
(1992) 02 KAR CK 0009
In the Karnataka High Court
Case No : C.R.P. 331 and 1490 of 1989

Bapuji Education Society

APPELLANT

Vs

Educational Appellate Tribunal

RESPONDENT

Date of Decision : 14-02-1992

Acts Referred:

Constitution of India, 1950 — Article 309

Citation : (1992) ILR (Kar) 999 : (1992) 4 KarLJ 676

Hon'ble Judges : R.V. Vasantha Kumar, J

Bench : Single Bench

Advocate : B. Veerabhadrappe and S. Vasanthakumar, for the Appellant; R.I. D'sa, HCGP for R-1 and C.M. Desai, for R-2 to R-4, for the Respondent

Judgement

Vasantha Kumar, J.—These two Civil Revision Petitions arise out of an order dated 18-11-1988 passed by the Court of the District Judge & Educational Appellate Tribunal, Tumkur (hereinafter called as the "Tribunal") wherein the Management of a Private Educational Institution styled as Bapuji Education Society and an employee by name Narasimha Murthy, who was an Assistant Master in the employment of Sumathi Jain School run under different Management have challenged the legality and correctness of the order passed by the Tribunal.

2. Few facts are necessary for proper appreciation of contentions advanced, briefly to state are as follows:-

Bapuji Education Society registered under the Societies Registration Act is running a school by name Bapuji High School at Tumkur district. One Rajanna was serving as Assistant Master in the aforesaid Bapuji High School. The subject matter of controversy relates to mutual transfer of the employees. It is seen from the records that on 17-8-1986, the Management of Bapuji High School has passed a resolution. The relevant portion of the extract is to the following effect:

Similarly, on 8-8-1986, the Managing Committee of Sumati Jain High School

where another Assistant Master by name B.R. Narasimha Murthy was employed and which is run under the Management of another Private Educational Institution styled as "Sri Swethamber Sthanakvasi Education Society Robertsonpet, K.G.F., Kolar District has passed a resolution to the following effect:-

"Ordinary meeting of the managing Committee of Sumathi Jain High School met on 8-8-86 at the School Office.

AGENDA:

To consider the transfer of service of Sri B.R.Narasimha Murthy, Assistant Master of this School in Sri Bapuji High School, Tumkur, in place of Sri S.Rajanna, B.Sc. B.Ed.,

MEMBERS PRESENT:

1. Sri K.Kanyalalji; 2. Sri C.S.Pannalalji; 3. Sri M.Bhavaraijalji;
4. Sri Kisturchandji; 5. Sri Madanlalji; 6. Sri R.Javanthraji

RESOLUTION:

It is resolved to transfer the services of Sri B.R.Narasimha Murthy, Assistant Master to Sri Bapuji High School, Tumkur as per the provision created in Rule No. 59 of the Grant-in-Aid Code, by posting Sri S. Rajanna, in the place of Sri B.R.Narasimhamurthy.

MEMBERS SIGNATURE.

1. sd/-; 2. sd/-; 3. sd/-; 4. sd/-; 5. sd/-; 6. sd/-

sd/- "copy" Head Master Sumathi High School, Robertsonpet, K.G.F.,"

Subsequently, a letter dated 12-9-1986 has been addressed to the Commissioner for Public Instructions, Karnataka, by one Sri C.S.Pannalal on behalf of Sumathi Jai High School. The contents of which are excerpted below:-

"To

The Commissioner for Public Instructions, in Karnataka, Bangalore.

Through the Deputy Director of Public Instruction, Kolar District, Kolar.

Sub: Permission for Pre-facto transfer of Assistant Master of Aided High Schools.

Ref: Grant-in-aid Code No. 59, of Secondary Schools, in Karnataka.

The Management of Sri Swethambar Sthanakvasi Education Society, Robertsonpet, K.G.F., Kolar District, and Bapuji Education Society, Tumkur, have resolved to transfer the following Assistant Masters under Grant-in-Aid Code No. 59 on the basis of Pre-facto transfer orders to be issued by the Commissioner for Public Instruction, Karnataka.

Sri B.R.Narasimha Murthy, B.Sc., (CBZ), B.Ed., teaching Biology and Chemistry working as Asst. Master, Sumathi Jain High School, Robertsonpet, K.G.F., in place of Sri S. Raj anna, B.Sc., (DBZ) B.Ed., working as Assistant Master, Bapuji High School, Tumkur teaching Biology and Chemistry to be transferred along with his services to Sumathi Jain High School, K.G.F.

It is further stated that the two Assistant Masters are working in their Institutions of Permanent basis and both the High School are aided. Both the teachers are teaching the same subjects in their schools. Hence there is no financial burden to the Government of Karnataka by according permission for pre-facto transfer.

In the above circumstances, I request you kindly to accord permission to effect the above transfer under different management on their own pay and grade at the earliest.

Yours faithfully,

sd/. C.S. Pannalal Sumati Jain High School, Robertsonpet, K.G.F.

Enclosed:

1. Copy of the appointment approval by the respective DDPI'S.
2. Service certificates issued by the respective institutions.
3. Copies of the resolutions made by both the managements.
4. Salary Certificates of both the Assistant Masters.
5. Statement of Staff pattern
6. "Strength and attendances."

