
(2013) 07 PAT CK 0001

In the Patna High Court

Case No : CWJC No's. 7237 of 1999, 13136 of 2001 and 10437 of 2002

Parvati Kumari and Others

APPELLANT

Vs

The State Government and Others

RESPONDENT

Date of Decision : 25-07-2013

Acts Referred:

Constitution of India, 1950 — Article 14
Income Tax Act, 1922 — Section 24, 35

Citation : (2013) 4 PLJR 4

Hon'ble Judges : Navaniti Pd. Singh, J

Bench : Single Bench

Advocate : Yugal Kishore, Dr. Anjani Pd. Singh, Abhinav Srivastava and Ajeet Kr, for the Appellant; Pushkar Narain Shahi, Anjani Kumar Sharan, Raj Kamal for the State, Ashok Kumar Kesari, Anil Singh, Ms. Shilpi Kesari for the University, for the Respondent

Judgement

Navaniti Pd. Singh, J.—These three writ petitions have been filed by Smt. Parvati Kumari and others. She happens to be the Principal of Sanjay Gandhi Smarak Mahila College, Sheikhpura. In substance, by these three writ petitions reliefs that are sought by the petitioners are:--

(i) For setting aside the letter by which annual recurring Government grant to the college amounting to Rs. 10 lacs was withdrawn;

(ii) To grant status of deficit grant college to the petitioners' college and;

(iii) In the larger public interest to takeover the college as constituent college under the Tilka Manjhi Bhagalpur University, Bhagalpur.

It may be noted that initially, the first writ petition was filed in the year, 1999 followed later by the other two writ petitions. They were all admitted for final hearing.

2. Counter affidavits have been filed with replies thereto. At one stage, petitioners brought on record that there were several colleges which were

established, affiliated later than the petitioners; colleges that were not found fit to be taken over but all those colleges were granted the deficit grant status, which is more than recurring grant and, some of them were even made constituent. But, for no good reason or no reason at all, petitioners' college was never considered even though they had recommendations for takeover and/or financial support from the Chancellor of the University, from the Chief Minister and from the University as well. When such affidavits were filed, this Court directed the State to specifically respond to the issues in relation to the facts as pleaded. Number of adjournments were granted but State, on one pretext or the other, avoided filing direct affidavit on the issues. At one stage, it was even reported that in respect of those colleges suddenly the files disappeared from the Secretariat relieving them of the obligation to controvert the facts. This Court took a very strict view of the matter and then one by one the files reappeared but State decided not to file any further counter affidavit controverting the facts in relation to the petitioners' college or for that matter, facts relating to other colleges.

3. Basic plea, as sought to be established by the petitioners, was of arbitrariness and hostile discrimination as against the plea of the State that the State policy did not permit giving any financial assistance to any educational institution. It is in this perspective that the facts have first to be seen.

4. Sheikhpura was a sub-division of Munger district which happens to be one of the oldest districts in the State. It became a full-fledged district ultimately in the year, 1994. It is quite some distance away both from Munger or from Bhagalpur. This rural town has a descent population but lacked exclusive women's college. In absence of women's college, girls and ladies of Sheikhpura were seriously handicapped in getting their education at intermediate or college level as in such rural areas, grown up girls are not encouraged to go to colleges which are co-educational. It is with the object of providing higher education that is college education to girls and encouraging them to pursue their studies that this college Sanjay Gandhi Smarak Mahila College at Sheikhpura was established in June, 1980 exclusively for women. Initially, it started as an exclusively Inter College that is imparting education to girls/ladies at intermediate level. Being encouraged by the response as it was the only exclusively women's college, the college got affiliation for various subjects from the Bihar Intermediate Education Council on 16.2.1982 (Annexure-14) and had a large number of girl students studying upto Intermediate. The college, having its own extensive land and building as well as qualified teaching staff, then applied for affiliation with Tilka Manjhi Bhagalpur University for graduate level courses. The application of the college was forwarded with necessary inspection report to the State Government by the said University. After making enquiries and being satisfied, on 11.11.1982, the State Government granted permission to the University to grant affiliation to the petitioners' college for various subjects upto graduate level for the Session 1982-1983 and 1983-1984. In turn, on 20.12.1982, the University granted approval and conveyed State Government's approval to the college in this

regard. Two important aspects be noted here. Firstly, State recognized the need for an exclusive women's college in that area and second it mentioned that State would not bear any financial burden of the college. Apparently, the reason for this last statement is not far to look. On 9.12.1982, State Government notified its policy of non-grant of financial aid to colleges and educational institutions but this policy was to have prospective effect thereby colleges, which had already been granted financial aid, those decisions would continue to operate.

