
(1997) 02 PAT CK 0039
In the Patna High Court
Case No : L.P.A. No. 36 of 1994

Braj Kishore Singh and Others

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 19-02-1997

Acts Referred:

Constitution of India, 1950 — Article 14, 142, 16, 25, 4

Citation : (1997) 1 BLJR 625 : (1997) 1 PLJR 509

Hon'ble Judges : D.P. Wadhwa, C.J.; S.N. Jha, J.; S.J. Mukhopadhyaya, J

Bench : Full Bench

Final Decision : Allowed

Judgement

S.N. Jha, J.—This appeal under Clause 10 of the Letters Patent of the Patna High Court is directed against judgment and order of a Learned Single Judge of this Court in CWJC No. 497 of 1994. The controversy relates to approval of Services of the appellants on class III/IV posts in Jagdam College, Chapra. The appeal was taken up for hearing before a Division Bench on August 21, 1996. The Bench noticed that there are conflicting decisions on the point and directed the appeal to be heard by full Bench. That is how this matter came up for hearing before this Bench. The relevant facts are as follows.

2. Jagdam College, Chapra (hereinafter called "the College") was an affiliated college of Bihar University (now known as Babasaheb Bhimrao Ambedkar University). On February 7, 1976 it was made a constituent Unit of the said University with effect from April 1, 1975. The college is now a constituent unit of Jai Prakash University. According to the appellants prior to January 17, 1973 20 sanctioned posts of class HI and 43 sanctioned posts of class IV were in existence. On January 17, 1993 9 class III posts and 13 class IVV posts were created. Thus 29 class III posts and 56 class IV posts were available in the college. On November 29, 1977 the Bihar University constituted a Selection Committee comprising of the Principal and three Senior Professors, for appointment against vacant class III/IV posts. In August 1978 advertisement

was published. In March 1979 appointments were made including those of the appellants. According to them, prior to March 1979, 21 (out of 29) class III posts and 43 (out of 56) class IV post had already been filled and, thus, 9 class III posts and 13 class IV posts were vacant against which the aforesaid appointments were made. On March 2, 1981, the University approved the appointments and by letter dated September 14, 1981 forwarded the same to the State Government for its approval, the appellants started getting salary. On June 8, 1983, however, the State Government refused to approve their appointments on the ground that appointments were beyond the staffing pattern.

3. The appellants filed representations and ultimately came to this Court by way of a writ petition in CWJC No. 497 of 1984, which has given rise to this appeal. From the judgment of the Learned Single Judge it appears that apart from the plea of discrimination (it is said that appointments made in other colleges, subsequent to the appellants, have been approved) a stand was taken on behalf of the appellants that they would be satisfied if direction similar to the one issued by this Court in CWJC No. 3790 of 1985 (Kiran Prakash, Gupta and Ors. v. State of Bihar and Ors. and CWJC No. 5647 of 1990 (Shashi Ranjan Kumar Shukla v. State of Bihar and Ors.) disposed of on May 22, 1992 is issued to the State Government to consider the recommendation of the University for sanctioning the post of non-teaching staff and to scrutinise the cases of the appellants against the sanctioned posts. The Learned Single Judge, however, held that the present case stood on different footing inasmuch as the impugned appointments had been made after the college had become, a constituent unit of the University and in view of the provisions of Section 35 and Section 10(5) of the Bihar State Universities Act, 1976 (called "Universities Act, " in short), appointments could not have been made against unsanctioned posts. The Learned Single Judge further noted that in the cases of Kiran Prakash Gupta and Shashi Ranjan Kumar Shukla (supra) the direction had been issued on concession of the Counsel for the University in view of the fact that the appointments in those cases had been made before the college was affiliated and they were, therefore, not subject to the restrictive provisions of the Universities Act. The order of the Supreme Court in Writ Petition No. 409 of 1991 directing the Ranchi University/State Government to take immediate steps to determine the staffing pattern and to take final decision within the fixed time-frame was also distinguished on the ground that the order had been passed under Article 142 of the Constitution, the Learned Single Judge, instead, followed the bench decision of this Court in CWJC No. 10378 of 1993 (Sukhsagar Prasad and Ors. v. State of Bihar and Ors. Reported in 1994 (2) BLJ 196) disposed of on March 23, 1994 on the scope of Section 35 of the Universities Act and certain other decisions of this Court as well as the Supreme Court holding that appointments made contrary to the provisions of the Statute are violative of Articles 14 and 16 of the Constitution and no relief can be granted to the persons concerned, declined to issue any favourable direction with respect to the appellants. The appellants have come in Letters Patent Appeal against the said judgment and order of the Learned Single Judge.

