out of a contract between the University and any of its officers or teachers shall, at the request of the officer or teacher concerned, be referred to a tribunal of arbitration consisting of one member appointed by the Executive Council, one member nominated by the officer or teacher concerned and an umpire appointed by the Visiting Board. The decision of the tribunal shall be final, and no suit shall lie in any Civil Court in respect of the matters decided by the tribunal. Every such request shall be deemed to be a submission to arbitration upon the terms of this section within the meaning of the Indian Arbitration Act, 1899, and all the provisions of that Act, with the exception of Section 2 thereof, shall apply accordingly.?

140. An almost similar provision came for consideration before the Apex Court in St. Xavier's case (supra) i.e., Section 52 of the Gujarat University Act, 1949 which also pertains to dispute with regard to conditions of service of any member which was required to be referred to a tribunal of arbitration. Section 52A is quoted as below :

?52A. (1) Any dispute between the governing body and any member of the teaching, other academic and nonteaching staff of an affiliated college of recognized or approved institution which is connected with the conditions of service of such member, shall, on a request of the governing body, or of the member concerned be referred to a Tribunal of Arbitration consisting of one member nominated by governing body of the college or, as the case may be, member of the recognized or approved institution, one member nominated by the member concerned and an Umpire appointed by the ViceChancellor.

(2) The provisions of Section 52 shall, thereupon mutatis mutandis apply to such request and the decision that may be given by such Tribunal.?

141. Before the Apex Court the Section 52A was also challenged on the ground that it violates the rights of the minority and is contrary to the rights of the minority to have its own say on the disciplinary matters. The Apex Court held that Section 52A cannot apply to a minority institution. Following was laid down in paragraph 44 :

?(44) The provisions contained in Section 52A of the Act contemplate reference of any dispute between the governing body and any member of the teaching, other academic and nonteaching staff of an affiliated college which is connected with the conditions of service of such member to a Tribunal of Arbitration consisting of one member nominated by the governing body of the college, one member nominated by the member concerned and an Umpire appointed by the ViceChancellor. These references to arbitration will introduce an area of litigious controversy inside the educational institution. The atmosphere of the institution will be vitiated by such proceedings. The governing body has its own disciplinary authority. The governing body has its domestic jurisdiction. This jurisdiction will be displaced. A new jurisdiction will be created in administration. The provisions

contained in Section 52A of the Act cannot, therefore, apply to minority institutions.?

142. Khanna, J. who delivered a concurring judgment to take same view in paragraph 107 on Section 52A, held that the effect of Section 52A would be that the governing body of an educational institution would be hardly in a position to take any effective disciplinary action against the member of the staff. Paragraph 107 is extracted below :

?(107) Section 52A of the Act relates to the reference of disputes between a governing body and any member of the teaching, other academic and nonteaching staff of an affiliated college or recognised or approved institution connected with the conditions of service of such member to a Tribunal of Arbitration, consisting of one member nominated by the governing body of the college or, as the case may be, of the recognized or approved institution, one member nominated by the member of the staff involved in the dispute and an Umpire appointed by the ViceChancellor. Section 52A is widely worded, and as it stands it would cover within its ambit every dispute connected with the conditions of service of a member of the staff of an educational institution, however, trivial or insignificant it may be, which may arise between the governing body of a college and a member of the staff. The effect of this section would be that the managing committee of an educational institution would be embroiled by its employees in a series of arbitration proceedings. The provisions of Section 52A would thus act as a spoke in the wheel of effective administration of an educational institution. It may also be stated that there is nothing objectionable to selecting the method of arbitration for settling major disputes connected with conditions of service of staff of educational institution. It may indeed be a desideratum. What is objectionable, apart from what has been mentioned above, is the giving of the power to the ViceChancellor to nominate the Umpire. Normally in such disputes there would be hardly any agreement between the arbitrator nominated by the governing body of the institution and the one member nominated by the concerned member of the staff. The result would be that the power would vest for all intents and purposes in the nominee of the ViceChancellor to decide all disputes between the governing body and the member of the staff connected with the latter's conditions of service. The governing body would thus be hardly in a position to take any effective disciplinary action against a member of the staff. This must cause an inroad in the right of the governing body to administer the institution. Section 52A should, therefore, be held to be violative of Article 30(1) so far as minority educational institutions are concerned.?

