

(2011) 09 GUJ CK 0059

In the Gujarat High Court

Case No : Special Civil Application No's. 5309, 8031, 8197, 9351, 9625, 12373, 12398 and 14284 of 2010

Ambaji Physiotherapy College Managed by Ambaji Education APPELLANT
Vs

State of Gujarat and Others RESPONDENT

Date of Decision : 08-09-2011

Acts Referred:

Constitution of India, 1950 — Article 19(1)(g), 245, 245(1), 246, 31C
Maharashtra Universities Act, 1994 — Section 105, 105(2), 115, 3(1), 6(1)
National Council for Teacher Education Act, 1993 — Section 14

Citation : (2011) 3 GLH 560

Hon'ble Judges : S.J. Mukhopadhaya, C.J.; J.B. Pardiwala, J

Bench : Division Bench

Advocate : Pratik Y. Jasani, Ms. Mamta R. Vyas, Mr. R.R. Marshall, Mr. V.D. Pargi and Mr. B.S. Patel, for the Appellant; Prakash Jani, Government Pleader with Mrs. Krina Calla, AGP for Respondents 1 - 2 and Mr. P.S. Champaneri for Respondent 3, for the Respondent

Judgement

Mr. J.B. Pardiwala, J.—As common questions of fact and law are involved in all these petitions, they were heard together and are being disposed of by this common judgment and order. In all the above captioned writ petitions, the issue involved is more or less identical and the reliefs which have been prayed for are also almost the same in each of the petitions.

2. The petitioners are Charitable Trusts registered under the provisions of the Bombay Public Trusts Act and each of these Trusts are running and administering respective colleges imparting education in various faculties.

3. The grievance voiced by the petitioners is with regard to the action of the State of Gujarat in not granting "No Objection Certificate" to the respective colleges for starting a self-financed college having affiliation with a university recognised as "Shreemati Nathibai Damodar Thackersey Women's University" situated outside the State of Gujarat.

4. In this background, the colleges have prayed for a relief, seeking appropriate writ, order or direction directing the State of Gujarat to grant "No Objection Certificate" to the colleges for getting affiliation with Shreemati Nathibai Damodar Thackersey Women's University irrespective of any State policy in the interest of justice and equity.

5. In one of the petitions, the petitioner has also prayed for an appropriate writ, order or direction to quash and set-aside the Government Resolutions dated 4th October 2007, 1st June 2009 and 10th August 2010 governing the policy as regards grant of "No Objection Certificate".

6. In short, it appears that Shreemati Nathibai Damodar Thackersey Women's University is a university in the State of Maharashtra permitted to admit to the privileges of the university outside the State of Maharashtra with the consent and approval of the concerned State. The petitioners who are running educational trusts are anxious to start colleges within the State of Gujarat seeking affiliation with Shreemati Nathibai Damodar Thackersey Women's University with the prior approval and consent of the State of Gujarat.

7. To adjudicate the controversy, it would be appropriate to trace in brief the history of Shreemati Nathibai Damodar Thackersey Women's University, more particularly, how the same was established and with what object.

8. It appears that initially Shreemati Nathibai Damodar Thackersey Women's University was registered under the Societies Act, 1860 and was administering and maintaining women's colleges in Mumbai, Pune and part of State of Bombay (which is now State of Gujarat).

9. It appears that the Society, at the relevant point of time, requested the then Provincial Government to accord to it statutory status. The Government appointed a Committee, which reported that statutory status be given to the Society. Accordingly, on 23rd November 1949 the then Bombay Government enacted "the Shreemati Nathibai Damodar Thackersey Women's University Act, 1948". Section 2(1) of the said Act defined the word "affiliated". It meant admitted or deemed to have been admitted to the privileges of the University u/s 5 or affiliated u/s 27. Section 5(2) empowered the University to admit any institution in the then State of Bombay or in other territories to the privileges of the University. This was subject to such conditions and restrictions as the University and the State Government thought fit to impose. Thus, granting privilege to an institution was subject to the conditions and restrictions of the concerned State Government. Under the provisions of Entry 66 List 1 of the Seventh Schedule to the Constitution, the Union Government enacted the University Grants Commission Act, 1956. This was in respect of coordination and determination of standards in institutions for higher education or research and scientific and technical institutions. The short title of University Grants Commission Act repeats the words of Entry 66 of the Seventh Schedule to the Constitution. Section 2(f) of the said Act defines "University". It runs as under:-

"2(f) "University" means a University established or incorporated by or under a Central Act, a Provincial Act or a State Act, and includes any such institutions as may, in consultation with the University concerned, be recognized by the Commission in accordance with the regulations made in this behalf under this Act."

University Grants Commission has confirmed that it has recognized the S.N.D.T. University as a University under this provision.

10. It appears that the Shreemati Nathibai Damodar Thackersey Women's University Act, 1949 came to be repealed and was replaced by Act of 1974. We do not have the Act of 1974 on record. All that has been shown to us is the Maharashtra Ordinance No.XIV of 1974 called "the Shreemati Nathibai Damodar Thackersey Women's University (Validating Provisions) Ordinance, 1974". By Section 4(1) of the validating Act of 1974, the power and Authority to recognize institutions outside the State of Maharashtra subject to conditions imposed by the concerned State Government, was recognized.

11. Once again, the Act of 1974 stood repealed and was replaced by the Maharashtra Universities Act, 1994 (hereinafter referred to as, "the Act of 1994"). The preamble to the Maharashtra Universities Act reads as under:-

"WHEREAS it is expedient to provide for a unified pattern for the constitution and administration of non-agricultural and non-technological universities in the State of Maharashtra and to make better provisions therefor;

AND WHEREAS with a view to consider and recommend measures for better governance of such universities and reorganisation of higher education, the Central Government and the Government of Maharashtra had appointed various committees and study groups.

AND WHEREAS after considering the recommendations made by these committees and groups, and the experience gained in implementing the present university Acts, it is felt necessary to make provisions to enable each university to effectively carry out with responsibility the objects of the university, to promote more equitable distribution of facilities for higher education, to provide for more efficient administration, financial control, better organisation of teaching research, to ensure proper selection and appointment of teachers and other employees, to provide for representation of students and teachers on various bodies of the university, to take measures for curbing or for eradicating undesirable non-academic influences detrimental to maintenance of discipline and standards of education or academic excellence in the universities and to provide for matters connected with or incidental thereto; it is considered expedient to unify, consolidate and amend the law relating to such universities in the State: It is hereby enacted in the Forty-fifth Year of the Republic of India as follows.."