4. Mr. Rajendra Prasad Singh, Learned Counsel for the appellants, submitted that the Learned Single Judge has committed error in rejecting the claim of the appellants on the ground that the appointments were not in conformity with the provisions of Section 35 of the Universities Act. Fact of the matter is that Section 35 which came into existence on 16.8.1976 has in terms, never been acted upon as yet. Asking the State Government to give effect to the provisions and lay down the staffing pattern now would amount to de-recognising the services/appointments of hundreds of employees, who have been working in various Colleges in the State for years, some of them for more than a decade. He submitted with reference to various documents that the State Government has already approved a staffing pattern framed by the Inter-University Board and in that view, appointment which are in conformity with the said staffing pattern, that is to say, appointments made within the sanctioned strength fixed by that staffing pattern cannot be said to be illegal. It is only when any appointment is sought to be made beyond or in excess of the staffing pattern/ sanctioned strength that the prior sanction of the State of Government u/s 35 would be required.

5. Dr. Sada Nand Jha, appearing amicus curiae, submitted that the restrictive provisions of Section 35 of the Universities Act are ultra vires. Article 14 of the Constitution since it confers unbridled and unguarded powers on the state Government in according or withholding its sanction in the matter of creation of posts, unlike the take-over Statutes which contain sufficient guidelines in this regard. He contended that there has been a patent discrimination between the teachers and non-teaching staff of the Colleges in the matter of regularisation of their services. While Statutes have been framed to regularise the services of the teachers, the non-teaching employees have been left in lurch. He also submitted that in order to sustain the appointments, which are now fait accompli, the restrictive provisions of Section 35 should be read down. He in this connection pointed out that if this Court is pleased to hold that Inter-University Board has power to lay down the staffing pattern, that is, if it is held that such staffing pattern has statutory basis, there should not be any difficulty in "reading down" the provisions of Section 35 as" otherwise, the provisions may have to be held ultra vires. Dr. Jha in this connection pointed out that no College can exist without teachers and staff. Without teacher and non-teaching staff, a College may not be eligible for affiliation when the college applied for affiliation it is understood that it has teachers. and non-teaching staff on its rolls. Any interpretation suggesting that their appointments would be illegal in absence of sanctioned posts u/s 35 is not only absurd but will also make the whole scheme regarding recognition/affiliation etc. of colleges unworkable. In such a situation the Court should read down the provisions of Section 35 and hold that any staffing pattern framed by the Inter-University Board and approved by the State Government would amount to creation of posts for the purpose of Section 35, against which appointments can be made without seeking specific approval in each and every individual case.

6. Mr. Indu Shekhar Prasad Sinha, Learned Counsel for the B.B. Rao Ambedkar University, made somewhat identical submissions virtually supporting the appellants' claim, he submitted that the State Government had accepted the staffing pattern proposed by the Inter-University Board, which amount to creation of posts within the meaning of Section 35 of the Universities Act. According to him, the staffing pattern prescribes the "minimum". The staffing pattern in existence can be amended by or subject to the approval of the State Government. Mr. Sinha submitted that where statutory power conferred on an authority is coupled with duty, the authority is obliged to exercise the power. Where the requisite conditions are fulfilled in exercise of power the authority cannot be permitted to say that it will not exercise the power and perform its duties. According to him, it is not necessary to "read down" the provisions of Section 35. It would be sufficient if the expression "prior approval" occurring in Section 35 is read as directory and not mandatory.