143. From the above, it is clear that all the five factors which are essential ingredients of right of administration vested in a minority institution as per T.M.A. Pai's case are absent in the Aligarh Muslim University as spelled out from the scheme of 1920 Act. All the above five factors being absent and in any view of the matter majority of the factors which have been held to be essential

ingredients of the rights of the minority being absent in the present case, it is abundantly clear that the institution which came into existence in the year 1920 was not an institution having character of minority institution. Thus applying the principles laid down in T.M.A. Pai's case also it cannot be held that there was any right of administration vested in the Aligarh Muslim University which constitute the essential components of the rights of administration of minority.

144. Apart from above even basis of Azeez Basha's case (supra) on ? establishment? has not been completely changed by 1981 Amendment Act. The only amendment made by 1981 Act is, as noted above, in preamble, long title, Section 2(1), Section 5(2)(c) and Section 8. In the preamble of the Act the words ?an Act to establish and incorporate? has been given slight amendment by deleting the word ?establish?. The definition in Section 2(1) was amended by which University has been defined with the meaning ?educational institution of their choice established by muslims of India?. The definition of the word ? established? has been considered in paragraph 25 of the judgment in Azeez Basha's case. It was held that established means ?to bring into existence?. In AIR. 1970 SC 2079, State of Kerala v. Very Rev. Mother Provincial, following was laid down in paragraph 8 while interpreting Article 30 of the Constitution it was held :

?.....Establishment here means the bringing into being of an institution and it must be by a minority community....?

145. The Aligarh Muslim University, a body corporate, came into existence only by Act of legislature. By merely changing the definition of Section 2(1) by amending the preamble and long title can the fact that the University came into being by an Act of legislature be forgotten. It is true that 1920 Act was passed as a result of the efforts of the muslim minority which fact has been clearly noted in paragraph 23 of the Azeez Basha's judgment and is also clear from previous history of the establishment of the University. The other provisions of the Act, namely, Sections 3 and 4 were also taken into consideration in paragraph 6 of the judgment in Azeez Basha's case which provided that first Chancellor, ProViceChancellor and ViceChancellor shall be the person appointed by the notification of the Governor General in Council constituted a body corporate by the name of the Aligarh Muslim University. Section 6 was also taken into consideration and following was laid down in Azeez Basha's case :

?.....Therefore when the Aligarh University was established in 1920 and by S. 6 its degrees were recognised by Government, an institution was brought into existence which could not be brought into existence by any private individual or body for such recognition of the degrees conferred by any university established by it.....?

146. We are thus in full agreement with the view of learned single Judge that the basis of judgment in so far as establishment part is concerned was also not completely changed by 1981 Act so as to make the Azeez Basha's judgment

ineffective. Thus in the establishment of the University the then Government had its significant role and the establishment was not entirely the act of minority community.

147. Now comes the question as to whether Sections 2(1) and 5(2)(c) are liable to be struck down. The learned single Judge in the impugned judgment has not struck down those provisions. Sri Ravi Kant has contended that those provisions are brazen overruling of the judicial decision of the Apex Court in Azeez Basha's case and the same is liable to be struck down on this ground alone. In view of the findings recorded in Azeez Basha's case that Aligarh Muslim University is not a minority institution, whether it was open to the parliament by legislative enactment to declare Aligarh Muslim University a minority institution ? According to Article 245 of the Constitution parliament may make laws subject to provisions of the Constitution. According to Article 13 any law made by State which takes away or abridges the rights conferred by Part III is void. Declaring the Aligarh Muslim University as minority institution by parliament enactment is not in the competence of parliament in view of the judgment of the Apex Court and if the parliament declares by the legislative enactment that Aligarh Muslim University is minority institution the said declaration shall contravene Article 30 since Article 30 provides that only institutions administered and established by minority are entitled for protection under Article 30. The parliament thus could not have directly declared by parliamentary enactment that Aligarh Muslim University is a minority institution. The amendments which has been brought by 1981 Amendment Act has not been able to change the basis of Azeez Basha's case (supra) and thus tend to overrule a judicial decision which is not in competence of the parliament.