(emphasis supplied).

12. We may also look into some of the provisions of the Act of 1994. Section 2(3) defines "affiliated college", which means a college which has been granted affiliation by the university. Section 2(10) defines "college", which means a college conducted by the university, or affiliated to the university, situated in the university area. Section 2(11) defines "State Government", which means the Government of Maharashtra. Section 2(36) defines "university", which means any of the universities mentioned in the Schedule. Section 2(37) defines "university area", which means the area specified against the name of the university in the Schedule.

13. It is evident to note that "university area" as defined under the Act means the area specified against the name of the university in the Schedule. The Schedule reads as under:-

The Maharashtra Universities Act, 1994 THE SCHEDULE [See Sections 3(1) and 6(1)] PART I

Name of the existing university

Name of corresponding area university under this Act

University area

1.

XXX XXX XXX

XXX XXX XXX

XXX XXX XXX

2.

XXX XXX XXX

XXX XXX XXX

XXX XXX XXX

3.

XXX XXX XXX

XXX XXX XXX

XXX XXX XXX

4.

XXX XXX XXX

XXX XXX XXX

XXX XXX XXX

5.

XXX XXX XXX

XXX XXX XXX

XXX XXX XXX

6.

The Nathibai Thackersey University, constituted under the Shreemati Nathibai Damodar Thackersey Women's University. Act, 1974 (Mah.XXVI of 1974)

Shreemati Damodar Women's

The Shreemati Damodar Women's

Nathibai Thackersey University.

The State of Maharashtra.

7.

XXX XXX XXX

XXX XXX XXX

XXX XXX XXX

8.

XXX XXX XXX

XXX XXX XXX

XXX XXX XXX

14. Section 6(1) of the Act of 1994 deals with jurisdiction and admission to privileges of university, which reads as under :-

"6(1) The territorial limits, within which the powers conferred upon the university by this Act shall be exercised, shall comprise the whole of the university area as specified against the name of such university in the Schedule :-

Provided that, the benefit of distance-education courses, correspondence courses, open university courses or external degree courses of any university may, with the prior permission of the State Government, extend and cover the entire area of the State outside the university area."

15. The most important provision which is the subject matter of controversy is Section 105 of the Act of 1994. The only relevant portion of Section 105 is, 105(1)(2) and , which reads as under :-

"105(1) In addition to the other provisions of this Act, and Statutes, the provisions set out in this Section shall apply to the Shreemati Nathibai Damodar

Thackersey Women's University.

(2) The territorial limits, within which the powers conferred upon the university by this Act shall be exercised, shall comprise the State of Maharashtra :-

Provided that, the university may, subject to such conditions and restrictions as it and the State Government may think fit to impose, admit any women's educational institution in any other territory to the privileges of the university, with the approval of the Government concerned."

16. Section 115 is repealed and savings. The relevant part of Section 115 is reproduced herein below :-

"115(1) On and from the date of commencement of this Act, -

(a) the Bombay University Act, 1974;

(b) the Poona University Act, 1974;

(c) the Shivaji University Act, 1974;

(d) the Dr.Babasaheb Ambedkar Marathwada University Act, 1974;

(e) the Nagpur University Act, 1974;

(f) the Shreemati Nathibai Damodar Thackersey Women's University Act, 1974;

(g) the Amravati University Act, 1983; and

(h) the North Maharashtra Universities Act, 1989, shall stand repealed.

(2)Notwithstanding the repeal of the said Acts,-

(i) any person holding office immediately before the commencement of this Act as Vice-Chancellor of an existing university shall, on such commencement, be the Vice-Chancellor of the corresponding university and shall continue to hold the said office till his term of office as Vice-Chancellor of the existing university would have expired had he continued to be as such unless he ceases to be the Vice-Chancellor by reason of death, resignation or otherwise before the expiry of his term of office as aforesaid and shall exercise all the powers and perform all the duties conferred and imposed on the Vice-Chancellor of the corresponding university by or under this Act;

(ii) all colleges which stood affiliated to any existing university immediately before the commencement of this Act, shall be deemed to be affiliated to the corresponding university under this Act till their affiliations is withdrawn by the corresponding university under this Act;

(iii) all other educational institutions which were entitled to any privileges of any existing university shall be entitled to similar privileges of the corresponding university;"

17. Thus, it can be seen from various provisions of the Act of 1994, including

Sections 6(1) and 105(2) of the Act of 1994 that Shreemati Nathibai Damodar Thackersey Women's University can exercise its power within the territorial limits of the State of Maharashtra, the corollary will be that power of Shreemati Nathibai Damodar Thackersey Women's University cannot be exercised beyond the territorial limits of the State of Maharashtra.

18. It is evident to note that Section 105(2) makes it abundantly clear that the territorial limits, within which the powers conferred upon the University by the Act of 1994 shall be exercised, shall comprise the State of Maharashtra. It is only by virtue of a proviso that the Shreemati Nathibai Damodar Thackersey Women's University can grant affiliation to any college outside the State of Maharashtra subject to approval of the concerned State Government.

19. It is also important to state at this stage that in the meanwhile with effect from 1st July 1995, the Central Government brought into effect an Act to provide for the establishment of a National Council for Teachers' Education with a view to achieving planned and coordinated development of the teacher-education system throughout the country, the regulation and proper maintenance of norms and standards in the teacher-education system and for matters connected therewith - the National Council for Teachers' Education Act, 1993. Section 14 of this Act empowers regional committees constituted under the Act to grant recognition to educational institution to run course for training the teachers.

20. It is also very important to look into two more enactments, (1) The Bombay Reorganisation Act, 1960; and (2) The Gujarat Adaptation of Laws (State and Concurrent Subjects) Order, 1960.

21. It is expedient to note that the Act of 1949 stood repealed and was replaced by a validating Act of 1974. Section 91(iv) of the Act of 1974 reads as under :-

"(iv) all colleges affiliated, colleges made constituent, institutions recognised and all secondary schools and higher secondary schools registered under the said Act and entitled to the privileges of the University under that Act, immediately before the commencement of this Act, shall be deemed to be affiliated, made constituent, recognised or registered or admitted to the privileges of the University, as the case may be, under this Act, except in so far as such privileges may be withdrawn, restricted or modified by or under this Act."