5. As noticed above, this college was a private college set up by local initiative. In a short span of time, it managed substantial land. It erected substantial buildings providing good infrastructure for intermediate and college level teaching alongwith dedicated bus service to pick up girl students from outside the town and to make it convenient to them to attend classes. I will notice a little later that it set up a girls' hostel as well. It acquired good faculty of qualified teachers.

6. Immediately thereafter, on 1.3.1983, the Governor of Bihar, who is also the Chancellor of Universities, visited this college. He was impressed with the facilities there and immediately recommended to the Chief Minister that in order to encourage education of girls in the rural areas, the college was an example and for better development, it should be made a constituent college of the Tilka Manjhi Bhagalpur University. This is Annexure-2 to the writ petition.

7. It may be mentioned here that the college fee and that too in rural areas for girl students cannot be very high. In fact they are regulated by the University and is very nominal. The college has no other source of income. It is virtually impossible for a college to be run on its own finance unless either it gets grants from public entrepreneurs or is supported by Government. Same being the fate of the college and realizing the fate, the Chancellor made the said recommendation because once the college was made constituent, it would be the University and, thus, State which would ultimately had to finance this college. It appears, on 2.7.1984 (Annexure-17), the Governing Body of the College took a resolution requesting the college to be taken over by the State by making it a constituent college or at least declare the college a deficit grant college so that college could maintain the infrastructure and the academic standards. The request had been forwarded to the University.

8. As noted above, once a college becomes a constituent college then the entire burden including management is taken over by the University and, hence, the State but if the college is granted the deficit grant status what happens is that the Governing Body continues, only the difference between the money raised by the college on its own and its legitimate expenses are to be paid or compensated by the State Government through the University. Here, it would also be relevant to note that once affiliation is granted to a private college then it is the University that constitutes Governing Body. The Governing Body no more remains totally private. The Governing Body, inter alia as per the University Statute, has only one donor member and rest of the members are either University officials or

Government officials. A fact of some significance should also be noticed here. Once a private college is granted affiliation by the University after approval of the State Government, it is University that constitutes the Governing Body of the said private college. The Governing Body consists of seven members. One of them is a donor member from amongst various donors. One is a University representative. The third is State Government's representative. Then is a public servant and a public representative. Normally, the public servant would be the Sub-Divisional Officer or the District Collector. The public representative would be the local MLA or MP. Then there is a teachers' representative being elected by the faculty. There is a place for co-opted educationist as well. The Principal is the ex-officio member and then this Governing Body, from amongst themselves, elects a Secretary of the Governing Body. Thus, even though a college may be said to be a private college after affiliation, there is quite extensive control over every aspect of the matter by the State and the University through the Governing Body itself.

9. Later, as would be evident from Annexure-5, it appears that on 27.10.1984, the Chief Minister of the State alongwith State Education Minister had come to the college. They were impressed with the facilities and the infrastructure available. They made a public announcement that the college would be granted deficit grant status so that it would encourage improving the facilities and continue with them. Accordingly, the Registrar of the University, vide his letter dated 23.11.1984 (Annexure-5) noticing this wrote to the Chief Minister drawing his attention to the assurance given by him and requesting that the college be declared deficit grant college.

10. It may be noted that in the meantime, at different places in different Universities, various events had taken place, details of which will be discussed appropriately. These included inspection reports for takeover of colleges, grant of deficit grant status etc. For some conspicuous reason, petitioner's college was kept out of this consideration. Neither the State nor the University is able to enlighten the Court in regards the same. It appears in 1998 (sic--1988?), the college became quite desperate for finance because it had expanded and by now it has received affiliation in respect of Science graduate course as well in addition to Arts courses which were granted way back in 1982. Accordingly, once again, the Chief Minister was apprised of his promise. Annexure-6 would reveal that he immediately wrote to the Education Minister to start immediate grant of at least Rs. 5 lacs from the budget session of 1987-1988. This had to be a recurring grant and, accordingly, the Minister sanctioned this. It appears this was grossly inadequate. The college authorities then again met the Chief Minister and the Education Minister trying to persuade them to grant the college deficit grant status which would be meaningful. Instead, as would be evident from Annexure-7, the recurring grant of Rs. 5 lacs was increased to Rs. 10 lacs with effect from financial year 1987-1988 itself. This was confirmed" to the University by the State Government vide their letter as contained in Annexure-7 being letter dated 12.2.1988. Subsequently, on 23.12.1988, seeing the permanency of

arrangements and the infrastructure, State Government approved the grant of permanent affiliation upto graduate level both for Arts and Science faculties in respect of the college.

