
(2009) 06 RAJ CK 0006
In the Rajasthan High Court

Manju Rani Sharma (Smt.)	Vs	APPELLANT
Managing Committee and Others		RESPONDENT

Date of Decision : 29-06-2009

Acts Referred:

Constitution of India, 1950 — Article 226, 227, 236, 309

Citation : (2009) 3 WLN 381

Hon'ble Judges : Prem Shanker Asopa, J

Bench : Single Bench

Judgement

Prem Shanker Asopa, J.—Since common question of termination of the petitioners is involved in all these aforesaid writ petitions, hence, they have been heard together and are being decided together by this common order.

2. By the aforesaid writ petitions, the petitioners have challenged the common order dt. 23.08.2008 passed by the Rajasthan Non-Government Educational Institutions Tribunal, Jaipur (in short "the Tribunal") whereby individual appeals filed by the petitioners u/s 19 of the Rajasthan Non-Government Educational Institutions Act, 1989 (in short "the Act of 1989") have been dismissed and termination orders of respective petitioners have been upheld on the ground that the Management has a right to close down the Institution and the State Government cannot compel the Management to run the Institution.

3. The brief facts of the case, as per the writ petitions, are that the respective petitioners were appointed as Assistant Teacher in the year 1994 in Nehru Bal Mandir, managed by the Managing Committee, respondent No. 1. In the aforesaid Institution, primary education was being imparted. On 15.05.2008, a notice signed by the Secretary of the Nehru Bal Mandir Administrative Society was pasted on the outside wall of the school, which was addressed to the Commissioner, Elementary Education, Bikaner. In the said notice, it was stated that the Management was unable to run the Institution due to financial crisis and the Government could take over the school or allow them to close it down. It is stated in the writ petition that prior to taking the drastic action of closure of the

school, new academic session 2008-2009 had already started from 30.04.2008 and it was wrong on the part of the Management to state that the Institution was closed on the last day of the session 2007-2008. It is further stated in the writ petition that the District Education Officer, Jhunjhunu also informed the Management that the Institution could not be closed abruptly in an illegal manner and it was intimated that the closure of the Institution without the approval of the Education Department was wrong and the Institution was to be responsible for consequential action. At this stage, the petitioners filed appeals u/s 19 of the Act of 1989 before the Tribunal. The Tribunal stayed operation of the impugned order dt. 15.05.2008 which continued till the decision of the appeals when the appeals were dismissed on 23.08.2009 on the ground that compliance of Section 14 of the Act of 1989 and Rule 10(v) of the Rajasthan Non-Government Educational Institution (Recognition, Grant-in-aid and Service Condition etc.) Rules, 1993 (in short "the Rules of 1993") has been made in true spirit, therefore, the closure of the Institution is valid and the employees have no right to seek compliance of other provisions of the Act of 1989 Section 18 and Rule 39 of the Rules of 1993 for the reason that the consequential termination on account of closure stands on different footing from termination and dismissal during continuance of the Institution.

4. Respondents No. 1 and 2 and 3 and 4 filed separate replies. Respondents No. 1 & 2 have raised the preliminary objection regarding maintain-ability of the writ petitions and further elaborated the fact that on account of financial constraints resulting from reduction of strength of the students and other expenses, the Managing Committee unanimously decided to close down Nehru Bal Mandir.

5. Respondents No. 3 and 4-Commissioner and the State have not supported the impugned order of the Tribunal with the further submission that on enquiry, the parents of the students were found present and it was informed that there is scarcity of the facilities for the students and in the inspection report prepared by the District Education Officer (Elementary Education), Jhunjhunu, he categorically observed that although there is scarcity of facilities and the school is being run in the premises of the temple of Shri Sarya Narain Bhagwan.

6. Submission of counsel for the petitioners is that when a particular thing is required to be done in a particular manner, then the same is to be done in the same manner and all other modes are prohibited. Counsel further submits that the Tribunal has committed error in laying much emphasis on the right of the Management to close down the Institution and further committed an error in holding that Section 18 of the Act of 1989 and Rule 39 of the Rules of 1993 are not applicable in case of the closure of the Institution. Counsel for the petitioner also submitted that cases of the petitioners be examined from another angle also that they have been rendered jobless even after completion of service of more than 15 years without there being any fault on their part.

7. In support of his submissions, Mr. Gaur, appearing for the petitioners cited the judgments in 1996 II AD 238 (SC); Union of India (UOI) and Another Vs.