22. Upon bifurcation of the State of Bombay, State of Gujarat was formed from the appointed day i.e. 1st May 1960. Section 2(d) of the Bombay Reorganisation Act, 1960 defines "law" as under :-

"law" includes any enactment, ordinance, regulation, order bye-law, rule, scheme, notification or other instrument having, immediately before the appointed day, the force of law in the whole or in any part of the State of Bombay."

23. Sections 87, 88 and 89 of the said Act are also relevant. They are as under :-

"87. Territorial extent of laws. -The provisions of Part II shall not be deemed to have effected any change in the territories to which any law in force immediately before the appointed day extends or applies, and territorial references in any such law to the State of Bombay shall, until otherwise provided by a competent Legislature or other competent Authority, be construed as meaning the territories within that State immediately before the appointed day.

88. Power to adapt laws. - For the purpose of facilitating the application in relation to the State of Maharashtra or Gujarat of any law made before the appointed day, the appropriate Government may, before the expiration of one year from that day, by order, make such adaptations and modifications of the law, whether by way of repeal or amendment, as may be necessary or expedient, and thereupon every such law shall have effect subject to the adaptations and modifications so made until altered, repealed or amended by a competent Legislature or other competent Authority.

Explanation. - In this Section, the expression "appropriate Government" means as respects any law relating to a matter enumerated in the Union List, the Central Government, and as respects any other law, the State Government.

89. Power to construe laws. -Notwithstanding that no provision or insufficient provision has been made u/s 88 for the adaptation of a law made before the appointed day, any Court, Tribunal or Authority, required or empowered to enforce such law may, for the purpose of facilitating its application in relation to the State of Maharashtra or Gujarat, construe the law in such manner, without affecting the substance, as may be necessary or proper in regard to the matter before the Court, Tribunal or Authority."

24. On the strength of Section 88 of the Bombay Reorganisation Act, 1960 by the Government of Gujarat on 1st May 1960 an order came to be published called "the Gujarat Adaptation of Laws (State and Concurrent Subjects) Order, 1960". Section 2(b) of the said Order explains "existing State law", which reads as under :-

"(b) "existing State law" means any law in force immediately before the appointed day in the whole or any part of the territories now comprised in the State of Gujarat, but does not include any law relating to a matter enumerated in the Union List."

Clause 3 of the order reads as under :-

"3. As from the appointed day, the existing State-laws mentioned in the Schedule to this Order shall, until altered, repealed or amended by a competent Legislature or other competent Authority, have effect subject to the adaptations and modifications directed by the Schedule or, if it is so directed, shall stand repealed."

25. Thus, what can be deduced is that by virtue of Order of 1960, the State of Gujarat adapted the then existing State laws mentioned in the Schedule to the

Order of 1960, clarifying that until altered, repealed or amended by a competent Legislature or other competent Authority, have effect subject to the adaptations and modifications directed by the Schedule or, if it is so directed, shall stand repealed.

26. We have noticed something very important. In the Schedule appended to the Order of 1960, we do not find "Shreemati Nathibai Damodar Thackersey Women's University Act, 1948".

27. Taking into consideration the above referred relevant aspects, we found ourselves perplexed as to how the applicability of the Act of 1994 can be extended beyond the territorial limits of the State of Maharashtra and that too, by way of a proviso to Section 105(2) of the Act of 1994. Section 105(2) makes it abundantly clear that the territorial limits, within which the powers conferred upon the university by the Act of 1994 shall be exercised, shall comprise the State of Maharashtra. Even the Schedule appended to the Act of 1994 makes it clear that the University area is State of Maharashtra. Having noticed these, we immediately realize the seriousness and the importance of the issue because colleges within the State of Gujarat are seeking affiliation with a university which is in the State of Maharashtra.

28. In this background, we noticed that the following questions are involved for determination :-

"(i) Whether the SNDT University has jurisdiction to affiliate any institute situated within the State of Gujarat?

(ii) Whether proviso to Sec. 105(2) of the Maharashtra Universities Act, 1994 empowering the SNDT University to approve college(s) situated within the State of Gujarat is ultravires Article 245(1) of the Constitution of India?

(iii) What shall be the effect on a college affiliated with the SNDT University after repeal of 1949 and 1974 Acts?

(iv) What shall be the effect of U.G.C. Act, if the SNDT University affiliates the institutes situated with the territory of State of Gujarat?"

29. We framed the above referred questions involved for determination, and as the question of validity of proviso to Section 105(2) of the Act being involved, we impleaded the State of Maharashtra through the Chief Secretary, as party respondent. We also issued notice to the learned Advocate General of the State of Maharashtra as well as the State of Gujarat.

30. In response to the notice issued to the State of Maharashtra, learned Advocate Mr.Nitin Deshpande, specially appointed Counsel for the State of Maharashtra appeared before us and made the following submission :-

31. Learned Counsel submitted that there is a presumption in favour of constitutionality of a statute. The burden is upon the one who assailed it to establish that it is unconstitutional. He has submitted that in none of the

petitions this issue as regards the validity of proviso to Section 105(2) has been raised or pleaded.

32. Counsel would submit that the Hon"ble Court on its own has taken up this issue in the absence of any challenge to the same by any of the parties including the State of Gujarat, who has framed its own policy for the purpose of granting "No Objection Certificate" for affiliation with Shreemati Nathibai Damodar Thackersey Women"s University. He further submitted that constitutional validity of a statutory provision can be challenged only by a person affected. It is not open for the Court to declare any provision of law unconstitutional or invalid without there being any challenge to the same by any of the parties and proper pleadings. To be precise, the main thrust of the submission appears to be that constitutional validity of a provision cannot be decided suo motu by a Court.

33. Counsel would further submit that the proviso to Section 105(2) would apply only if the State of Gujarat accords its approval for affiliation and not otherwise. Operation of Section 105(2) is subject to approval of the State of Gujarat, the Legislature of which is sovereign to enact laws for the said State. He submitted that if the State of Gujarat apprehends that once approval is accorded to affiliation it will have no control over the affiliated college within the State, it can always impose condition subject to which approval can be granted.