7. Mr. Ram Balak Mahto, . Learned Counsel for the Jai Prakash University, submitted that neither Section 35 is ultra vires Article 4 of the Constitution nor the provisions thereof have to be "read down". According to him, Section 35 itself provides the necessary guidelines for exercise of power. He submitted that there is presumption of validity of statutes and it should be Court's endeavour to sustain the statute; only when that is not possible the statute/provision should be read down or held to be ultra vires. Regarding the staffing pattern Mr. Mahto submitted that the so-called staffing pattern provides the ceiling on posts. In other words, it provides for the maximum and not the minimum, as contended by Mr. Indu Shekhar Prasad Sinha, within which the posts are to be sanctioned by the State Government. On merits of the claim of the appellants, Mr. Mahto submitted that admittedly posts were created by Governing Body in 1973, the College was made constituent in 1976, with effect from April 1, 1975, but the appointments were made only in 1979 by the Principal who was not competent to make the appointment.

8. Mr. Ganga Prasad Roy, Learned Additional Advocate General No. 3, submitted on behalf of the State that the impugned appointments ; were violative of Section 35 of the Universities Act. He took the stand that even if the appointments were in conformity with the staffing pattern in the absence of any approval (of appointment) by the State Government u/s 35, they cannot be said to be valid. According to him, the so called staffing pattern is merely a guideline and has no statutory force. It does not amount to creation or sanction of posts;

9. As the appointment of the appellants has been found to be illegal for want of sanction of the posts by the State Government in view of the provisions of Section 35 of the Universities Act, it would be appropriate at this stage to notice the relevant provisions as hereunder:-

Notwithstanding anything contained in this Act, no University or any College affiliated to such a University except such College-

(a) As is established, maintained or governed by the State Government; or

(b) As is established by religious or linguistic minority;

(i) After the commencement of this Act no teaching or non-teaching post involving financial liabilities shall be created without the prior approval of the State Government;

(ii) Shall either increase the pay or allowance attached to any post, or sanction any new allowance;

Provided that the State Government may, by an order, revise the pay-scale attached to such post or sanction any new allowance;

(iii) Shall sanction any special pay or allowance or other remuneration of any kind including ex-gratia payment or any other benefit having financial implication to any person holding a teaching or non-teaching post;

(iv) Shall incur expenditure of any kind on any development scheme without the prior approval of the State Government. (2) Notwithstanding anything contained in this Act, no College other than one mentioned in Clauses (a) and (b) of Sub-section (1), shall, after the commencement of this Act, appoint any person on any post without the prior approval of the State Government:

Provided that the approval of the State Government shall not be necessary for filling up a sanctioned post of a teacher for a period not exceeding six months, by candidate possessing the prescribed qualification.

10. From bare perusal of the provisions it will appear that except Colleges which have been established and/or are maintained or governed by the State Government or Colleges which have been established by the religious or linguistic minority, other affiliated Colleges and the Universities are forbidden from creating teaching or non-teaching post, involving financial liabilities and making any appointment without the prior approval of the State Government. Temporary appointment for period not exceeding six months can be made without the prior approval of the State Government against a teaching post provided that post is sanctioned and the candidate possess the prescribed qualifications. The restraint envisaged by the section is thus twofold-neither post can be created nor appointment can be made without the prior approval of the State Government. If a sanctioned post of teacher is available i.e. vacant, appointment can be made without the prior approval of the State Government but for a period not exceeding six months.

11. If the aforesaid provisions are literally construed it would virtually mean that no college can be established except by the State Government or linguistic / religious minority. As per the provisions of Section 21 of the Universities Act, a College can be affiliated only with the approval of the State Government and before granting such approval, the State Government has to consider, inter alia, "the viability of the academic standard and all other conditions which are likely to

have observe effect on the interests of students admitted to such a College." Section 21, therefore, contemplates the existence of a full-fledged institution with adequate provision. It would be a tautology to say that an educational institution cannot exist without students. If the existence of students is a must, so is the existence of teachers, for the students cannot prosecute their studies in the institutions without teachers. And no office can run without class III/IV employees. If the existence of adequate infrastructure, inclusive of the provisions for teachers and non-teaching staff, is a condition precedent for grant of approval in the matter of affiliation and without affiliation the College cannot claim the privileges of University under the provisions of the Universities Act or the statutes framed thereunder, it is obvious that literal interpretation and a steadfast insistence on prior approval of the State Government in the matter of creation of posts and appointment may lead to any absurd situation.