Shardindu, ; Saint Meera Brotherhood Society Vs. State of Rajasthan and Others, and Managing Committee, Rao Tularam Rashtriya Unnati Vidyalaya No. 2, Patel Nagae, Bikaner v. Jetha Ram and 2 Ors. 2005(3) WLC (Raj.) 456.

8. Submission of counsel for the respondent Management is that the Management has unanimously decided to close down the Institution because of financial constraints and the same is the relevant factor to decide. In support of his submissions, counsel for the respondents cited the judgments in M.G.D.Girls School and Anr. v. Education Tribunal & Smt. Indubala Srivastava (1995) 1 RLR 99 and Shri Maheshwari Senior Higher Secondary School and Anr. v. Bhika Ram Sharma and Ors. (supra).

9. I have gone through record of the writ petitions and further considered rival submission of counsel for the parties.

10. Before proceeding further, it is necessary to quote Section 10, 14 and relevant portion of Section 18 of the Act of 1989 and Rule 10(v) and relevant portion of Rule 39 of the Rules of 1993 which are as under:

Section 10, 14 and relevant portion of Section 18 of the Act of 1989

Section 10

10. Powers of the State Government to take over management.-(1) Notwithstanding anything contained in any law for the time being in force, whenever it appears to the State Government that the managing committee of any recognised institution has neglected to perform any of the duties assigned to it by or under this Act or the rules made thereunder or has failed to manage the institution properly and that it has become necessary in the public interest to take over the management of such institution, it may, after giving to such managing committee a reasonable opportunity of showing cause against the proposed action, take over such management and appoint an administrator to exercise control over the assets of the institution and to run the institution for such period as the State Government may from time to time fix.

(2) Where, before the expiry of the period fixed under Sub-section (1), the State Government is of opinion that it is not necessary to continue the management of the institution by an administrator, such management shall be restored to the managing committee.

Section 14

14. Closure of recognised institution.-(1) No recognised institution or its class or the teaching of any subject therein shall be closed without a notice in writing to the Competent Authority. It shall have to be shown that adequate arrangements have been made for the continuance of teaching of the students for the entire remaining period of study for which the students had been admitted or for the refund of the remaining fees, if any, paid by the students.

(2) The period of notice under Sub-section (1) shall be such as may be

prescribed and different periods of notice may be prescribed for different classes of institutions having regard to the period of each course of study.

Relevant portion of Section 18

18. Removal, dismissal or reduction in rank of employees.-Subject to any rules that may be made in this behalf, no employee of recognised institution shall be removed, dismissed or reduced in rank unless he has been given by the management a reasonable opportunity being heard against the action proposed to be taken.

Provided that no final order in this regard shall be passed unless prior approval of the Director of Education or an officer authorised by him in this behalf has been obtained:

Provided further that this Section shall not apply.-

(i)

(ii)

(iii) Where the managing committee is of unanimous opinion that the services of an employee can not be continued without prejudice to the interest of the institution, the services of such employee are terminated after giving him six months notice or salary in lieu thereof and the consent of the Director of Education is obtained in writing.

Rules 10(v) and 39 of the Rules of 1993

Rule 10(v)

10. General Conditions Governing Grant-in-Aid.-Every institution which applies for grant-in-aid shall be deemed to have accepted its obligation to comply with the following conditions:

(i) to (iv)

(v) The educational institution or any of its faculties, subject, course, class or Section, shall not be closed down or down-graded without at least one full academic year's notice in writing as envisaged u/s 14 of the Act to the department.

(vi) to (xxiv)....

Relevant portion of Rule 39

39. Removal or Dismissal from Service.-(1) The services of an employee appointed temporarily for six months, may be terminated by the management at any time after giving at least one month's notice or one month's salary in lieu thereof. Temporary employee, who wishes to resign shall also give at least one month's notice in advance or in lieu thereof deposit or surrender one month's salary to the management.

(2) An employee, other than the employee referred to in Sub-rule (1) may be removed or dismissed from service on the grounds of insubordination, inefficiency, neglect of duty, misconduct or any other grounds which makes the employee unsuitable for further retention in service. But the following procedure shall be adopted for the removal or dismissal of an employee:

(a) to (h)

Provided that the provisions of this rule shall not apply:-

(i) To an employee who is removed or dismissed on the ground of conduct which led to his conviction on a criminal charge, or

(ii) Where it is not practicable or expedient to give that employee an opportunity of showing cause, the consent of the Director of Education has been obtained in writing before the action is taken, or

(iii) Where the managing committee is of unanimous opinion that, the services of an employee cannot be continued without prejudice to the interest of the institution, the service of such employee are terminated after giving him six months notice or salary in lieu thereof and the consent of the Director of Education is obtained in writing.