On 3-1-1987, Directorate of Public Instructions has communicated its approval on the following lines:-

On 5-1-1987, the concerned Managements have served orders of transfer and as well as orders relieving them from their respective posts. Copy of the order dated 5-1-1987 issued by Bapuji Educational Society reads as follows:

"SUMATHI JAIN HIGH SCHOOL; ROBERTSONPET K.G.F. 563112

Ref: No. SJHS. To No. 96/86-87 Dt.5-1-87

RELIEVING ORDER

Sub: Transfer of Sri B.R. Narasimhamurthy, Asst.Master, Sumathi Jain High School, K.G.F. to Bapuji's High School Tumkur, Vide-Sri Rajanna Assistant Master of that school to Sumathi Jain School, K.G.F.

Ref: No. E-7(a) Transfer-7: 86-87 Dt.3-1-87.

In accordance with the Memo of the Joint Director of Public Instruction (Secondary Education) Bangalore the Management of the Sumathi Jain High

School is pleased to relieve Sri B.R. Narasimha Murthy from his duties with effect from afternoon of 5-1-87.

sd/-

Head Master Sumathi Jain High School, Robertsonpet, K.G.F."

It is seen from the records that the Directorate of Public instructions on the representation made by Sri Rajanna Assistant Master attached to Bapuji Educational Society has, on 19-1-1987, withdrawn its approval accorded on 3-1-1987 subject to further instructions and on 30-1-1987, it has directed the Bapuji Educational Institution to take back Sri Rajanna. Meanwhile, the Assistant Master viz., Rajanna preferred an appeal before the jurisdictional Educational Appellate Tribunal, being aggrieved of the order of transfer and challenged the legality, propriety and correctness of the order of transfer. The main grounds of appeal are formulated as hereunder:

1) Order of transfer affected employees conditions of service and the same cannot be imposed on an employee as ascribing to him under the doctrine of implied term of service.

2) The order of transfer as being motivated and not a transfer due to exigencies of administration, public interest, but is actuated by extraneous considerations oblique motives for achieving alien purpose in the garb of ostensible purpose of public interest and administrative exigencies.

3) The order of transfer not only affects the conditions of service but a colourable exercise, mala fide and no public or administrative exigencies are involved.

4) The approval of Directorate of Public Instructions under Rule 59(ii) of the Grant-in-Code does not ipso facto confer a blanket power to the Private Educational Institutions to effect mutual transfers as against the consent of their employees and that principles of natural justice having not been complied and the same as having been violated. The Management of the Private Educational Institutions have contested the appeal and the main grounds justifying their action may be formulated as hereunder:

1) The orders of transfer are in accordance with Rule 59(ii) of the Grant-in-Code.

2) The orders of transfer do not change or affect any conditions of service and the same is done on account of administrative exigencies and in the public interest.

3) The Management has inherent right to transfer and the transferability as being one of the implied terms of service.

4) That Educational Appellate Tribunal has no jurisdiction to interfere with administrative instructions and that the order of transfer does not partake the character of an order as contemplated or envisaged under the provisions of Karnataka Private Educational Institutions (Discipline & Control) Act, 1975.

3. The main question that arises for consideration in these petitions is about the scope and extent of judicial review and the Court's power to interfere in the administrative orders affecting the conditions of service of employees of Private Educational Institutions.

4. His Lordship Justice Rama Jois in the *PRESIDENT GOLDEN VALLEY EDUCATIONAL TRUST OORGAM KOLAR GOLD FIELDS v. DISTRICT JUDGE & EDUCATIONAL APPELLATE TRIBUNAL, KOLAR* ILR 1979 Kar 526: Para 11 has observed:.

"The Tribunal constituted under the Act therefore has the authority to decide the disputes arising between the Management of Private Educational Institutions and their employees finally both on the question of truth of the allegations or charges levelled against the employees as also the penalty to be imposed on the charges found proved. The Legislature has made the satisfaction of the Tribunal final on both those questions and it is for this purpose ample power and jurisdiction is conferred on the Tribunal u/s 10 of the Act. Thus, the object of the Act particularly as disclosed by Section 10(4) of the Act is the speedy and final disposal of disputes in accordance with the satisfaction of the Tribunal and is similar to the corresponding provisions of Sections 11 and 11A of the Industrial Disputes Act. Further, the power conferred on the Tribunal under the Act compared with the powers conferred on the Labour Court or the Industrial Tribunal u/s 11A of the Industrial Disputes Act are wider to this extent, viz.,

i) While the power conferred u/s 11A of the Industrial Disputes Act is only to interfere with the penalty of discharge or dismissal and to substitute a lesser penalty, Section 10(4)(c) of the Act empowers the Educational Appellate Tribunal to find out whether any penalty imposed by the Management is not justified and to substitute a lesser penalty, and is not confined to penalties of discharge or dismissal.

ii) While the Industrial Tribunal or the Labour Court can take evidence, only when the domestic enquiry is held invalid, or when the benefit of domestic enquiry is given up by the Management, the Educational Appellate Tribunal under the Act has the power to take additional evidence, even if the domestic enquiry is found valid and at the instance of either party."