34. The third limb of the submission is with regard to extra territorial operation and territorial nexus. Learned Counsel would contend that Section 105(2) is merely an enabling provision and if the State of Gujarat or any other State refuses approval then the affiliation cannot be granted and the application of the Act would be confined to the State of Maharashtra. Section 105(2) operates provided only and only if the State Government concerned accord sanction.

35. Counsel would further contend that Article 245 of the Constitution of India restricts the legislative powers of the State Legislature within the boundaries of that particular State. However, the Courts have applied the "doctrine of territorial nexus" in order to uphold validity of certain enactments. The Counsel would contend that the legislation can be applied outside the territories of the State on the basis of the doctrine of territorial nexus. It means there must be a nexus between the subject matter that is controlled by a statute and the State whose statute is being operated.

36. Learned Counsel has relied upon some case-laws to fortify the contentions which have been put forward.

(1) State of Bihar v. Smt.Charusila Dasi, AIR 1959 SC 1002:

This judgment has been relied upon to fortify the contention that there is a general presumption that the Legislature does not intend to exceed its jurisdiction and it is a sound principle of construction that the act of sovereign Legislature should, if possible, receive such an interpretation as will make it operative and not inoperative.

(2) Waverly Jute Mills Co. Ltd. Vs. Raymon and Co. (India) Private Ltd., .

This judgment has been relied upon to fortify the contention that in the absence of any pleadings by any of the parties and in the absence of any specific challenge to the constitutional validity of a provision, the Court on its own suo motu may not declare a provision to be unconstitutional or ultra vires Article of the Constitution of India.

(3) Hans Muller of Nuremburg Vs. Superintendent, Presidency Jail, Calcutta and Others,

(4) Sanjeev Coke Manufacturing Company Vs. Bharat Coking Coal Limited and Another,

(5) The State of Andhra Pradesh and Another Vs. K. Jayaraman and Others,

(6) Yadlapati Venkateshwarlu v. State of Andhra Pradesh, 1992 Supp(I) SCC 74

(7) K.I. Shephard and Others Vs. Union of India (UOI) and Others,

37. On the question of doctrine of territorial nexus, the following case- laws have been relied upon :-

(1) The State of Bombay Vs. R.M.D. Chamarbaugwala,

(2) Tata Iron and Steel Co. Ltd. v. State of Bihar, AIR 1958 SC 452 (Paragraphs 11 to 15)

(3) Shrikant Bhalchandra Karulkar and others v. State of Gujarat and another, AIR 1994 SCW 3822 (Paragraphs 6 to 10)

(4) Transport Corporation of India Vs. Employees" State Insurance Corpn. and Another,

(5) Ganyog Education and Welfare Trust v. State of Gujarat and another, AIR 2009 GUJ 30.

38. We have also heard learned Government Pleader appearing for the State of Gujarat. Learned Government Pleader appearing for the State Government concentrated only on certain Government Resolutions issued by the Education Department so far as issuance of "No Objection Certificate" to the concerned colleges seeking affiliation with Shreemati Nathibai Damodar Thackersey Women's University are concerned.

39. The Government Resolutions which have been relied upon are more of policy matters and have nothing to do with the issue which we are considering i.e. as regards the constitutional validity of Section 105(2) of the Act of 1994.

40. We have also heard Learned Counsel Mr.Y.C.Contractor who appeared for Shreemati Nathibai Damodar Thackersey Women's University. Mr.Contractor by and large adopted the submissions canvassed by Learned Counsel appearing for the State of Maharashtra.

41. We have also heard Learned Counsel Mr.B.S.Patel appearing in two of the writ petitions. Mr.Patel would contend that the Shreemati Nathibai Damodar Thackersey Women's University Act, 1949 was applicable to Bombay Province and other territories which includes Gujarat as the Act was in force prior to the constitution. The Act is applicable in the State of Gujarat. He relied upon a Division Bench's judgment of this High Court in the case of Gnanyog Education and Welfare Trust v. State of Gujarat and another, reported in 2008(3) GLH 557, whereby the Supreme Court's judgment in the case of Prof. Yashpal and Another Vs. State of Chhattisgarh and Others, has been considered and it has been held that the University Grants Commission Act is the Central Act and Section 105 of the Maharashtra Universities Act, 1994 has been relied. He would contend that the proviso to the Act cannot be ignored without striking down the said provisions. He submitted that so far as the college which he is representing has been given permission by the National Council for Teachers' Education and Section 40(6) of the National Council for Teacher Education Act 1993 says that every examining body shall, on receipt of the order under sub-Section 4, grant affiliation to the institution where recognition has been granted.

42. Having heard Learned Counsel for the respective parties and having perused the various provisions of law, more particularly, the provisions of the Maharashtra Universities Act, 1994, we shall now proceed to deal with the legal issues involved in this group of matters.

43. We have noticed that the Act of 1949 stood repealed and was replaced by a validating Act of 1974. We have also noticed that in the year 1960 there was bifurcation of the State of Bombay resulting into formation of the State of Gujarat. We also noticed as to which of the laws before 1960 were adapted under the Gujarat Adaptation of Laws (State and Concurrent Subjects) Order, 1960 made u/s 88 of the Bombay Reorganisation Act, 1960. We have noticed that the Act of 1949 was not adapted as it is evident from the Schedule appended to the Order of 1960.

44. What is important is, whether Shreemati Nathibai Damodar Thackersey Women's University has jurisdiction to affiliate any institution situated within the State of Gujarat and, whether the proviso to Section 105(2) of the Maharashtra Universities Act, 1994 empowering Shreemati Nathibai Damodar Thackersey Women's University to approve colleges situated within the State of Gujarat is ultra vires Article 245(1) of the Constitution of India.

45. Article 245 of the Constitution of India is very clear. It reads as under :-

"245. Extent of laws made by Parliament and by the Legislatures of States. -

(1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.

(2) No law made by Parliament shall be deemed to be invalid on the ground that

it would have extraterritorial operation."

46. Whenever the Court is examining the validity of an Act, the first thing for the Court to do is to examine whether the Act is a law with respect of a topic assigned to a particular Legislature which enacted it. If it is, then the Court is next to consider whether, in the case of an Act passed by the Legislature, its operation extends beyond the boundaries of the State, for under the provisions conferring legislative powers on it such Legislature can only make a law for its territories or any part thereof and its laws cannot, in the absence of a territorial nexus, have any extraterritorial operation. If the law which is being examined by the Court satisfies both these tests, then finally the Court has to ascertain if there is anything in any other part of the Constitution which places any fetter on the legislative powers of such Legislature. The law in question has to pass all these three tests.