11. Before discussing the citations referred here-in-above, I would like to quote the relevant portion of the judgment of the Tribunal dt. 23.08.2008, which is as under:

In this case respondent No. 1 and 2 have placed on record letter dt. 22.03.2007 (Annexure R-1/1) on record. A perusal of this letter reveals that the Nehru Bal Mandir Chirawa Administrative Society has clearly informed the competent authority that it is not possible to run the primary school and hence permission be accorded for closure of the institution. It may be pointed out that as per provisions of Section 14 of the Act, 1989 no permission was required and the request for the same was superfluous but the fact remains that respondent No. 1 had given notice of intention to close the institution, hence this letter is in perfect compliance of Section 14 of Act, 1989. It is an admitted position that institution was closed after completion of next full academic session and hence compliance of Section 14 of Act, 1989 and Rule 10(v) of Rules, 1993 has been made in true spirit.

In my humble opinion, if institution is closed lawfully, the natural consequence would be that employees of the institution, shall cease to be in employment. But if closure of institution is not lawful, it will have to be held that institution continues to exist and in that event the employees will not cease to be in employment. In my opinion the inquiry in cases of termination of services in consequence of closure of an institution should be confined to the legality of closure and not beyond it, because if closure is found to be lawful the natural consequence of termination of services of employees can not be faulted with on the ground that compliance of Section 18 of Act, 1989 was not made. In my

humble opinion the management has every right to close the institution by following the procedure laid down by Section 14 of Act, 1989 and if State Government, so desires, it can take over the management of such institution in public interest u/s 10 of Act, 1989. But if, this course is not adopted State Government or it's officers can not take any exception to the closure of the institution, if it is otherwise lawful. Similarly, the employees of such an institution can not also insist that their services should be terminated by following the procedure envisaged u/s 18 of Act, 1989. In my view to insist on compliance of Section 18 of Act, 1989 in cases of lawful closure of an institution will be too rigorous & would render the closure of institution impossible, if termination is not approved by Director of Education. The scheme of Act and Rules does not warrant an other inference and right of management to close the institution can not be circumvented by insisting on compliance of Section 18 of Act, 1989. The Act, 1989 in fact does not provide any remedy against ceasure of employment consequent to closure of institution, and it is not the job of this Tribunal to provide a remedy, where the legislature has not chosen to provide the same.

An argument has also been raised in para-23 of the appeal that termination of services of appellant is contrary to the provision of Clause (iii) of second proviso to Section 18 of Act, 1989 and Clause (iii) of proviso to Sub-rule (2) of Rule 39 of Rules, 1993. In my considered opinion the aforesaid provision does not give any right to an employee to insist that his services should have been terminated by following the procedure prescribed therein. The different clauses of second proviso to Section 18 and Sub-rule (2) of Rule 39 merely engrafts situations where the compliance of provisions proceeding these provisos would not be required. Thus the different clauses of those two provisos are shield in the hands of management and not the sword in the hands of employees I, therefore, also reject the aforesaid contention.

I, therefore, hold that in cases of termination of services as a natural consequence of closure of an institution, the compliance of Section 18 of Act, 1989 is not required to be made.

Learned Counsel for the appellants has relied on Managing Committee v. Jetha Ram 2005 (6) RRD 1934 (Raj.); Managing Committee v. Smt. Pushpa 2006 (3) WLC (Raj.) 504 and Saint Meera Brotherhood Society v. State of Rajasthan and Ors. 2006 (1) WLC (Raj.) 677 but these cases do not relate to termination consequent to closure of institution and two cases deal with abolition of post, which is quite different from closure of institution, hence these judgments do not advance the case of appellants.

I, therefore, hold that termination of services of appellants, consequent to closure of primary Section of Nehru Bal Mandir Chirawa is perfectly valid and these appeals have no force.

Order

I, therefore, dismiss these appeals so far as termination of services of appellants

is concerned and for the rest of the reliefs they are left to pursue such remedies as may be available to them.

12. Supreme Court in *Shri Maheshwari Senior Higher Secondary School and Anr. v. Bhikaram* (supra), has held that in a case relating to abolition of posts, Sections 18 and 39 of the Act of 1989 are not applicable.

13. In view of the above, I am of the view that Sections 18 and 39 of the Act of 1989 are not applicable to the present case and the matter is required to be examined with reference to Section 14 of the Act of 1989 and Rule 10(v) of the Rules of 1993.