5. Sections 7 and 8 of the Karnataka Private Educational institutions (Discipline and Control) Act, 1975 (hereinafter referred to as "the Act") contemplate the nature of the order of the Management which gives a right to prefer an appeal before the Tribunals. Section 7 of the Act uses the term "order". His Lordship Justice Puttaswamy in *VIDYA DHANA SAMITHI v. BURLI* 1978 (1) KLJ 255 has explained the meaning of the term "order". In paragraph 3 of the Judgment observed:-

"The word "order" has not been defined in the Act, I, have, therefore, to ascertain its meaning from the context which it occurs. The word order is a well known legal expression and is generally understood as a command or a direction

by a Court or an authority intended to affect the rights of parties."

The observations of His Lordship Justice KRISHNA IYER in Bar Council of Maharashtra Vs. M.V. Dabholkar and Others, are relevant while considering the meaning to be attached to word "order":-

"No narrow pedantic, technical centenarian construction can be blindly applied. On the other hand a spacious construction, functionally informed by the Social conscience and salutary purpose of the enactment must illumine the judicial effort.

Judicial interpretation is not bloodless and sterile exercise in spinning subtle webs, sometimes cobwebs, out of words and phrases otherwise simple but to unfold the scheme of legislation insightfully sense its social setting and read the plain intendment."

The order of transfer effected by the Management of the Private Educational Institutions in the instant case cannot be otherwise construed than an order partaking the character of command or direction issued by the authorities. The next question that is to be adverted is whether this order of transfer would affect the conditions of service of an employee in order to come within the encompass of the appealable orders under the provisions of the Act, with a view to confer jurisdiction to the Tribunal to adjudicate disputes arising between the Management and its employees. The Supreme Court in STATE OF MADHYA PRADESH v. SHARDAM SINGH has held that the expression "conditions of service" means all those conditions which regulate the holding of post by a person right from the time of his appointment until the date of his retirement and even beyond it in matters like pension etc., and would include right to dismiss such persons from service. It is to be stated that the Court has power to ascertain the true purport of the orders of transfer even though it appears innocuous but in fact if it is passed for extraneous purposes in the garb of legal purpose, and the same amounted to colourable exercise of power, abuse of power and the same is being motivated and arbitrary.

5(A) The Managements of the Private Educational Institutions in this case have not placed any materials as to what factors relating to administrative exigencies, public interest outweighed their mind to effect transfers of their employees except stating "in the interest of the public". Another question that is to be adverted to is whether it is permissible for the Managements of Grant-in-Aid Private Educational Institutions to effect mutual transfers of their employees belonging to their institutions which are independent and run by different Managements without obtaining consent of their employees proposed to be transferred and whether accord and approval of the Directorate of Public Instructions under Rule 59(ii) of Grant-in-Aid Code would by itself subserve the administrative exigencies and the interest of public at large; and could justify the legality of the orders of transfer, as resolved by them and approved by the Directorate of Public Instructions.

6. From the perusal of the records and as well as resolutions passed and orders of transfer communicated to the employees in the instant case, it is to be noted that no details of specifications of conditions of service are either mentioned or found and as such non-mentioning of details; non-mentioning of specifications of conditions of service by applying principles of natural justice would render orders of transfer invalid. His Lordship RAMA JOIS, J: in HANUMANTHAPPA. K v. STATE OF KARNATAKA and Ors. 1982 (1) KLJ 67 observed thus:-

"....transfer gives rise to several questions, viz.,-

(i) Even if the pay-scale is similar, whether the pay last drawn in the Bangalore University would or would not be his pay in the Gulbarga University?

(ii) Even if his pay is protected, on what date he would be entitled to draw his next increment? i.e., whether the part of incremental year during which he has worked in Bangalore University does or does not count for increments in Gulbarga University?

(iii) Whether the unutilised leave accrues to his benefit or it lapses.

(iv) Whether the service rendered by the petitioner as Reader in the Bangalore University does or does not count for seniority?

(v) What is the joining and preparation period?

(vi) How the period after his relief from the Bangalore University and till the date he joins the Gulbarga University is going to be treated? If it is duty, which University will pay him the salary for the period?

(vii) Whether the petitioner and/or members of his family is/are entitled to travelling allowance or not? if entitled to what is the rate? and which University will pay that amount to the petitioner?

(viii) Whether the petitioner would be entitled to pensionary benefits?

In paragraph-14(i), (ii) and (iii) it is further observed thus:-

"(i) It is plain that the Legislature did not intend that a transferred employee should make a representation in respect of every one of these matters and to accept whatever is given to him as and when it is given. On the other hand, the Legislature in requiring the specification of the conditions of service in the order or transfer itself, intended to present such uncertainty and consequential hardship to the transferred official. The intention is that he must be made known about the conditions of service to which he is entitled to in the University to which he is transferred, by the order of transfer. The provision is certainly intended to protect the rights and interests of the transferred employees. Therefore that part of Section 52 of the Act which confers power on the Chancellor to specify the conditions of service applicable to an employee of a University transferred to another University in the order of transfer, is indubitably a power coupled with a duty to protect the interests of the official affected by the

exercise of the power of transfer. Under the provision, apart from specifying the various conditions categorised earlier, it is also permissible for the Chancellor to give any compensatory allowance to the transferred employee to meet the increase in the expenses required to be incurred by him on account of the transfer.