47. The above referred position of law has been very well explained by a ruling of a Constitutional Bench of the Supreme Court, reported in the case of State of Bombay v. R.M.D. Chamarbaugwala and another [AIR 1957 SC 699]. Paragraph 14 of the said judgment reads as under :-

"14. The principal question canvassed before us relates to the validity or otherwise of the impugned Act. The Court of Appeal has rightly pointed out that when the validity of an Act is called in question, the first thing for the Court to do is to examine whether the Act is a law with respect to a topic assigned to the particular Legislature which enacted it. If it is, then the Court is next to consider whether, in the case of an Act passed by the Legislature of a Province (now a State) its operation extends beyond the boundaries of the Province or the State; for under the provisions conferring legislative powers on it such Legislature can only make a law for its territories or any part thereof and its laws cannot, in the absence of a territorial nexus, have any extra-territorial operation. If the impugned law satisfies both these tests, then finally the Court has to ascertain if there is anything in any other part of the Constitution which places any fetter on the legislative powers of such Legislature. The impugned law has to pass all these three tests."

48. Chamarbaugwala's judgment (supra) was subsequently once again relied upon by the Supreme Court in the case of The State of Bihar and Others Vs. Charusila Dasi, , where the Constitutional Bench in paragraph 14 observed as under :-

"It is necessary first to determine the extent of the application of the Act with reference to SS.1(2) and (3) of the Act read with the preamble. The preamble states :-

"Whereas it is expedient to provide for the better administration of Hindu religious trusts in the State of Bihar and for the protection and preservation of properties appertaining to such trusts."

It is clear from the preamble that the Act is intended to provide for the better administration of Hindu religious trusts in the State of Bihar. Section 1(2) states that the Act extends to the whole of the state of Bihar, and S.3 we have quoted earlier. If these two provisions are read in the context of the preamble, they can only mean that the act applies in cases in which (a) the religious trust or institution is in Bihar and (b) any part of the property of which institution is situated in the State of Bihar. In other words, the aforesaid two conditions must be fulfilled for the application of the Act. It is now well settled that there is a general presumption that the legislature does not intend to exceed its jurisdiction, and it is a sound principle of construction that the Act of a sovereign legislature should, if possible, receive such an interpretation as will make it operative and not inoperative."

49. The question which falls for our determination is as to whether on the strength of a proviso to Section 105(2) of the Maharashtra Universities Act, 1994 the Act could have been given extra-territorial operation without there being any territorial nexus with the object sought to be achieved by giving such extra-territorial operation.

50. It is a settled law that the normal function of a proviso is to except something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. As was stated in *Mullins v. Treasurer of Survey* [1880(5) QBD 170], (referred to in *Shah Bhojraj Kuverji Oil Mills and Ginning Factory Vs. Subbash Chandra Yograj Sinha, and The Calcutta Tramways Co. Ltd. Vs. The Corporation of Calcutta*, ; when one finds a proviso to a Section the natural presumption is that, but for the proviso, the enacting part of the Section would have included the subject-matter of the proviso. The proper function of a proviso is to except and to deal with a case which would otherwise fall within the general language of the main enactment and its effect is confined to that case. It is a qualification of the preceding enactment which is expressed in terms too general to be quite accurate. As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment and ordinarily, a proviso is not interpreted as stating a general rule. "If the language of the enacting part of the statute does not contain the provisions which are said to occur in it you cannot derive these provisions by implication from a proviso." Said Lord Watson in *West Derby Union v. Metropolitan Life Assurance Co.* (1897 AC 647) (HL). Normally, a proviso does not travel beyond the provision to which it is a proviso. It caryes out an exception to the main provision to which it has been enacted as a proviso and to no other. (See *A.N. Sehgal and others Vs. Raje Ram Sheoram and others*, , *Tribhovandas Haribhai Tamboli Vs. Gujarat Revenue Tribunal and others*, and *Kerala State Housing Board and Others Vs. Ramapriya Hotels (P) Ltd. and Others*, .

Kedarnath Jute Manufacturing Co. Vs. Commercial Tax Officer, Calcutta and Others, .

"...The normal function of a proviso is to except something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment...."

The Commissioner of Income Tax, Mysore, Travancore-cochin and Coorg, Bangalore Vs. The Indo Mercantile Bank Limited, .

"...To read a proviso as providing something by way of an addendum or as dealing with a subject not covered by the main enactment or as stating a general rule as distinguished from an exception or qualification is ordinarily foreign to the proper function of a proviso..."

DOCTRINE OF TERRITORIAL NEXUS

51. It is now well-settled that to determine whether a law is extra-territorial the doctrine of territorial nexus must be applied. It must be seen whether the statute has selected some fact or circumstance which provides some real relation or connection with the territory in respect of which the Legislature is entitled to legislate and has adopted this as the ground of its interference. If the legislation satisfies this test, its validity would not be open to question. This doctrine which has commonly come to be known as nexus theory has been applied in support of tax legislation in several cases in Australia as well as in England and an admirable statement of it is to be found in the following passage from the dissenting judgment of Rich. J., in *Broken Hill South Ltd v. Commissioner of Taxation (TV. S W.)*, (1937) 56 C. L. R. 337 at p.361 :-

"I do not deny that once any connection with New South Wales appears, the Legislature of that State may make that connection the occasion or subject of the imposition of a liability. But the connection with New South Wales must be a real one and the liability sought to be imposed must be pertinent to that connection."

The nexus theory was first applied in this country to support income tax legislation in AIR 1944 51 (Federal Court); (1948) 16 ITR 240 (Privy Council) ; and (1949) 17 ITR 63 (Federal Court) . The Supreme Court extended it to sales-tax legislation in *Poppatlal Shah Vs. The State of Madras*, and in *The State of Bombay Vs. R.M.D. Chamarbaugwala*, which was a case concerned with tax on cross-word competition, the Supreme Court applied it to legislation imposing tax on gambling. The principles underlying the nexus theory were explained by the Supreme Court in the last mentioned case at page 711 in the following words :-

"The doctrine of territorial nexus is well-established and there is no dispute as to the principles. As enunciated by Learned Counsel for the petitioners, if there is a territorial nexus between the person sought to be charged and the State seeking to tax him the taxing statute may be upheld. Sufficiency of the territorial connection involves a consideration of two elements, namely, (a) the connection must be real and (b) the liability sought to be imposed must be pertinent to that connection. It is conceded that it is of no importance on the question of validity that the liability imposed is or may be altogether disproportionate to the

territorial connection. In other words, if the connection is sufficient in the sense mentioned above the extent of such connection affects merely the policy and not the validity of the legislation."