12. Another aspect which should be kept in mind that Section 35 does not envisage sanction, individually, with respect to each and every post of teachers or non-teaching staff. The authority may create one post or number of post at the same time. It may be sufficient if instead of creating post or posts for a particular institution a general staffing pattern is laid down. If such staffing pattern is laid down it would amount to creation/sanction of posts. That would also be conducive to the exercise of power u/s 21. In other words, the College/ University may make appointment against posts in accordance with the staffing pattern, then apply for affiliation. This would enable the State Government to consider the viability of the institution for the purpose of granting or refusing approval to its proposed affiliation. This would also make the provisions of Section 35 workable.

13. The point for consideration, therefore, is whether a general staffing pattern has been laid down by the State Government or not. Such an exercise, in my opinions, is necessary and also expedient because it is more or less an admitted position that the power u/s 35, such, has never been exercised by the State Government and if a strict interpretation of the provisions were to be made, appointment of almost all teachers and non-teaching staff in each and every College would be rendered illegal. It is another matter that, as regards teachers, statutes have been framed for regularisation of their services but so far as Section 35 is concerned it puts both teachers and non-teaching staff on par. In fact, regularisation of the services of teachers under statutes framed for that purpose without making corresponding provisions for the non-teaching staff has caused (sic) burn and consternation and given rise to a plea discrimination.

14. The appellants have brought on record certain documents to show that the Bihar Inter University Board after due consideration of the matter had recommended staffing pattern which was approved by the State Government. The first document referred to in this connection is the minutes of the proceeding of the Inter University Board dated February 12, 1983, Annexure 18 to the writ petition. From the aforesaid minutes it appears that the State Government and

convened a meeting on February 8, 1983 under the Chairmanship of the Education Commissioner in which it was decided that the Chairman, Inter University Board should call in meeting to suggest norms regarding staffing pattern for the University or its allied offices, Colleges and P.G. Departments and to send the same to the State Government, after approval by the Board, the Board accordingly considered the matter on February 12, 1983. It would be useful to quote the portion of the minutes as follows:

The meeting convened by the Board was attended by the aforesaid persons. In the meeting the norms for staffing pattern in universities and Colleges as approved by the Board on 14.1.1960 and the norms of staffing pattern for the PG Science Departments as prepared by the Committee earlier were discussed. Certain amendments were made therein. In addition, the norms for under-Graduate Science Departments and other allied offices of the University were finalised.

The norms of staffing pattern for Universities and allied offices, Science Departments of Colleges and PG Departments, as recommended by the Committee, are given in the appendix.

15. It would thus appear that a staffing pattern, approved by the Inter University Board, was already in existence from before. The Board at the behest of the State Government considered the matter again and made certain amendments and submitted a revised staffing pattern. The staffing pattern dated January 14, 1980 which forms part of the minutes is to be found at pages 123-124 of the paper book. During course of hearing Counsel for the appellants produced to copy of the letter of Education Department No. 1-40/80 shi-938 dated August 4, 1980 issued under the hand of Shri A.K. Biswas, Joint Secretary, communicating the Government approval regarding creating of posts pursuant to recommendations of a High-Power Committee constituted for that purpose, to the different Universities of the State. The Bihar University later communicated the same to its constituent and affiliated colleges by letter No. A/C 15420-8-dated September 13, 1980. It may be useful to quote the aforesaid letter marked Annexure-12 to the writ petition at pages 82-84 of the paper book, so far as relevant, as follows:

We are aware that before 16.8.1976 (the date of promulgation of Bihar State Universities ordinance, 1976) the G.B. of an affiliated College was competent to create post of IIIrd and IVth Grade employees subject to approval of the University of the College concerned and after making provision of the posts so sanctioned in the College budget, the G.B. was competent to appoint IIIrd grade employees and the Principle was competent to make appointment of IVth grade Staff of the College within the sanctioned strength provided in the College budget for the relevant period. The appointments were done under the approved process i.e. advertisement, selection Board etc.