(ii) Further, once a person is transferred from one University to another and he joins duty at another University he becomes the employee of the latter University. Section 52 provides that he shall be deemed to have been appointed by the corresponding appointing authority of that University. Consequently, the power to regulate his conditions of service, thereafter, stands vested in the Senate of that University and not in the Chancellor. Section 52 therefore confers power, and requires the Chancellor to specify the conditions of service in the transfer order so that the transferred employee stands vested with those rights before he joins duty at the University to which he is transferred.

(iii) Therefore it appears to me that having regard to the settled rule of construction, it is impermissible to hold that the word "may" used in the context of specifying the conditions of service in the order of transfer made u/s 52 of the Act is only directory and not mandatory."

7. At this stage, it is relevant to quote Rule 59(ii) of the Grant-in-Aid Code which reads:

"(ii) If a teacher is transferred from one school to another school under different managements with concurrence of both the managements and prior approval of the concerned Departmental Officer, his pay is protected. Such transferred teacher will have to take the last place in the cadre for purposes of his seniority in the new school. However, his continuous service is protected for other service benefits like pension and service gratuity."

Rule 59(ii) does not encompass within its fold all the conditions of service which regulate the holding of post by a person right from the time of his appointment until his retirement. In this context consent of the employee concerned would play a vital role, judging the same from the concept of natural justice at the time of effecting transfers from one Private Educational Institution to another Private Educational Institution which are run under different Managements and which are having separate legal existence. As is apparent, Sub-rule (ii) of Rule 59 do not envisage prior consent of the employee before approval is accorded. It is seen that Rule 59 leave no scope for any kind of opportunity to be given to an employee of Private Educational Institution. Rule 59 of the Grant-in-Aid Code is not statutory since it is not framed under Article 309 of the Constitution of India but particularly it partakes the character of Administrative instructions. It is to be noted that creation of master and servant is initially the function of contract and services under aided institutions are one of contract. Grant-in-aid Code is nothing but compilation of various administrative instructions and orders relating to aided educational institutions and have no statutory force. As observed by LORD REID

in *ARKINSON v. UNITED STATES OF AMERICA GOVERNMENT*: "It is now well recognised that the Court has power to expand procedure laid down by statute if that is necessary to prevent infringement of natural justice."

8. The Supreme Court in *UNION OF INDIA v. TULSIRAM PATEL* has observed in paragraphs-72 to 81. They read as follows:-

"The principles of natural justice are not the creation of Article 15. Article 14 is not their begetter but their Constitutional guardian. Principles of natural justice trace their ancestry to ancient civilizations and centuries long past. Until about two centuries ago the term "natural justice" was often used interchangeably with natural law and at times it is still so used, The expression "natural law" has been variously defined. In Jowitt's Dictionary of English Law (Second Edition, page 1221) it is defined as "rules derived from God, reason or nature, as distinct from man-made law." Black's Law Dictionary (Fifth Edition, Page 925) states:

"This expression, "natural law," or *jus naturale*, was largely used in the philosophical speculations of the Roman jurists of the Antonine age, and was intended to denote a system of rules and principles for the guidance of human conduct which, independently of enacted law or of the systems peculiar to any one people, might be discovered by the rational intelligence of man, and would be found to grow out of and conform to his nature meaning by that word his whole mental, moral, and physical constitution. The point of departure for this conception was the Stoic doctrine of a life ordered "according to nature." which in its turn rested upon the purely, supposititious existence, in primitive times, of a "state of nature"; that is, a condition of society in which men universally were governed solely by a rational and consistent obedience to the needs, impulses, and promptings of their true nature, such nature being as yet un-defaced by dishonesty, falsehood, or indulgence of the baser passions. In ethics, it consists in practical universal judgments which man himself elicits. These express necessary and obligatory rules of human conduct which have been established by the author of human nature as essential to the divine purposes in the universe and have been promulgated by God solely through human reason."

There are certain basic values which man has cherished throughout the ages. But man looked about him and found the ways of men to be cruel and unjust and so also their laws and customs. He saw man flogged, tortured, mutilated, made slaves, and sentenced to row the galleys or to toil in the darkness of the mines or to fight in an arena with wild and hungry beasts of the jungle or to die in other ways a cruel, horrible and lingering death. He found judges to be venal and servile to those in power and the laws they administered to be capricious, changing with the whims of the ruler to suit his purposes. When, therefore, he found a system of law which did not so change, he praised it. Thus, the Old Testament in the Book of Esther (I, 19) speaks admiringly of the legal system of the Achaemenid dynasty (the First Persian Empire) in which "a royal commandment" was "written among the laws of the persons and the Medes, that it be not altered. "Man saw cities and towns sacked and pillaged, their populace

dragged into captivity and condemned to slavery the men to labour, the women and the girls to concubinage, and the young boys to be castrated into eunuchs their only crime being that their ruler had the misfortune to be defeated in battle and to lose one of his cities or towns to the enemy, Thus, there was neither hope nor help in man-made laws or man-established customs for they were one-sided and oppressive, intended to benefit armed might and monied power and to subjugate the downtrodden poor and the helpless needy. If there was any help to be found or any hope to be discovered, it was only in a law based on justice and reason which transcended the laws and customs of men, a law made by someone to greater and mightier than those men who made these laws and established these customs. Such a person could only be "natural law" or "the law of nature" meaning thereby "certain rules of conduct supposed to be so just that they are binding upon all mankind". It was not "the law of nature" in the sense of "the law of the jungle" where the lion devours the lamb and the tiger feeds upon the antelope because the lion is hungry and the tiger famished but a higher law of nature or "the natural law" where the lion and the lamb lie down together and the tiger frisks with the antelope.