14. The notice of closure was given by the respondent institution on 15.05.2008 for the reason of financial constraints but the Government has not accepted the same meaning thereby that the Government is compelling the institution to run, which is not in a position to run. Therefore, I am of the view that when the Management failed to manage the institution, the Government could have appointed Administrator but has no power to insist on the Management to run the institution. The said insistence of the Government is arbitrary. The same findings have been recorded by the Tribunal by saying that a particular Institution cannot be pressurized by the Government to run even if there is scarcity of facilities and financial crisis, and further in case of termination on account of closure, the same cannot be equated with the case of termination during continuance of the school. The Government cannot compel the Management to run the institution. If the Management is unable to run the institution then it is always open to the Government to invoke the power u/s 10 of the Act of 1989 to appoint an Administrator. I find no error in the judgment of the Tribunal but at the same time, I invoke my extraordinary jurisdiction under Articles 226 and 227 of the Constitution of India for absorption of the employees as held by this Court in *Managing Committee Vaidik Kanya P.G. College, Jaipur and Anr. v. Rajasthan Non-Government Educational Institutions Tribunal, Jaipur and Ors.* SBCWP No. 6665/2008, decided on 29.05.2009, in which the judgment of this Court dt. 01.05.2009 *Managing Committee Vaidik Kanya P.G. College v. The Presiding Officer* was considered. The relevant of paras 13 to 20 of the aforesaid judgment dt. 01.05.2009 are as under:

(13) Before proceeding further, I would like to quote Section 16 of Rajasthan Non-Government Educational Institutions Act, 1989 and Rules 92 and 93 of the Rajasthan Non-Government Educational Institutions Rules, 1993 which read as under:

Section-16. Power of the State Government to regulate the terms and conditions of employment.-(1) The State Government may regulate the recruitment and conditions of service, including conditions relating to qualifications, pay, gratuity, insurance, age of retirement, entitlement of leave, conduct and discipline of a persons appointed as employees of aided institutions in the State.

Provided that the rights and benefits accruing to an employee of an existing

institution under the grant in aid rules in force at the commencement of this Act shall not be varied to the disadvantage of such employee:

Provided further that every such employee shall be entitled to opt for such terms and conditions of service as were applicable to him to him immediately before the commencement of this Act:

Provided also that, irrespective of the age of retirement prescribed, action may be taken for compulsory retirement of such an employee after completion of 25 years of service or on attainment of the age of 50 years whichever is earlier, in accordance with the procedure as may be prescribed.

(2) Every recognized institution shall constitute a provident fund for the benefit of its employees in such manner and subject to such conditions as may be prescribed and contribute to such fund and pay interest on the deposited amount at such rate as may be prescribed from time to time.

Rule-92 Powers to exempt from Rules.-The State Government may, by general or special order exempt any institution or any class of institutions from any of the provisions of the rules or may direct that such provisions shall apply to such institution or class or institutions with such modification and, or conditions as may be specified in the orders.

Rule-93 Removal of Doubts.-Where a doubt arises as to the interpretation of any of the provisions of these rules or their applicability, the matter shall be referred to the Government in the Education Department, whose decision thereon shall be final.

(14) In the case title as Avas Vikash Sansthan and Anr. v. Avas Vikash Sansthan Engineers Association and Ors. (Supra), the Supreme Court has observed in para 51 as under:

Power to abolish posts as a measure of economy.-It is well settled that the power to abolish a post which may result in the holder thereof ceasing to be a Government servant has got to be recognized. The measure of economy and the need for streamlining the administration to make it more efficient may induce any State Government to make alterations in the staffing pattern of the civil services necessitating either the increase or the decrease in the number of posts or abolish the post. In such an event, a department which was abolished or abandoned wholly or partially for want of funds, the Court cannot, by a writ of mandamus, direct the employer to continue employing such employees as have been dislodged. In the instant case, the State of Rajasthan has framed a scheme and offered alternative employment in the other local bodies as a Welfare State on humanitarian grounds.