But in Section 33 of Bihar State Universities Ordinance 1975 (promulgation on

16.8.1976), it has been laid down that no other Colleges than the Colleges managed and maintained by the State Government and also the College established by the minority College, can create posts of teaching or non-teaching staff and make any new appointment to posts either existing from before 16.8.1976 or after 15.8.1976, without having obtained the permission of the State Government to sanction additional posts of non-teaching staff after making further appointments in the Colleges, but in absence of any yard-stick to measure the need of the Colleges, the State Government was not in a position to take a final decision in the matter.

Now, the State Government in consultation with the Bihar Inter University Board, has finalised the norms of staffing pattern to be followed in the Colleges in the State, in order to finalise the proposal of Colleges for sanction of additional number of non-teaching staff.

The number and grade of non-teaching staff admissible to Colleges on the basis of students on roll as approved by the State Government are as follows-

16. It may be stated here that the recommendation of the Inter University Board dates February 12, 1983 and its approval by the State Government. appears to have been treated as in relation to additional posts, understandably because the staffing pattern framed in 1980 was already in existence and what the Board had been called upon to do was to suggest revision/modification in the existing staffing pattern. The Board while revising the staffing pattern had recommended for some additional posts.

17. It appears that in the light of correspondence which later took place between the university and the College, the Principal of the College by his letter No. 395 dated December 15, 1987 forwarded the particulars of the additional staff required on the basis of the Government staffing pattern "as approved", in the prescribed proforma. The aforesaid letter which is marked Annexure-19 to the writ petition is at page 125 of the paper book. This also shows that the matter pending consideration related to appointment/approval of the additional staff against "the additional posts as per the revised staffing pattern which had been approved by the State Government. It is, therefore, not correct to say, as was sought to be contended, by Mr. Ganga Pd. Roy, Additional Advocate General No. 3 on the basis of instructions contained in the letter of the Director, High Education, bearing No. 1589 dated August 26, 1996, that the staffing pattern regarding non-teaching posts was "never" recognised/approved by the State Government.

18. Another document which may be noticed is the Resolution, of the State Government contained in Memo No. 989 dated May 10, 1991 of the Human Resources Development Department, which is part of annexure-17 to the writ petition (at pages 108-109 of the paper book). The very opening paragraph of the aforesaid resolution mentions that staffing pattern based on the recommendation of the Bihar Inter University Board with respect to non-teaching

staff of different categories has been circulated. The resolution further states that having reconsidered the matter regarding staffing pattern, the State Government decided to create the posts on the basis of the staffing pattern circulated earlier, the details where of are mentioned in the Appendix. A salient aspect of the aforesaid resolution is that by that resolution the State Government also communicated its decision to allow such employees who were working since prior to May 10, 1986, beyond the staffing pattern, to continue until they are adjusted against, vacancies occurring in future; while services of the persons appointed after the said date i.e. May 10, 1986 were to be terminated.

19. In view of the aforesaid documents there cannot be any doubt that a staffing pattern with respect to non-teaching posts in the Universities and Colleges in State of Bihar has been in existence since at least 1980. If that is the correct factual position then whether it is open to the State Government to take the stand that non-teaching class III/IV posts have not been created in the College? The answer, in my opinion, must be in the negative. I have already stated above that competent authority whether the government or any other authority can either create individual post (s) or can lay down a staffing pattern. In that situation the posts will be deemed to have been created. Once posts are available, it should be open to the competent authority to make the appointments against those posts and that would be deemed to be appointment in accordance with the staffing pattern. They cannot be said to be illegal for want of posts. It would be absurd to suggest that although staffing pattern has been laid down providing for different categories of posts, the same post (s) should be created over and over again individually in different Colleges. That interpretation would make the whole exercise in framing the staffing pattern as superfluous and redundant.