148. The submission of Aligarh Muslim University and Union of India is that the amendment in preamble, long title, Section 2(1) and Section 5(2)(c) declare that institution was established by minority community. The said declaration being contrary to the Azeez Basha's case (supra) and the basis of the said judgment having not successfully changed, the aforesaid provisions are nothing but overruling of a judicial decision which has been frowned upon by the Apex Court in several judgments, as noted above. Consequently the provisions of Section 2(1) and Section 5(2)(c) as well as amendment in preamble and long title are liable to be struck down.

149. There is one more aspect of the matter which needs consideration. Article 29(2) provides that no citizen shall be denied education into any educational institution maintained by the State or receiving the aid out of the State fund on the grounds only of religion, race, caste, language or any of them. Admittedly the Aligarh Muslim University is a Central University receiving aid from the State. It is contended that Article 29(2) is also applicable on the minority institution and in view of the judgment in T.M.A. Pai's case even minority institutions are obliged to admit certain percentage of students belonging to majority and there is no infringement of the rights of the majority even in the minority institutions.

In T.M.A. Pai's case one of the question before the Apex Court was regarding interplay between Article 29(2) and Article 30 of the Constitution, i.e., Question No. 4. The Apex Court while answering Question No.4 held that an aided minority institution shall be entitled to have the right of admission of students belonging to the minority group and at the same time shall be required to admit a reasonable extent of nonminority students so that the rights under Article 30(1) are not substantially impaired and further the citizens' rights under Article 29(2) are not infringed. The Apex Court further held that what would be the reasonable, would vary from the types of institution, the courses of education for which admission is sought and other factors like educational needs. The State Government concerned has to notify the percentage of the nonminority students to be admitted in the light of the above observations.

150. Question No. 4 and its answer are extracted below :

?Q.4. Whether the admission of students to minority educational institution, whether aided or unaided, can be regulated by the State Government or by the university to which the institution is affiliated?

A.A minority institution does not cease to be so, the moment grantin aid is received by the institution. An aided minority education institution, therefore, would be entitled to have the right of admission of students belonging to the minority group and at the same time, would be required to admit a reasonable extent of any minority students, so that the rights under Article 30(1) are not substantially impaired and further the citizens' right under Article 29(2) are not infringed. What would be a reasonable extent would vary from the types of institution, the courses of education for which admission is being sought and other factors like educational needs. The State Government concerned has to notify the percentage of the nonminority students to be admitted in the light of the above observations. Observance of inter se merit amongst the applicants belonging to the minority group could be ensured. In the case of aided professional institutions, it can also be stipulated that passing of the common entrance test held by the State agency is necessary to seek admission. As regards nonminority students who are eligible to seek admission for the remaining seats, admission should normally be on the basis of the common entrance test held by the State agency followed by Counselling wherever it exists.?