Most, if not all, jurists are agreed that "reason" and "the nature of man" constitute the fountain-head of natural law but there is a considerable divergence of opinion amongst them as also amongst philosophers about the nature and meaning of that law and its relation to positive law. Among the ancient Greeks the Sophists, Aristotle in his treatises on "Logic" and "Ethics", and the Stoics developed different theories. The theory propounded by Aristotle in his "Logic" adhered substantially to the point of view of the Sophists, namely, that man is a natural creature but is also endowed with reason. Later, in his "Ethics", Aristotle came to distinguish between natural and legal or conventional justice and postulated that natural law had authority everywhere and was discoverable by the use of reason. The ancient Romans were not given to Philosophical speculations of creative originality in art. They preferred to borrow these from the Greeks. The Romans were a hard-headed, practical race of conquerors, administrators and legislators. Roman jurists, therefore, used the concept of natural law, that is, *jus naturale* (or *jus naturale* as the Romans wrote it because Roman alphabet had no letter "J" or "j" in it) to introduce into the body of law those parts of laws and customs of foreigners, that is, non-Roman people with whom they came in commercial contract or whom they subjugated. The rules which the Romans borrowed from these laws and customs were those which were capable of general application and they developed them into general legal principles, which came to form *jus gentium* or the law of nations. In doing so they acted upon the principle that any rule of law which was common to the nations (*gentes*) they knew of must be basically in consonance with reason and, therefore, fundamentally just. They applied *jus gentium* to those to whom *jus civil* (civil law) did not apply, that is, in cases between foreigners or between Roman citizen and a foreigner. On this basic formulation that what was common to all known nations must be in consonance with reason and justice, the Roman

Jurists and magistrates proceeded to the theory that any rule which instinctively Commanded itself to the sense of Justice and reason would be part of the *jus gentium*. The *jus gentium* of the Romans was different from what we call international law and should not be confused with it, for the scope of the *jus gentium* was much wider than our international law. Because of the theory of its identity with justice and reason, the term "*jus gentium*" came at times to be used for *aequitas*, that is, equity as understood by the Romans, which was the basis of the praetorian law or the power of the praetors to grant remedies where none existed under the *jus civile*. In the Dark Ages the expression "natural law" acquired a theological base and the Fathers of the Church, particularly St.Ambrose, St.Augustine and St.Gregory, held the belief that it was the function of the Church to bring about the best possible approximation of human laws to Christian principles. As Europe emerged from the Dark Ages in about the ninth Century, Christianity became substituted for reason as the supreme force in the universe, and this led to the development of a theory of law in which Christianity had the supreme spiritual and legal force and was superior to all other laws, with the Church as the authentic expositor of the law of nature. Gratian (Francisco Graziano) in the twelfth century in his "*Decretum*" or "*Concordia discordantium canonum*" considered the law of nature as part of the law of God. According to St.Thomas Aquinas (1226-74), natural law was derived from the law of God which was supreme and such of it as was intelligible to men was revealed through Church law as the incorporation of divine wisdom. Thus, according to this theory, natural law was that part of divine law which revealed itself in natural reason, and man as a reasonable being applied this part of divine law to human affairs. This theory, though it upheld the supreme authority of the Church, made some concession to the authority of the Emperor, that is, the Holy Roman Empire. Dante in his "*De Monarchia*" championed the supremacy of the Holy Roman Empire as against the Church on the ground that the Emperor was the legitimate successor of the Roman people and was chosen by God to rule the world. The authority of the law of nature or natural law was repeatedly sought support from during the centuries which saw the struggle for supremacy between the Popes and the General Councils of the Church and between the Popes and the Emperors and later in the struggle between the Catholics and the Protestants. Both sides in these conflicts found in natural law the interpretation of scriptural texts which supported their respective views and were, therefore, according to them, the true interpretation. Bracton, in the thirteenth century, however, considered natural law as that which nature, that is God, teaches to all animals, and though he tried to reconcile natural law with human law, he acknowledged the difficulty of doing so because he found rules of positive law which could hardly be so reconciled.

Natural law was also seized upon as furnishing arguments in the struggle between the judges and Parliament for supremacy which took place in the seventeenth Century. Coke in *Dr.Bonham's Case* (1610) 8 Co. Rep.113b, 118. said by way of obiter, "when an Act of Parliament is against common right or

reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void." There were later assertions to the same effect until the supremacy of Parliament and the Legislation enacted by it became firmly established in 1688. However, in *British Railways Board v. Pickin* 1974 AC 765 sub nomine *Pickin v. British Railways Board* 1972(3) WLR 824 the argument was once again advanced before the House of Lords that a Court was entitled to disregard a provision in an Act of Parliament and a distinction was sought to be drawn for this purpose between a public Act and a private Act. Referring to the argument on this point, Lord Reid observed (at page 782):

"In earlier times many learned lawyers seem to have believed that an Act of Parliament could be disregarded in so far as it was contrary to the law of God or the law of nature or natural justice, but since the supremacy of Parliament was finally demonstrated by Revolution of 1688 any such idea has become obsolete."