(15) In the case title Agrawal Shiksha Samiti (Shri) and Anr. v. State of Rajasthan (supra), the Division Bench of this Court has observed in paras Nos. 14 to 21 as under:

14.1. Whether term regulate the recruitment and condition of service u/s 16(1) of the Act of 1989 includes promotion also. In other words, whether the promotion is condition of service:

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Provided that the rights and benefits accruing to an employee of an existing institution under the grant in aid rules in force at the commencement of this Act shall not be varied to the disadvantage of such employee:

Provided further that every such employee shall be entitled to opt for such terms and conditions of service as were applicable to him to him immediately before the commencement of this Act:

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14.1. Whether term regulate the recruitment and condition of service u/s 16(1) of the Act of 1989 includes promotion also. In other words, whether the promotion is condition of service: The Supreme Court in State of Madhya Pradesh v. Sardul Singh 1970 SLR 101 in para Nos. 8 and 9, has held that "condition of service" is an expression of wide import which means all those conditions which regulate the holding of a post by a person right from the time of his appointment till his retirement and even beyond it, in matters like pension. The same view has been followed in Lily Kurian v. Sr. Lawina 1979 (1) in para 13 and it has been held that expression "condition of service" includes everything from the state of appointment to the stage of termination of service and even beyond, and relates to matters pertaining to disciplinary action and in State of Punjab v. Kailash Nath, 1989 (1) SLR 12 in para Nos. 6 and 7 dealing with a case of prosecution against a retired Government employee, the Supreme Court while interpreting the term "condition of service", further followed the judgment of Sardul Singh (supra) and it was held that in the normal course what falls within the purview of the term "condition of service" may be classified as salary or wages including subsistence allowance during suspension, the periodical increments, pay-scale, leave, Provident Fund, Gratuity, Confirmation, promotion seniority, tenure or termination of service, compulsory or premature retirement, superannuation, pension, changing the age of superannuation deputation and disciplinary proceedings.

Para No. 7 of the aforesaid judgment is as follows:

(7) In the normal course what falls within the purview of the term "condition of service" may be classified as salary or wages including subsistence allowance during suspension, the periodical increments, pay-scale, leave, Provident Fund, Gratuity, Confirmation, promotion, seniority tenure or termination of service, compulsory or premature retirement, superannuation, pension changing the age of superannuation deputation and disciplinary proceedings. Whether or not a Government servant should be prosecuted for an offence committed by him obviously cannot be treated to be something pertaining to conditions of service.

Making a provision that a Government servant, even if he is guilty of grave misconduct or negligence which constitutes an offence punishable either under the Penal Code or Prevention of Corruption Act or an analogous law should be granted immunity from such prosecution after the lapse of a particular period so as to provide incentive for efficient work would not only be against public policy but would also be counter productive. It is likely to be an incentive not for efficient work but for committing offence including embezzlement and misappropriation by some of them at the fag end of their tenure of service and making an effort that the offence is not detected within the period prescribed for launching prosecution or manipulating delay in the matter of launching prosecution. Further, instances are not wanting where a Government servant may escape prosecution at the initial stage for want of evidence but during the course of prosecution of some other person evidence may be led or material may be produced which establishes complicity and guilt of such Government employee. By that time period prescribed, if any, for launching prosecution may have expired and in that even on account of such period having expired the Government servant concerned would succeed in avoiding prosecution even though there may be sufficient evidence of an offence having been committed by him. Such a situation, in our opinion, cannot be created by framing a rule under Article 309 of the Constitution laying down an embargo on prosecution as condition of service.

15. The Supreme Court has further held in *Sitaram Jivabhai Gavali Vs. Ramjibhai Potiyabhai Mahala and Others*, , that new condition of service can be prescribed by executive order. The relevant para No. 13 of the aforesaid judgment is as follows:

13. ...It is well recognized that a new service condition may be brought into effect by an executive order and such condition would remain in force as long as it is not repealed either expressly or by necessary implication by another executive order or a rule made under the proviso of Article 309 of the Constitution of by a statute.

16. Thus, it can safely be concluded that not only the conditions of service which are initially prescribed will be covered by the terms and conditions of the service but the same can also be subsequently prescribed either by rules or by executive order.

17. Promotion is a condition of service as held by the Supreme Court in *State of Maharashtra v. Jagannath Achyut Karandikar* 1989 (2) S.L.R. 31. In para 7 of the aforesaid judgment the Supreme Court has also held that the Government preserved power to dispense with, or relax the requirements of any rule regulating "the condition of service of Government servants; or any class there of". The relevant portion of para No. 7 of the aforesaid judgment is reproduced hereunder for ready reference:

(7) The aforesaid rules expressly provided power to the Government to grant

more changes for passing the examination in any individual case or in class of cases. Under the 1955 Rules, the Government preserved power to dispense with, or relax the requirements of any rule regulating the conditions of service of Government servants; or any class thereof". In exercise of this power, the Government could dispense or relax the operation of any rule, if it cause undue hardships in any particular case. It is needless to state that this power includes the power to relax the conditions prescribed for promotion since promotion is a condition of service. There is no restriction as to the exercise of the power or discretion.