20. It would not be out of place to mention here that the aforesaid resolution dated May 10, 1991 has since been recalled on January 9, 1996. From perusal of the file of the Human Resources Development Department (File No. 14/MI-044/91) in which the aforesaid decision has been taken, it appears that in cancelling the previous resolution dated May 10, 1991 the State Government took into account the financial burden involved in the matter of regularisation of the existing employees. Prima facie, the aforesaid decision dated January 9, 1996 does not appear to be reasonable. While taking the decision contained in resolution dated May 10, 1991, the State Government was fully conscious of the need to adjust existing hands against the posts within the staffing pattern, leaving individual disputes to be sorted out individually at the appropriate levels. In the present case, however, it may not be necessary to go into the correctness or otherwise of the aforesaid decision dated January 9, 1996 in full-fledged manner as, in my opinion, the same does not stand in the way of those appellants or other similarly situated person in getting the reliefs. The decision as contained in resolution dated May 10, 1991, as noticed above, was in two parts, the first part related to regularisation of the services of the existing employees against the posts within the staffing pattern; the second part provided for

continuance of the excess/surplus staff, working from before May 10, 1986 (i. e. those who had already completed 5 years or more in service) until they are adjusted against future vacancies. These appellants claim to have been appointed against sanctioned posts. If the posts against which they were appointed, all within the staffing pattern, there was no question of their regularisation, questions of eligibility and suitability apart and, therefore, the State Government cannot decide unilaterally to terminate their services, irrespective of whether a formal decision to regularise their services was taken on May 10, 1991 or not.

21. The point for consideration then is whether appointments made by the College/University authorities against sanctioned posts, that is, posts within the staffing pattern are to be accepted as final. As noticed above, Section 35 of the Universities Act provides for prior approval both in the matter of creation of posts as also in the matter of appointment. Creation of post is the earlier stage, actual appointment comes next. As noticed above, there cannot be a College without the teachers and without teachers the College cannot be granted affiliation, the relevant part of Section 35 requiring prior approval in the matter of appointment has to be read down to include "post facto" approval otherwise the provision may become unworkable and lead to anomalous or absurd situations. One of the objects underlying Section 35 is that appointments are made of persons possessing necessary eligibility and qualifications and in accordance with law. This object can be achieved even without insistence on "prior approval" in each and every case. In appropriate cases, appointment can be made subject to "post facto" approval of that State Government after such scrutiny of the qualifications and the recruitment process as may be necessary and appropriate. Such appointments, made by the College/University authorities, should not be treated as final; they shall have legal effect and sanctity only after approval of the State Government.

22. The above discussion may be summed up in these words. By reason of the approval of the staffing pattern proposed by the Bihar Inter University Board non-teaching class III and IV posts will be deemed to have been created with the prior approval of the State Government i.e. sanctioned. Appointment can be made against those posts in accordance with the staffing pattern without seeking further approval regarding post (s). Merely on the ground that prior approval of the State Government was not obtained, the appointment cannot be said to be illegal. The College/University authorities are competent to make appointment of eligible and suitable persons against such posts. Ordinarily, this should be done with the prior approval of the State Government. In exceptional cases, in exigency of service of situation, provisional appointment can be made subject to approval of the State Government within the stipulated time-frame. It is open to the State Government to examine the eligibility and suitability of even those who have already been appointed against the sanctioned posts as per the staffing pattern.

23. The view that I have taken above is somewhat at tangent with the express provisions of Section 35 of the Universities Act. But as I have pointed out above, if the provisions are literally construed, it may result into an absurd situation and may also make the provisions unworkable rendering them vulnerable to challenge on the ground of arbitrariness. No guidelines have been laid down and absolute discretion has been conferred on the State Government. As rightly contended at the Bar when power is conferred on an authority to do certain thing, the authority is obliged to exercise that power on way or the other conferment of power is coupled with obligation to exercise the power. In order to sustain the provisions, so that the objects underlying the same are achieved, it becomes necessary to interpret the provisions in the manner indicated above by reading them down. Reading down of the provisions of an Act is a settled Principle of interpretation to sustain its validity, as well as for effectuation of the purpose of the statute. The Court though have no power to amend the law by process of interpretation, they do have the power to mend it so as to be in conformity with the intendment of legislature. As has been observed in *Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and Others*, the doctrine of reading down or of recasting the statute can be applied for saving a statute from being struck down on account of any unconstitutionality or on the ground of vagueness or ambiguity where it is possible to gather the intention of the legislature from the object of the statute, the context in which the provision occurs and the purpose for which it is made.