Rejecting the above argument, the House of Lords unanimously held that the function of the Court was to consider and apply the enactments of Parliament, and accordingly, in the course of litigation, it was not lawful to impugn the validity of a statute by seeking to establish that Parliament, in passing it, was misled by fraud or otherwise, nor might a litigant seek to establish a claim in equity by showing that the other party, by fraudulently misleading Parliament, had inflicted damage on him; for any investigation into the manner in which Parliament had exercised its function would or might result in an adjudication by the courts, bringing about a conflict with Parliament.

As a result of the infusion of new ideas during the Renaissance and the Reformation, the intellectual authority of reason again came to be substituted for the Spiritual Authority of divine law as the basis of natural law. This new or rather resuscitated basis of natural law was laid by Grotius (Huigh de Groot) in his "*Dejure Belli ac Pads*" the precursor of modern public international law.

Reason as the theoretical basis for natural law, however, once again suffered a reversal at the hand of David Hume. According to Hume, only knowledge obtained by mathematical reasoning was certain; knowledge obtained from other sciences being only probable. His theory of justice was that it served both an ethical and a sociological function. He contended that public utility was the sole origin of legal justice and the sole foundation of its merit, and that for a legal system to be useful, it must adhere to its rules even though it may cause injustice in particular cases. He did not make a formal analysis of law but distinguished equity or the general system of morality, the legal order, and law, as a body of precepts. According to him, the authority of civil law modified the rules of natural justice according to the particular convenience of each community.

Blackstone, however, in his "*Commentaries on the Laws of England*" had this to say about natural law:

"This law of nature, being coeval with mankind, and dictated by God himself, is

of course superior in obligation to any other. It is binding over all the globe in all countries, and at all time: no human laws are of any validity, if contrary to this; and such of them as are valid derive all force and all their authority, mediately or immediately, from this original."

In the nineteenth and twentieth centuries there was a reaction against natural law as the basis of law. The French Revolution had enthroned reason as a goddess. The excesses of the French Revolution, however, led to a reaction against the theory that reason was the basis of law. The utilitarian view was that the basis for law was the practical inquiry as to what most conduce to the general benefit. The spirit of scientific inquiry which predominated the Nineteenth and Twentieth Centuries could not favour hypotheses which were vague and unprovable. In the twentieth century, disillusionment with the theory that good could come out of the power of the State and positive law has, however, once again brought about a revival of interest in natural law.

Apart from providing the subject-matter for philosophical dissertations and speculative theories on the origin and attributes of natural law, the concept of natural law has made invaluable contribution to the development of positive law. It helped to transform the rigidity of the *jus civile* of the Romans into a more equitable system based on the theory of the *jus gentium*, it provided arguments to both sides in the struggle during the Middle Ages between the popes and the Emperors. It inspired in the eighteenth century the movement for codification of law in order to formulate ideas derived from the concept of natural law into detailed rules. In England, the idea of natural law and natural justice has influenced its law in several respects. The origin and development of equity in England owed much to natural law. It also served as the basis for the recognition or rejection of a custom. It was looked to for support in the struggle for supremacy which took place between the judges and Parliament in the seventeenth century. The concept of natural law and natural rights influenced the drafting of the Constitution of the United States of America and many of the amendments made thereto as also the Constitutions of its various States. It has provided a basis for much modern international law and International Conventions, Covenants and Declarations. Above all, it has enriched positive law by introducing into it the principles of natural justice, divested of all their philosophical metaphysical and theological trappings and disassociated from their identification with, or supposed derivation from, natural law.

Natural justice has been variously defined by different judges. A few instances will suffice. In *Drew v. Drew and Leburn* (1855) 2 Macq. 18 Lord Granworth defined it as "universal justice". In *James Dunbar Smith v. Her Majesty The Queen* 1877 3 App Cas 614 Sir Robert P. Collier, speaking for the Judicial Committee of the Privy Council, used the phrase "the requirements of substantial justice", while in *Arthur John Spackman v. The Plumstead District Board of Works* 1884 10 App. Cas 229 Earl of Selborne, L.C. preferred the phrase "The Substantial requirement of Justice". In *Vointet v. Barrett* (1855) 55 LJRB 39, 41

Lord Esher, M.R., defined natural justice as "the natural sense of what is right and wrong". While, however, deciding *Hopkins v. Smethwick Local Board of Health* (1890) 24 QBD 712, 716. Lord Esher, M.R., instead of using the definition given earlier by him in *Voinet v. Barret* chose to define natural justice as "fundamental justice". In *Ridge v. Baldwin* (1963) 1 QB 539 Harman, L.J., in the Court of Appeal equated natural justice with "fair play in action", a phrase favoured by Bhagwati, J., in *Mrs. Maneka Gandhi Vs. Union of India* (UOI) and Another, In re H.K.(An Intact) (1967) 2 QB 617 Lord Parker, C.J., preferred to describe natural justice as "a duty to act fairly". In *Fairmound Investments Ltd. v. Secretary of State for the Environment* (1976)1 WLR 1255, 1265-66 Lord Russell of Killowen somewhat picturesquely described natural justice as "a fair crack of the whip", while Geoffrey Lane, L.J., in *Regina v. Secretary of State for Home Affairs, Ex parte Hosenball* (1977) 1 WLR 766, 784 preferred the homely phrase "common fairness".