As regards condition of service detailed out in Section 16(1) of the Act of 1989, the expression "condition of service" as mentioned in Section 16(1) of the Act of 1989 is inclusive, therefore, the same has to be given the meaning of wide import. The list of service conditions illustrated in the said section is inclusive and not exhaustive. The Supreme Court while interpreting the word "includes" in definition "Industry" u/s 2(j) of the Industrial Disputes Act, 1947 in the case of The State of Bombay and Others Vs. The Hospital Mazdoor Sabha and Others, , interpreting the inclusive definition, has held that the inclusive definition denote extension and cannot be treated as restricted in any sense. Where the Courts are dealing with an inclusive definition, it would be inappropriate to put a restrictive interpretation upon terms of wide denotation. Para No. 10 of the aforesaid judgment is reproduced hereunder for ready reference:

(10) There is another point which cannot be ignored. Section 2(j) does not define "industry" in the usual manner by prescribing what it means the first clause of the definition gives the statutory meaning of "industry" and the second clause deliberately refers to several other items of industry and brings them in the definition in an inclusive way. It is obvious that the words used in an inclusive definition denote extension and cannot be treated as restricted in any sens. (Vide: Stround"s "Judicial Dictionary", Vol. 2, P.1415), Where we are dealing with an inclusive definition it would be inappropriate to put a restrictive interpretation upon terms of wider denotation.

18. The said judgment has been held to be a good law by the majority view of the seven Judges Constitution Bench of the Supreme Court in Bangalore Water Supply and Sewerage Board Vs. A. Rajappa and Others, , while again interpreting the term "industry" which was given a wide import. Similarly the Supreme Court in The State of Maharashtra Vs. Labour Law Practitioners" Association and Others, in para No. 10, has held that term "District Judge" indicates that a wide interpretation is to be given to the expression " District Judge". The extensive definition of a District Judge under Article 236 is inclusive Judge of the Labour Court and the Judge of the Industrial Court.

19. In view of the above not specifying the term "promotion" as a condition of service in Section 16(1) of the Act of 1989 is of no help to the petitioners. The term of regulate condition of service will include promotion also.

20.As concluded herein above, even new condition of service for promotion can be laid down by the State Government, we have no hesitation in holding that the State Government can still make promotion as a condition of service either by amending the rules or by executive order for employees of non Government educational institutions.

(16) In the case title Andhra University v. M. Sivaram and Ors. (supra), the Supreme Court has observed in para 2 as under:

2. the respondents were serving the Institute of Coastal and Offshore Research (INCOR) in different capacities. In the year 1989, the INCOR as department was wound up and all the posts therein were abolished. The respondents sought a writ in the nature of mandamus from the Andhra Pradesh High Court seeking a direction that INCOR being a part of the Andhra University, the respondents were entitled to be absorbed in the University on equivalent posts. A learned Single Judge of the High Court rejected the contention of the respondents that INCOR was a unit of the University. The learned Single Judge, however, directed the University to frame a scheme to absorb the respondents in the service of the University in the existing and future vacancies. The learned Single Judge dismissed the writ petition in the following terms:

...They have been working in an institution which had been in some association with the University. It will be fair for the University to consider and absorb many employees of the INCOR as are eligible and willing to come in the service of the University in suitable posts and the existing vacancies or the vacancies which may arise at the foreseeable future. I am not suggesting that direct recruitment by University should be totally banned for this purpose.

(17) In the instant case, Act of 1989 and the Rules of 1993 are silent on the issue of transfer/ absorption and in such a situation, the executive powers can be exercised as held by the Supreme Court in case of Sant Ram Sharma Vs. State of Rajasthan and Another, , which has been consistently followed till today. The relevant paragraph of para-7 of Sant Ram Sharma"s case (supra), is as under:

It is true that Government cannot amend or supersede statutory rules by administrative instructions but if the rules are silent on any particular point Government can fill up the gaps and supplement the rules and issue instructions not consistent with the rules already framed.

(18) For the aforesaid reasons, there is no impediment for the Government to frame a scheme of transfer/absorption of the employees who have been declared surplus in one institution and other institution is willing to take the employee on the same status.

(19) In view of the Division Bench judgment of Agrawal Shiksha Samiti (Shri) and Anr.(supra) the term of transfer/absorption is also inclusive of term "condition of service" as referred in Section 16 of the Act of 1989. The Government being a welfare Government and its duty not to generate

unemployment and discontent among teachers/ employees even of Non-Government Educational Institution and it can interfere in such kind of situation by framing the scheme.