24. In *Pannalal Bansilal Patil and others etc. Vs. State of Andhra Pradesh and another*, certain provisions of the Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act, 1987 providing for appointment of Board of Trustees and management by the executive officer appointed by the State Government or the Commissioner/Deputy Commissioner/Assistant Commissioner came up under challenge on the ground of violation of Article 25 of the Constitution. The impugned provisions had been made on the recommendation of the Challa Kondaiah Commission which indicated large scale mis-management and mis-utilisation of funds of Charitable and Hindu religious institutions and endowments. The Supreme Court observed that it would not be proper to interfere with the legislative wisdom. But taking into consideration the fact that the freedom of religion was as much applicable to the majority Hindu as to the minority and that the charitable and religious institutions and endowments owe their very existence to the founder or members of his family, held it would be in the interest of religious institutions and endowments and also in keeping with the wishes of the founder that he i.e. founder or member of the family is given the primary in the management. The Court observed, "with a view, therefore, to effectuate the object of the religious institutions or endowment or specific endowment and to encourage establishment of such institutions in future, making the founder or in his absence a member of his family to be chairperson and to accord him a major say in the management and governance would be salutary and effective." The Supreme Court, accordingly while

upholding the abolition of hereditary right, further upheld the validity of the impugned provisions regarding management of the religious institutions and endowments by "a Board of Trustees appointed by the State Government of its officials, as the case may be, "headed either by the founder or the member of his family" by reading down the provisions in that manner.

25. In the present case also, in view of the inherent "unworkability" of the impugned provisions regarding prior approval of the State Government, the provisions can be read down in the manner indicated above. The soul of the provisions is not violated and the purpose is also achieved. The purpose in making these provisions is to pre-empt illegal and uncalled for appointments. Large scale illegal appointments without availability of posts have been made in different establishments /organisations in this State in recent times and the legislature thought it appropriate to intervene and make the provisions which would deter the College/University authorities from making illegal appointments because, more often than not, it is the State which was to bear the financial burden of the appointments. The purpose underlying the provisions, therefore, has not only to be lauded but also achieved. If Section 35 is interpreted in the provisions would be substantially complied with but the purpose also would be fulfilled.

26. Once staffing pattern is prescribed/laid down it would be unreasonable to insist on prior approval of the State Government in the matter of creation of posts within the frame-work of the staffing pattern. And so far as the question of approval of the appointment made against those posts is concerned, if the power of the State Government to scrutinise the eligibility or suitability of the candidates appointed or proposed to be appointed or the validity of the selection process is reserved to it, the State Government can, even after the appointments have been made, decide not to approve them. I should not be interpreted to mean that the term "prior approval" in Section 35 in the matter of appointment should be read as "post facto" approval. As a general rule, after completing the selection process the University/College authorities should seek approval of the State Government before its decisions are given effect to and actual appointments are made. There, however, maybe situations where it may not be expedient to seek prior approval. I have cited example of a newly established College which cannot seek affiliation unless it has teachers and staff on its rolls to cater to the academic needs of the students. There may be other situations which, if not equally compelling, may justify, appointment without prior approval. It should be kept in mind that even in terms of proviso to Sub-section (2) of Section 35 it is open to the University College to make temporary appointments against sanctioned posts for a period not exceeding six months.

27. In *M.K. Agrawal v. Gurgaon Gramin Bank* : [1987]3SCR640 , Branch Managers were appointed on probation of one year. The period of probation was extended by six more months. The regulations were silent on the point as to whether at the end of the period, the probationers should be treated as

confirmed or discharged. The Supreme Court held that continuance of the incumbent on the post should be treated as confirmation by implication. In *H.C. Puttaswamy and others Vs. The Hon'ble Chief Justice of Karnataka High Court, Bangalore and others*, , appointments had been made without consulting the Public Service Commission, the Supreme Court held that the procedure was not correct. However, all appointees were directed to be treated as regularly appointed. In *All Manipur Regular Posts Vacancies Substitute Teachers' Association Vs. State of Manipur*, , the Supreme Court directed regularisation of services of substitute/ad hoc teachers working for several years. It further directed that direct recruitment should be made only if vacancies still remain after process of regularisation is complete.