Having in view of the ratio decidendi of the cases, referred supra, I am of the view that fair play in action, and requirements of substantial justice command consent of the employee before his proposed transfer to another institution where his parent institution has no control. It is well settled position in law that principles of natural justice must be regarded as super added to any statutory provision which confers power on any public authority unless by necessary implication it is excluded. Since concept of natural justice is expanding, rules of natural justice are applicable to administrative actions, enquiries and no order has to be passed to the prejudice of any person unless reasonable opportunity is afforded.

9. The Private Educational Institutions must adhere to the principles of natural justice, whenever they intend to transfer their employees to different institutions run under different Managements. Sub-rules (i) and (ii) of Rule 59 of the Rules are only regulatory and are made applicable to aided Private Educational institutions with a view to have control over the same. Accord and approval as envisaged under Rule 59 of the Grant-in-Aid code by itself would not exonerate the Managements of the aided Private Educational Institutions from obtaining letters of consent-in-writing before their employees are transferred to different institutions run under different Managements. In the case on hand, no letters of consent of the employees concerned are placed before the Educational Appellate Tribunal nor produced even before this Court except as contended that prior consent having been obtained.

10. The Supreme Court in *General Officer Commanding-in-Chief and Another Vs. Dr. Subhash Chandra Yadav and Another*, has observed at paras-15, 16 and 17 thus:-

"It is not disputed that the Cantonment Boards are statutory and autonomous bodies controlled entirely by the Cantonments Act. Each Cantonment Board is an independent body functioning within its limited jurisdiction. The Board is the appointing authority of its employees. The service under the Cantonment Board

is not a centralised service nor is it a service at the State-level.

There is much force in the contention of the respondent that as service under the Cantonment Board is not a centralised service or a service at the State-level, the transfer of an employee from one Cantonment Board to another would mean the termination of appointment of the employee in the Cantonment Board from which he is transferred and a fresh appointment in the Board where he is so transferred. The GOC-in-Chief, Central Command is not the appointing authority of the respondent or the employees of the Cantonment Board, and so transfer of the respondent by the GOC-in-Chief is not permissible. In any event, one autonomous body cannot transfer its employee to another autonomous body even within the same State unless the services of the employees of these two bodies are under a centralised or a State-level service. In this connection, we may, refer to a decision of this Court in *Om Prakash Rana Vs. Swarup Singh Tomar and Others*, Pathak, J. (as His Lordship then was) speaking for the Court observed as follows (At pp. 1676-77 of AIR):-

"As is clear by now, the fundamental basis of the contention that the power of transfer under the Education Act and its Regulations continues in force even after the enactment of the Services Commission Act rests on the assumption that the power of appointment does not include the power of transfer. In our opinion, the assumption is unsustainable. The scheme under the Education Act envisages the appointment of a Principal in relation to a specific college. The appointment is in relation to that college and to no other. Moreover, different colleges may be owned by different bodies or organisations, so that each Principal serves a different employer. Therefore, on filling the office of a Principal to a college, a new contract of employment with a particular employer comes into existence. There is no State-level service to which Principals are appointed. Had that been so, it would have been possible to say that when a Principal is transferred from one college to another no fresh appointment is involved. But when a Principal is appointed in respect of a particular college and is thereafter transferred as a Principal of another college it can hardly be doubted that a new appointment comes into existence. Although the process of transfer may be governed by considerations and move through a machinery different from the considerations governing the appointment of a person ab initio as Principal, the nature of the transaction is the same, namely, that of appointment, and that is so whether the appointment be through direct recruitment, through promotion from the teaching staff of the same institution or by transfer from another institution."

The observation extracted above clearly supports the contention made on behalf of the respondent that the employees of one Cantonment Board cannot be transferred to another Cantonment Board inasmuch as the service under the Cantonment Board is not a centralised service or a service at the State-level."

It is apt to refer to the observation of His Lordship Justice Bhagwati in *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, It reads:-

"Now, if this be the test of applicability of the doctrine of natural justice, there can be no distinction between a quasi-judicial function and an administrative function for the purpose. The aim of both administrative inquiry as well as quasi-judicial inquiry is to arrive at a just decision and if a rule of natural justice is calculated to secure justice, or to put it negatively, to prevent miscarriage of justice, it is difficult to see why it should be applicable to quasi-judicial inquiry and not to administrative inquiry. It must logically apply to both. On what principle can distinction be made between one and the other? Can it be said that the requirement of "fair play in action" is any the less in an administrative inquiry than in a quasi-judicial one? Sometimes an unjust decision in an administrative inquiry may have far more serious consequences than a decision in a quasi-judicial inquiry and hence the rules of natural justice must apply equally in an administrative inquiry which entails civil consequences."