(20) The Supreme Court has also approved the judgment of the learned Single Judge of Andhra Pradesh High Court for framing such kind of scheme in the similar circumstances for their absorption in the university on closure of INCOR wherein it has also been upheld by the Supreme Court although INCOR was not an unit of the University." as follows:

(7) In the normal course what falls within the purview of the term "condition of service" may be classified as salary or wages including subsistence allowance during suspension, the periodical increments, pay-scale, leave, Provident Fund, Gratuity, Confirmation, promotion, seniority tenure or termination of service, compulsory or premature retirement, superannuation, pension changing the age of superannuation deputation and disciplinary proceedings. Whether or not a Government servant should be prosecuted for an offence committed by him obviously cannot be treated to be something pertaining to conditions of service. Making a provision that a Government servant, even if he is guilty of grave misconduct or negligence which constitutes an offence punishable either under the Penal Code or Prevention of Corruption Act or an analogous law should be granted immunity from such prosecution after the lapse of a particular period so as to provide incentive for efficient work would not only be against public policy but would also be counter productive. It is likely to be an incentive not for efficient work but for committing offence including embezzlement and misappropriation by some of them at the fag end of their tenure of service and making an effort that the offence is not detected within the period prescribed for launching prosecution or manipulating delay in the matter of launching prosecution. Further, instances are not wanting where a Government servant may escape prosecution at the initial stage for want of evidence but during the course of prosecution of some other person evidence may be led or material may be produced which establishes complicity and guilt of such Government employee. By that time period prescribed, if any, for launching prosecution may have expired and in that even on account of such period having expired the Government servant concerned would succeed in avoiding prosecution even though there may be sufficient evidence of an offence having been committed by him. Such a situation, in our opinion, cannot be created by framing a rule under Article 309 of the Constitution laying down an embargo on prosecution as condition of service.

15. The Supreme Court has further held in *Sitaram Jivabhai Gavali Vs. Ramjibhai Potiyabhai Mahala and Others*, that new condition of service can be prescribed by executive order. The relevant para No. 13 of the aforesaid judgment is as follows:

13. ...It is well recognized that a new service condition may be brought into effect by an executive order and such condition would remain in force as long as

it is not repealed either expressly or by necessary implication by another executive order or a rule made under the proviso of Article 309 of the Constitution of by a statute.

16. Thus, it can safely be concluded that not only the conditions of service which are initially prescribed will be covered by the terms and conditions of the service but the same can also be subsequently prescribed either by rules or by executive order.

17. Promotion is a condition of service as held by the Supreme Court in *State of Maharashtra v. Jagannath Achyut Karandikar* 1989 (2) S.L.R. 31. In para 7 of the aforesaid judgment the Supreme Court has also held that the Government preserved power to dispense with, or relax the requirements of any rule regulating "the condition of service of Government servants; or any class there of". The relevant portion of para No. 7 of the aforesaid judgment is reproduced hereunder for ready reference:

(7) The aforesaid rules expressly provided power to the Government to grant more changes for passing the examination in any individual case or in class of cases. Under the 1955 Rules, the Government preserved power to dispense with, or relax the requirements of any rule regulating the conditions of service of Government servants; or any class thereof". In exercise of this power, the Government could dispense or relax the operation of any rule, if it cause undue hardships in any particular case. It is needless to state that this power includes the power to relax the conditions prescribed for promotion since promotion is a condition of service. There is no restriction as to the exercise of the power or discretion.

As regards condition of service detailed out in Section 16(1) of the Act of 1989, the expression "condition of service" as mentioned in Section 16(1) of the Act of 1989 is inclusive, therefore, the same has to be given the meaning of wide import. The list of service conditions illustrated in the said section is inclusive and not exhaustive. The Supreme Court while interpreting the word "includes" in definition "Industry" u/s 2(j) of the Industrial Disputes Act, 1947 in the case of *The State of Bombay and Others Vs. The Hospital Mazdoor Sabha and Others*, , interpreting the inclusive definition, has held that the inclusive definition denote extension and cannot be treated as restricted in any sense. Where the Courts are dealing with an inclusive definition, it would be inappropriate to put a restrictive interpretation upon terms of wide denotation. Para No. 10 of the aforesaid judgment is reproduced hereunder for ready reference:

There is another point which cannot be ignored. Section 2(j) does not define "industry" in the usual manner by prescribing what it means the first clause of the definition gives the statutory meaning of "industry" and the second clause deliberately refers to several other items of industry and brings them in the definition in an inclusive way. It is obvious that the words used in an inclusive definition denote extension and cannot be treated as restricted in any sens.