These principles were once again affirmed by the Supreme Court in *Tata Iron and Steel Co. v. Bihar State*, AIR 1958 S.C. 452 and sales-tax legislation of the Bihar State was tested and justified by reference to these principles. Of course it is true that in this case the Supreme Court observed :-

"It is not necessary for us on this occasion to lay down any broad proposition as to whether the theory of nexus, as a principle of legislation, is applicable to all kinds of legislation."

But in the subsequent case of *The State of Bihar and Others Vs. Charusila Dasi*, which was a case dealing with legislation in regard to public religious and charitable institutions situate in the State of Bihar any part of the property of which was situate within the State, the Supreme Court once again adopted the same principles and applied the nexus theory to repel the argument that the law was extra-territorial in operation. The Supreme Court held that the religious endowment being in Bihar and the trustees functioning there, there was sufficient territorial nexus to validate the legislation. It would thus be seen that the theory of nexus as a principle of legislation must now be held to be applicable to all kinds of legislation and the challenge to the constitutionality of the legislation must be tested by reference to this principle.

52. Applying this principle let us examine whether there is any connection between the Act of 1994 and the territories subject to the jurisdiction of the State Legislature and, whether such connection is real or illusory. Even the doctrine of territorial nexus which is sought to be relied upon does not save the situation. It is no doubt true as held by the Supreme Court that a legislation can be applied outside the territories of the State on the basis of the doctrine of territorial nexus. It means there must be a nexus between the subject matter that is controlled by a statute and the State whose statute is being operated. It must be seen whether the statute has selected some fact or circumstance which provides some real relation or connection with the territory in respect of which the Legislature is entitled to legislate and has adopted this as the ground of its interference. If the legislation satisfies this test, its validity would not be open to question. This doctrine which has commonly come to be known as "nexus theory" has been applied in support of tax legislation. Of course, the Supreme Court has, in *State of Bihar v. Smt. Charusila Dasi* (supra), held that the doctrine of territorial nexus would be applicable to all kinds of legislations and the challenge to the constitutionality of the legislation must be tested by reference to this principle. To apply the doctrine of territorial nexus, two conditions must be fulfilled;

3. connection must be real and not illusory, and

4. liability sought to be imposed must be pertinent to that connection.

We are unable to understand as to what object is sought to be achieved by making the provisions of the Maharashtra Universities Act, 1994 extra-territorial in operation. There does not appear to be any nexus with the object sought to be achieved. We are not dealing with a tax legislation which can have an extra-territorial operation as there is always a nexus to be achieved. The Supreme Court in the case of State of Bombay (supra) has explained this position very succinctly. It held in paragraph 24 as under :-

"24. The next point urged by the petitioners is that under Arts. 245 and 246 the Legislature of a State can only make a law for the State or any part thereof and consequently the Legislature overstepped the limits of its legislative field when by the impugned Act it purported to affect men residing and carrying on business outside the State. It is submitted that there is no sufficient territorial nexus between the State and the activities of the petitioners who are not in State.

The doctrine of territorial nexus is well established and there is no dispute as to the principles. As enunciated by Learned Counsel for the petitioners, if there is a territorial nexus between the person sought to be charged and the State seeking to tax him the taxing statute may be upheld. Sufficiency of the territorial connection involves a consideration of two elements, namely, (a) the connection must be real and not illusory and (b) the liability sought to be imposed must be Pertinent to that connection.

It is conceded that it is of no importance on the question of validity that the liability imposed is or may be altogether disproportionate to the territorial connection. In other words, if the connection is sufficient in the sense mentioned above, the extent of such connection affects merely the policy and not the validity of the legislation. Keeping these principles in mind we have to ascertain if in the case before us there was sufficient territorial nexus to entitle the Bombay Legislature to make the impugned law.

The question whether in a given case there is sufficient territorial nexus is essentially one of fact The trial Court took the view that the territorial nexus was not sufficient to uphold the validity of the law under debate."

53. In the case of Shrikant Bhalchandra Karulkar and others v. State of Gujarat and another, reported in AIR 1994 SCW 3822, the Supreme Court held in paragraph 8 as under :-

"8. It is no doubt correct that under Articles 245 and 246 of the Constitution of India the legislature of a State can make laws for the State or any part thereof. It would be overstepping the limits of its legislative field when it purports to affect men and property outside the State. In other words the State Legislature has no legislative competence to make laws which have extra-territorial operation. Meaning of the words "extra-territorial operation" have been authoritatively laid down by this Court in various judgments. A State Legislature has plenary jurisdiction to enact laws in respect of subjects in Lists II and III, Schedule 7th, Constitution of India, Such laws may be in respect of persons

within the territory, of property - immovable or movable - situated within the State, or of acts and events which occur within its borders. So long as the law made by the State Legislature is applicable to the persons residing within its territory and to all things and acts within its territory, it cannot be considered extra-territorial. this Court -over a period of three decades - has evolved a principle called "doctrine of territorial nexus" to find out whether the provisions of a particular State law have extra-territorial operation. The doctrine is well established and there is no dispute as to its principles. If there is a territorial nexus between the persons/ property subject-matter of the Act and the State seeking to comply with the provisions of the Act then the Statute cannot be considered as having extraterritorial operation. Sufficiency of the territorial connection involves consideration of two elements, the connection must be real and not illusory and the liability sought to be imposed under the Act must be relevant to that connection. The Act has to satisfy the principles of territorial nexus which are essentially discernible from the factual application of the provisions of the Act."