I am of the view that substitution of new master which necessarily involves discontinuance in the parent institution has the attribution of removal. It is understood that every employee expects that he should continue in service by the same tenure, by same remuneration, upon same terms and conditions and with the same rights and privileges as to seniority, promotion, leave, gratuity, Provident Fund, Pension and other matters as he would have been entitled to the same as on the date of commencement of service. As such mutual transfers without employees mutual consent from one institution to different institution run under different Managements would be ineffective and legally not sustainable and employees continue in their respective parent institutions until they cease to be one by process known to law. The Supreme Court in the Manager, Pyarchand Kesarimal Ponwal Bidi Factory Vs. Omkar Laxman Thange and Others, has observed in para-7 as follows:-

"The general rule in respect of relationship of master and servant is that a subsisting contract of service with one master is a bar to service with any other master unless the contract otherwise provides or the master consents. A contract of employment involving personal service is incapable of transfer..... The classic case commonly cited and in which this rule was applied is *Quaraman v. Burnett* (1840) 6 M & W 499 [cf. also *Jones v. Scullard* (1898) 2 QB 565 where Lord Russell applied the test of the power to direct and control the act in performance of which damage was caused to another person]. The position in law is, therefore, clear that except in the case of a statutory provision to the contrary, a right to the service of an employee cannot be the subject matter of a transfer by an employer to a third party without the employee's consent. Thus, in *Nokes v. Doncaster Amalgamated Collieries, Ltd.* 1940-3 All ER 549 where an order was made u/s 154 of the Companies Act, 1929 transferring all the assets and liabilities of a company to another company, Viscount Simon held that such an order did not mean that contracts of service between the appellant and the transferor-company also stood transferred. The principle that even in cases where the services of an employee are lent to a third party temporarily for a particular work the employee still remains the employee of the employer is

illustrated in *Denham v. Midland Employees Mutual Assurance Ltd.* 1955 2 QB 437."

The Supreme Court in *Bidi Factory's* (supra) further observed in para-8 as follows:-

"A contract of service being thus incapable of transfer unilaterally, such a transfer of service from one employer to another can only be effected by a tripartite agreement between the employer, the employee and the third party, the effect of which would be to terminate the original contract of service by mutual consent and to make a new contract between the employee and the third party. Therefore, so long as the contract of service is not terminated, a new contract is not made as aforesaid and the employee continues to be in the employment of the employer."

As such, I am of the view that previous conditions of service shall be protected and same shall not be varied by Management to detriment and disadvantage of the employees except with the approval and consent of the concerned employees. Having in view of the observations of the Supreme Court laid down in *Union of India v. Tulsiram Patel* and *P.K.R. Bidi Factory v. Onkar Laxman Thenge & G.O. Commanding-in-chief v. Dr. Subhas Chandra Yadav* I hold that the orders of transfer of Assistant Masters namely RAJANNA and NARASIMHAMURTHY given effect to by Bapuji Educational Society and Sumathi Jain High School run under the Administration by Swethamber Sthanakvasi Education Society are invalid, ineffective and not legally sustainable since both the institutions have not adverted their mind to the basic principles of law and as well as principles of natural justice. Further, it is to be noted that this Court while considering interim reliefs prayed for by the parties concerned, had passed an order on 16-4-1990 to the following effect in C.R.P.No. 331/1989. It reads:

"During the pendency of CRP 331/1989 the salary of the petitioner may continue to be paid by the Government.

Similarly the salary of petitioner in CRP 1490/89 will be paid by the Government pending disposal of the same."

11. In respect of the points formulated by this Court, I hold that:-

1) The orders of transfer are not in accordance with law and they have affected the conditions of service of the employees in question and are not supported by administrative exigencies and they are opposed to principles of natural justice and transferability of employees of one Educational Institution to another Institution run under different Management without obtaining their consent cannot be justified as being an implied condition of service.

2) The Management of the Private Educational Institution must adhere to the principles of basic rules of law and natural justice by obtaining the consent of their employees and providing opportunity of hearing before their transfers to other institutions belonging to different Managements.

3) Approval and accord as contemplated and envisaged in Sub-rule(ii) of Rule 59 of the Grant-in-Aid Code is mere regulatory and approval by itself would not exonerate the Managements from observing the principles of natural justice and in providing opportunity to the transferred employees and in obtaining their consent.

12. Hence, I am of the view that orders of transfer resolved and given effect to by the concerned two Private Educational Institutions are bad in law. The impugned order passed by the Tribunal does not suffer from legal infirmities and the same is well founded. I hereby direct that S. Rajanna must be taken back into service by Bapuji Educational Society with all conditions of service in tact in addition to continuity of service, entitlement to salary accrued from the date of relieving and other benefits arising out of conditions of service. Similarly, Narasimhamurthy also must be considered as being in the employment of Sumathi Jain school subject to his conditions of service being in tact with all the benefits arising out of the conditions of service as mentioned supra. The Managements are at liberty to quantify salary and other monetary benefits if paid either through the orders of this Court or otherwise while settling their benefits.

13. It is made clear that any benefits accrued to the concerned employees arising out of their conditions of service during the pendency of these Civil Revision Petitions would enure to their benefits and the Management of both the Institutions shall give regard to the same.

14. The Managements are directed to settle the accounts and implement the orders of this Court as expeditiously as possible preferably within a period of one month from the date of receipt of this order.