(Vide: Stround's "Judicial Dictionary", Vol. 2, P.1415), Where we are dealing with an inclusive definition it would be inappropriate to put a restrictive interpretation upon terms of wider denotation.

18. The said judgment has been held to be a good law by the majority view of the seven Judges Constitution Bench of the Supreme Court in Bangalore Water Supply and Sewerage Board Vs. A. Rajappa and Others, , while again interpreting the term "industry" which was given a wide import. Similarly the Supreme Court in The State of Maharashtra Vs. Labour Law Practitioners' Association and Others, , has held that term "District Judge" indicates that a wide interpretation is to be given to the expression " District Judge". The extensive definition of a District Judge under Article 236 is inclusive Judge of the Labour Court and the Judge of the Industrial Court.

19. In view of the above not specifying the term "promotion" as a condition of service in Section 16(1) of the Act of 1989 is of no help to the petitioners. The term of regulate condition of service will include promotion also.

20.As concluded herein above, even new condition of service for promotion can be laid down by the State Government, we have no hesitation in holding that the State Government can still make promotion as a condition of service either by amending the rules or by executive order for employees of non Government educational institutions.

(16) In the case title Andhra University v. M. Sivaram and Ors. (supra), the Supreme Court has observed in para 2 as under:

2. the respondents were serving the Institute of Coastal and Offshore Research (INCOR) in different capacities. In the year 1989, the INCOR as department was wound up and all the posts therein were abolished. The respondents sought a writ in the nature of mandamus from the Andhra Pradesh High Court seeking a direction that INCOR being a part of the Andhra University, the respondents were entitled to be absorbed in the University on equivalent posts. A learned Single Judge of the High Court rejected the contention of the respondents that INCOR was a unit of the University. The learned Single Judge, however, directed the University to frame a scheme to absorb the respondents in the service of the University in the existing and future vacancies. The learned Single Judge dismissed the writ petition in the following terms:

...They have been working in an institution which had been in some association with the University. It will be fair for the University to consider and absorb many employees of the INCOR as are eligible and willing to come in the service of the University in suitable posts and the existing vacancies or the vacancies which may arise at the foreseeable future. I am not suggesting that direct recruitment by University should be totally banned for this purpose.

(17) In the instant case, Act of 1989 and the Rules of 1993 are silent on the issue of transfer/absorption and in such a situation, the executive powers can be

exercised as held by the Supreme Court in case of Sant Ram Sharma v. State of Rajasthan and Ors. reported in AIR 1967 SC 1910 which has been consistently followed till today. The relevant paragraph of para-7 of Sant Ram Sharma's case (Supra), is as under:

It is true that Government cannot amend or supersede statutory rules by administrative instructions but if the rules are silent on any particular point Government can fill up the gaps and supplement the rules and issue instructions not consistent with the rules already framed.

(18) For the aforesaid reasons, there is no impediment for the Government to frame a scheme of transfer/ absorption of the employees who have been declared surplus in one institution and other institution is willing to take the employee on the same status.

(19) In view of the Division Bench judgment of Agrawal Shiksha Samiti (Shri) and Anr.(supra) the term of transfer/absorption is also inclusive of term "condition of service" as referred in Section 16 of the Act of 1989. The Government being a welfare Government and its duty not to generate unemployment and discontent among teachers/ employees even of Non-Government Educational Institution and it can interfere in such kind of situation by framing the scheme.

(20) The Supreme Court has also approved the judgment of the learned Single Judge of Andhra Pradesh High Court for framing such kind of scheme in the similar circumstances for their absorption in the university on closure of INCOR wherein it has also been upheld by the Supreme Court although INCOR was not an unit of the University.

15. In view of the above, the judgment of the Tribunal dt. 23.08.2008 is modified to the extent that the respondent State is directed to frame Government policy/ Scheme of absorption of the surplus employees of Non-Government Educational Aided Institution to another Non-Government Educational Aided Institution where the posts are lying vacant, by fixing appropriate percentage and to further pass appropriate orders in such cases before starting of the next academic session/ filling of the respective posts in the Non Government Educational Aided Institutions for the fresh selections of which Government shall send its representative within a period of one month and take appropriate action within another period of one month.

16. The writ petitions are disposed of in the manner, as indicated above.