54. In the case of Kurmanchal Inst. of Degree and Diploma and Others Vs. Chancellor, M.J.P. Rohilkhand Univ. and Others, , the Supreme Court almost dealing with an identical issue held as under :-

"Although we are inclined to agree with the Learned Counsel appearing on behalf of the appellants that for all intent and purport the requirements of law for making an ordinance by the Executive Council of the University had been done pursuant whereto new courses could be opened, we are, however, unable to persuade ourselves to accept the contention that such study centres should be permitted to be operated beyond the territorial jurisdiction of the University. Section 5 of the Act clearly states in regard to the territorial jurisdiction of the University. In terms of the Schedule appended to the Act, the territorial jurisdiction of the University is confined only to seven districts, Nainital not being one of them. Each University in the country which is recognised under the University Grants Commission Act must have their own territorial jurisdiction save and except for the Central Universities or specified in the Legislative or Parliamentary Act.

The submission of the Learned Counsel that for the purpose of running a distance education course, extra?territorial activities must be carried out may not be entirely correct. It is one thing to say that the University takes recourse to the correspondence courses for conferring degrees or diplomas but it would be another thing to say that study centres would be permitted to operate which requires close supervision of the University. In a study centre, teachers are appointed, practical classes are held and all other amenities which are required to be provided for running a full-fledged institution or college are provided. Such an establishment, in our opinion, although named as a study centre, and despite the fact that the course of study and other study materials are supplied by the University cannot be permitted to be established beyond the territorial

jurisdiction of the University. Nainital is outside the territorial jurisdiction of the University. In fact it is not situated in the State of U.P. and, thus, beyond the provisions of the Act.

The submission of the Learned Counsel that the UGC Regulations, 1985 provides for study centre of this nature cannot be countenanced. The UGC Regulations being a subordinate legislation must be read with the principal Act. The subordinate legislation will be ultra vires if it contravenes the provisions of the principal Act. [See Vasu Dev Singh and Others Vs. Union of India (UOI) and Others, . A statutory Authority, it is well known, must act within the four corners of the statute. A fortiori it has to operate within the boundaries of the territories within which it is to operate under the statute. Such territorial jurisdiction of the University must be maintained as otherwise a chaos would be created. If distance education of such a nature is to be encouraged, the only course would be to suitably amend the provisions of the Act.

The study centres of the appellants being situated in Nainital, is beyond the territorial jurisdiction of the respondent University. No writ of or in the nature of mandamus as has been prayed for in the writ petition can be issued."

55. The review of the various judgments which we have quoted above, more particularly, the principle of "extra-territorial operation" and "territorial nexus" leaves us with no manner of doubt that by virtue of a proviso to Section 105(2), the provisions of the Maharashtra Universities Act, 1994 could not have been made applicable beyond the limits of the State of Maharashtra even with the permission of the concerned State Government. There is also no doubt in our mind on the issue that there is no nexus at all sought to be achieved with the object of the Act in making the Act of 1994 extra-territorial in operation.

56. In spite of the fact that we have no doubt in our mind about this position of law, we are still reluctant to declare Section 105(2) of the Act of 1994 ultra vires Article 245 of the Constitution of India for the simple reason that there is no specific challenge in this regard in any of the petitions raised by any of the parties. Even the State Government has not thought fit to raise this issue but has only concentrated on their own policies in this regard. We are left with a situation where, though we have serious doubt as regards the validity of Section 105(2) of the Maharashtra Universities Act, but we still would like to refrain from giving any declaration in this regard. We restrain ourselves taking into consideration some judgments of the Supreme Court.

57. The Supreme Court in the case of Sanjeev Coke Manufacturing Company Vs. Bharat Coking Coal Limited and Another, , has sounded a note of caution by observing in paragraph 11 as under :-

"...The Counsel who appeared, however, chose to question the constitutional validity of Section 4 of the Constitution Forty-second Amendment Act, 1976 by which the immunity afforded by Art. 31C was extended by replacing the words "the principles specified in Cl.(b) or Cl.(c) of Art.39" by the words "all or any, of

the principles laid down in Part IV". No question regarding the constitutional validity of Sec. 4 of the constitutional Forty-second Amendment Act, 1976 arose for consideration in the case, firstly, because the immunity from attack given to a law giving effect to the policy of the State towards securing the principles specified in Cl.(b) or Cl.(c) of Art.39 was given by the Constitution Twenty-fifth Amendment Act, 1971 itself and secondly because the Sick Textile Undertakings (Nationalisation) Act had been enacted before the Constitution Forty-second Amendment Act, 1976. Yet, Counsel successfully persuaded the Court to go into the question of the validity of S .4 of the Constitution Forty-second Amendment Act. An objection was raised before the Court by the learned Attorney General that the Court should not concern itself with hypothetical or academic questions. The objection was overruled on the ground that the Forty-second Amendment was there for anyone to see and that the question raised was an important one dealing with, not an ordinary law, but, a constitutional amendment which had been brought into operation and which of its own force permitted the violations of certain freedoms through laws passed for certain purposes. We have serious reservations on the question whether it is open to a Court to answer academic or hypothetical questions on such considerations, particularly so when serious constitutional issues are involved. We (Judges) are not authorised to make disembodied pronouncements on serious and cloudy issues of constitutional policy without battle lines being properly drawn. Judicial pronouncements cannot be immaculate legal conceptions. It is but right that no important point of law should be decided without a proper lis between parties properly ranged on either side and a crossing of the swords. We think it is inexpedient for the Supreme Court to delve into problems which, do not arise and express opinion thereon."

(emphasis supplied).

58. In *Waverly Jute Mills Co. Ltd. Vs. Raymon and Co. (India) Private Ltd.*, , the Supreme Court in paragraph 16 observed as under :-

"16. Then as regards the attack based on Art. 19(1)(g) the position is that though the appellants raised this contention in the pleadings they did not press it before the learned Judges in the Court below because there was a decision of the Bench of the Calcutta High Court which had decided the point against the appellants. The point, however, was taken on the grounds of appeal to this Court, and has been sought to be pressed before us. The respondents complain and rightly that a point like this should not be allowed to be taken at this stage as a decision thereon will turn on investigation of facts which has not been made. It is also contended that there being a strong presumption in favour of the constitutionality of a legislation, the appellants must fail as they have not placed any materials before the Court to rebut that presumption. The answer of the appellants to this contention is that as the Act is on the face of it violative of the fundamental rights under Art. 19(1)(g), it was for the other side to place materials for showing that it was protected by Art.19(6) as one which is reasonable and made in the interests of the general public, and not for them to

show negatively that it was not and reliance was placed on the observations of this Court in *Saghir Ahmad Vs. The State of U.P. and Others*, . We are of opinion that those observations cannot be read as negating the presumption as to the constitutionality of a statute. But it is unnecessary to say more about it, as the appellants abandoned this point after some argument. This contention also must therefore be found against the appellants."