151. According to the law laid down by the Apex Court in T.M.A. Pai's case the right in a minority institution under Article 29(2) is not the same as it is with regard to nonminority institution. An institution, if it is not minority, 100% seats will be available to all the citizen and no one can be discriminated on the ground of religion but in an institution declared minority institution it still permits admission to majority but right of the majority is substantially infringed and marginalised and it cannot be said that the right under Article 29(2) are not effected when an institution which is receiving aid is declared as minority. The Apex Court in (1975) 2 SCC 283, The Gandhi FaizeAm Cottage v. University of

Agra & Anr., has held that abridgement of the constitutional right is as obnoxious as annihilation. Even if the right of citizens under Article 29(2) is abridged the fundamental right is infringed. Following observations were made in paragraph 19 :

?(19) All the other learned Judges who are party to St. Xavier's College case (supra) and all the earlier rulings have negated the untouchable absoluteness urged by the management. Equally fallacious is the simplistic submission which appears to have appealed to the High Court that Article 30 is disturbed only when the right is destroyed, not when it is damaged. St. Xavier's College case has dispelled doubts in this behalf: Abridgement of the constitutional right is as obnoxious as annihilation. To cripple is to kill.?

152. The observations of the Apex Court in State of Gujarat & Anr. v. Raman Lal Keshav Lal Soni & Ors., (1983)2 SCC 33, (as quoted in preceding paragraph of this judgment) also do support that law must satisfy the requirements of the Constitution today. The rights of citizens under Article 29(2) which was being enjoyed by all the citizens since very inception of university were sought to be impaired by 1981 Amendment Act. It is admitted fact that prior to 2005 in the admission policy the Aligarh Muslim University never prescribed any quota for muslim candidates and all citizens had right under Article 29(2) to seek admission.

153. The next question comes is the question of locus and relief. It has been contended by Counsel for the Aligarh Muslim University that the writ petitioners have no locus to challenge the rules for admission they having appeared and having taken a chance to get success. The admission in which the writ petitioners appeared was admission under internal quota which for the year 2005 was 25%. It has been stated that earlier years All India quota was 25% and rest of the seats were filled up as internal candidates. The writ petitioners have not been challenging the conduct of examination or any infirmity or irregularity in the examination, what they were challenging is the marginalisation of institutional quota by carving out 50% muslim quota. The admission policy in so far it reserves 50% muslim quota was being challenged by the petitioners and the petitioners having passed the MBBS has right to challenge the policy of the institution which adversely effected their chance to seek admission in the year in question and even in future years. We are not convinced with the submission of Counsel of Aligarh Muslim University that the writ petitioners have no locus to file the writ petition.

154. Now comes the question of relief. It has been submitted by Counsel for the Aligarh Muslim University that no mid session admission can be directed by the Court and the learned single Judge by the impugned judgment has directed for holding a fresh examination against 50% muslim quota. Reliance has been placed on Medical Council of India's case (supra) which lays down that no mid session admission can be directed. Another judgment relied is 2005(2) SCC 65, Mridul Dhar v. Union of India. Paragraph 31 of the judgment provides for time

schedule of postgraduate and superspeciality course. The last date for joining the allotted college and course of postgraduate course is 1st May. The results for 2005 admission were declared on 26th February, 2005, thereafter the students even under 50% quota were admitted and are pursuing the course. It is true that by an interim order the admissions were made subject to the final decision. We have also been told that for the year 2006 the examination for fresh admission course is going to be held in February, 2006. The judgment of learned single Judge directing for holding examination cannot be given effect to at such distance of time. No fresh admission can be taken at this stage. The muslim students whose admission has been quashed by the learned single Judge are also before us by filing two appeals, we have granted leave them to file appeal. They complained that they were neither party nor noticed before quashing their admissions. We are not expressing any opinion on the effect of their being not party or not being noticed because we have already held that Aligarh Muslim University is not a minority institution and the muslim quota of 50% was invalid. However, in facts of the present case and the fact that those students who have passed MBBS and admitted in the courses have run for substantially long period, we are inclined to modify the judgment of learned single Judge permitting those admissions to continue in special facts of the present case.

155. In view of the reasons as given by Hon''ble the Chief Justice and some reasons given in this order, I am in full agreement with the orders passed as at (i) to (x) in the order of Hon''ble the Chief Justice.

156. All the appeals are disposed of accordingly. Parties shall bear their own costs.

Appeals disposed of.