28. Counsel of Jai Prakash University and the State of Bihar placed reliance on certain judgments in which a view has been taken that where appointments are made contrary to the recruitment rules they must be deemed to be null and void and the State cannot be liable (*Madhyamik Siksha Parishad, U.P. Vs. Anil Kumar Mishra and others etc.*, ; *Vijay Kumar v. The State of Bihar* 1993 (1) PLJR 99 and so on. Counsel also referred to *Manor Prasad v. Ranchi University* 1993 (2) BLJR 873; and *Gopi Krishna Pathak and Others and Dharendra Prasad Singh and Others Vs. Ranchi University and Others* and unreported decisions in the cases of *Sukhsagar Prasad v. The State of Bihar* reported in 1994 (2) BLJ 196. *Umesh Prasad Singh Madhukar v. State of Bihar* CWJC No. 5399 of 1992, "disposed of on 23.3.1994, *Pankaj Kumar Mishra v. State of Bihar* CWJC No. 4165 of 1994, disposed of on 14.9.1994 and *Akhila Nand Pandey and Nita Rani Sinha* (CWJC No. 2700 of 1992 (R), disposed of on 31.3.1995). It was pointed out that special leave Petitions against the orders of this Court in the last three cases were dismissed by the Supreme Court.

29. The latter cases relate to Section 35 of the University Act itself and, in fact, the last one has been noticed by the Learned Single Judge. this Court held that where appointments are made in violation of Section 35 of the Act, that is, without prior approval of the State Government and the same is subsequently terminated, the appointees cannot claim salary as the very appointment was contrary to the provisions of the Statute and illegal. In *Sukhsagar Prasad's* 1994 (2) BLJ 196 case while refusing to issue any direction to the State of Bihar to accord sanction observed that it is expected that the State and the concerned University would implement its own policy decision and as and when posts are sanctioned on the basis of staffing pattern or otherwise, the appointments would be made strictly in accordance with the provisions of the Universities Act and the statutes framed thereunder.

30. In view of my interpretation of Section 35 of the Act and conclusion that the staffing pattern has already been laid down which amounts to creation of posts, the abovesaid decisions cannot be said to be correct in law. The Supreme Court rejected the S.L. Ps. summarily and those orders cannot be understood as upholding the judgments/orders on merit. If the appointments are made against

posts as per the staffing pattern, i.e. within the sanctioned strength, they cannot said to be violative of Section 35 of the Act and illegal on the ground that the posts have not been sanctioned by the State Government provided, for course, the candidates possess the eligibility and suitability and the selection/appointment process was in conformity with Articles 14 and 16 of the Constitution.

31. Learned Single Judge was referred to Section 10(6) of the Universities Act. That section empowers the vice-Chancellor to make appointment of ministerial staff and other servants of the University. Learned Judge was held that after the College became constituent in 1979, the impugned appointment could not have been made by the College authorities. However, as stated above, while narrating the foundational facts, the University had already approved those appointments on 2nd March, 1981 and forwarded the same to the Department for approval of the State Government.

32. In the above premises, the judgment of the Learned Single Judge rejecting the claim of the appellants on the ground that they were appointed without prior approval of the Act cannot be sustained. In the ordinary course, in view of my conclusion that it is open to the State Government to consider the validity of appointments already made for the purpose of granting or refusing past facto approval, I would have considered asking the State Government to look into the claim of the appellants afresh. However, having regard to the fact that the appellants have continued in service for more than 17 years, I do not think it would be appropriate exercise of discretion to reopen the matter after such a long lapse of time. In *The Direct Recruit Class-II Engineering Officers' Association and others Vs. State of Maharashtra and others*, a Constitution Bench of the Apex Court held that where initial appointment is not made according to the rules but the appointee continues in service uninterruptedly for long period till regularisation of his service, the entire period as the period spent in service for the purpose of consequential benefits will be counted. The appellants are accordingly entitled to have their services regularised against the posts within the staffing pattern as applicable to the college.

33. In the result, this appeal is allowed. The judgment of the Learned Single Judge under appeal is set aside. The impugned order of the State Government dated June 8, 1983, Annexure-7 to the writ petition, is also set aside. The writ petition stands allowed accordingly. In the circumstances of the case there will be no order as to costs.

D.P. Wadhwa, C.J.

34. I agree.

S.J. Mukhopadhyaya, J.

35. I agree.