59. In *The State of Andhra Pradesh and Another Vs. K. Jayaraman and Others*, , the Supreme Court in paragraph 9 held as under :-

"9. We think that the High Court was wholly in error in declaring the rule invalid suo motu, against the common case of both sides, found in the petition and the returns filed before the High Court, that the A.T.A. rule was valid. No cogent reason could be advanced before us for holding, on merits, that the rule was really invalid. We, however, refrain from deciding the question of its validity as that was not put in issue by the averments made by the parties to the case. It was not, we think, a pure question of law. The invalidity of the A.T.A. rule, could not, for the reasons given above, be urged on the Writ Petition before the High Court without even an amendment of the petition so as to give the respondents an opportunity to meet a case of alleged invalidity of the rule."

60. In the case of *Yadlapati Venkateswarlu Vs. The State of Andhra Pradesh and another*, , the Supreme Court in paragraph 7 held as under :-

"The validity of S.4(I) itself having not been challenged, it was not open for the Courts to give an interpretation contrary to the clear and unequivocal language of the Section. The rule is that an amendment Act must be read as if the words of amendment had been written into the Act except where that would lead to an inconsistency. *Shamarao V. Parulekar Vs. The District Magistrate, Thana, Bombay and Others*, . Power of the Legislature to pass a law includes the power to validate actions retrospectively, of course, within Constitutional limitations. It is apt to remember that the State's power to tax is derived from the Constitution and the municipality's power to tax is derived from the State Legislature which could delegate that power in the manner the Constitution permits to the municipal council, an agent of the State Government, and the municipality cannot refuse to raise taxes as directed. The proper Authority to determine what should and what should not constitute a public burden is the Legislature of the State. This is not only true for the State itself but it is also true in respect of each municipality of the State; these inferior corporate bodies having only such Authority in this regard as the legislature shall confer upon them. A statute will not be declared unconstitutional unless it is specifically challenged and the principle is equally applicable to an enactment authorising levy of a tax for a public purpose."

61. We do not want to multiply the case-laws on this issue any further since the Supreme Court has time and again sounded a note of caution that without any specific challenge to the constitutional validity of a particular provision and in the

absence of pleading in this regard, the Court on its own suo motu may not declare a provision of law unconstitutional or ultra vires.

62. Thus, though we have very serious doubts in our mind as regards the extra-territorial operation of Section 105(2) of the Maharashtra Universities Act, 1994 keeping in mind Article 245 of the Constitution of India, the Court on its own suo motu may not declare a provision of law unconstitutional or ultravires. For the said reason, we are not deciding the question of validity of any of the provisions including Section 105(2) of the Act of 1994.

63. The question that arises to decide is, whether the colleges situated within the State of Gujarat should be allowed by the State Government or by the Court to get it affiliated with Shreemati Nathibai Damodar Thackersey Women's University.

64. For determination of the aforesaid question, the other question requires to be determined is, whether Shreemati Nathibai Damodar Thackersey Women's University can have any control in any manner whatsoever with the State of Gujarat.

65. Learned Counsel for the State of Maharashtra referring to the Supreme Court decision in the case of Smt.Charusila Dasi (supra) submitted that the doctrine of territorial nexus will be applicable in the case of the University. Therefore, it will have a control over the colleges situated within the State of Gujarat.

66. To apply the doctrine of territorial nexus as noticed above, two conditions must be fulfilled :-

iii. connection must be real and not illusory;

iv. liability sought to be imposed must be pertinent to that connection (Refer to Supreme Court decision in Smt.Charusila Dasi (supra)).

67. The control of a university on any of the colleges does not amount to liability sought to be imposed in connection with any of the affairs of the University and college. Therefore, it cannot be pleaded that the second condition, viz. "liability sought to be imposed must be pertinent to that connection" is fulfilled by Shreemati Nathibai Damodar Thackersey Women's University. One of the conditions being absent, we hold that the University cannot take advantage of the doctrine of territorial nexus for having control over any of the colleges situated within the State of Gujarat.

68. There is one more reason why we are not inclined to issue any writ of mandamus or any other writ, order or direction as prayed for by the petitioners. As discussed earlier, if the University has no control over the colleges within the State of Gujarat after being affiliated, then why should such a high prerogative writ be issued in favour of the colleges.

69. In view of the discussion as made above, as the Shreemati Nathibai Damodar Thackersey Women's University has no control over the colleges within the State

of Gujarat after being affiliated, we are of the view that the State Government should not grant permission to such colleges to get affiliated with Shreemati Nathibai Damodar Thackersey Women's University and the Court should refuse to issue high prerogative writ like a writ of mandamus in favour of the college.

70. In this view of the matter, we hold that the petitioners have no legal right to pray that the State Government is legally bound to grant "No Objection Certificate" as required for the purpose of seeking affiliation with Shreemati Nathibai Damodar Thackersey Women's University. We hold that the State Government has no legal duty to grant such "No Objection Certificate" on mere asking by the respective colleges and more so when Shreemati Nathibai Damodar Thackersey Women's University has no control over the colleges affiliated within the State of Gujarat.

71. So far as Special Civil Application No.5309 of 2010 is concerned, it is a Public Interest Litigation preferred by the President, National Student Union of India, for direction on respondent Nos. 12 to 22 to appoint one committee for holding inquiry about admission of students in B.Ed. Course after 31st August 2009 and to submit report before this Court. Prayer has been also made to appoint one committee and re-assess answer sheets of B.Ed. Examination held in April 2009 of 94 students and declare their result within fifteen days. As the matter relates to institution affiliated to Shreemati Nathibai Damodar Thackersey Women's University, this Application was also heard along with other cases, but in view of our finding given in the preceding paragraphs, we are not inclined to give any specific finding on the question of de-affiliation of any college, as sought for by the writ petitioner, though it will be open to the petitioner to bring the facts to the notice of the University Grants Commission, New Delhi, as alleged in the present case. In the above view of the matter and in absence of any merit in the petitions, the petitions fail and are hereby rejected with no order as to cost.