11. Here, it may be noted that college was then inspected whether it was satisfying the University Grants Commission (UGC) norms. A report was submitted to the UGC and being satisfied after enquiries being made, the college was granted UGC satisfying norms status and consequently UGC granted funds to the college for construction of exclusive women's hostel which was much needed to encourage women's education.

12. On 27.12.1989 (Annexure-9), State took a decision to abolish the earlier decision of allowing unaided colleges to be established. Thereby, the policy decision of the year, 1982 not to grant aid to colleges stood revoked.

13. In 1990, State resolved that upto post graduate level, for women, education would be free thereby women's colleges admitting women were not allowed to charge fee from lady students. This had severe repercussions so far as petitioners' college is concerned. This college was only receiving a recurring grant of Rs. 10 lacs from the Government. Its expenses on the faculty and other heads were partly met from the fee received from the girl students. Later, the State agreed to make good the fee exemption. It may also be noted here that later on, after about eight years on or about 17.6.1998, this policy of free education for women was withdrawn as would be evident from Annexure-12 to the writ petition.

14. The college all along hoped that it would be considered favourably for either grant of deficit grant status or would be made constituent but for some conspicuous reason, it was not so done rather on 19.7.1998 (Annexure-13), the recurring grant which the petitioners' college was receiving of Rs. 10 lacs per year was suddenly, without notice, cancelled on 4.3.1997 as is evident from Annexures-11 and 11/1 to the writ petition. This forced the petitioners' college to move this Court by filing CWJC No. 4733 of 1997. This Court, by judgment and order dated 9.7.1998 (Annexure-13), set aside the decision of the State and directed the State to grant a hearing to the petitioner before taking such a decision. It is pursuant to orders of this Court that hearing was done and ultimately the State Government reiterated its earlier decision withdrawing the recurring grant. The justification given was that the recurring grant was made to the college contrary to the Government policy of non-aided college education as was taken and notified on 9.12.1982. It is this order which is also under challenge.

15. Thus, the first issue is whether the State action is justified or not? It is from this the other issues that also arise with regard to deficit grant status or take over of the college as a constituent college because of various intervening facts.

16. As noticed in the beginning, there were some colleges which were established after petitioners' college. Some colleges, which had got affiliation

after petitioner's college, some colleges which were found totally lacking in infrastructure notwithstanding non-aid policy of the Government, whereas those colleges were granted deficit grant status or they were made constituent while petitioners' college was deprived of everything. State, as noticed above, has not chosen either to contradict the facts as stated by the petitioner or on its own bringing on record facts different from those stated by the petitioner. They were granted ample opportunities to do so. In the end, Shri Pushkar Narain Shahi, AAG-XIV, on proper instructions from Principal Secretary (Education), clearly took a stand that State would not file any affidavit on those issues apart from the stand that the unaided policy being there since 1982, petitioners' college was wrongly granted recurring grant. It would stick to the issue that the Governing Body not having approached the Court, relief should not be granted. It further took an objection that relief for declaring the college a deficit grant college or a Statute was not raised at the appropriate time and, as such, Court should not grant them the relief. State's stand further was that recurring grant is not a statutory grant or pursuant to any policy. It was merely an executive decision which creates no right in the petitioners and, as such, no mandamus could be issued in that regard.

17. Why this Court has noticed this is because the petitioners had gone at great length to show that all along that is right from 1984 onwards while petitioners' college was being deprived of any financial aid, there were other education institutions springing up and being absorbed or supported by the State. In all fairness, State should have come up with proper facts and figures to justify State action but in spite of repeated opportunities, as noticed above, they have chosen not to do so. Therefore, the burden lies upon this Court first to notice those facts because upon those facts is dependent the plea of the petitioners with regard to gross arbitrariness and hostile discrimination.

18. First, this Court would like to notice some facts in relation to colleges which were made constituent colleges of various Universities in the State in this period. These facts are pleaded and a comparative chart is contained in Annexure-26. It appears that in 1985, State took a decision to make constituent various affiliated colleges. It must be remembered that at this time, the policy of non-aided education, as enunciated in the year 1982, was in vogue. In spite of this, Government set up a committee which is commonly known as "Viable Committee". This Committee was to examine various colleges as to its infrastructure, availability of teachers, students etc. to evaluate whether it was desirable to take over those colleges and make them constituent. The first thing conspicuous about this is though the Governor-cum-Chancellor of Universities had recommended to the Chief Minister for making the college constituent as far back as in 1983, the Governing Body in 1984 having resolved and requested the University to make it a constituent college, the University having in turn requested to the State Government to make it a constituent college, when this Viable Committee was set up again, for some inexplicable reason, the name of this college did not figure anywhere. It was totally left out. State is not in a

position to give any explanation as to why this happened.

19. Now coming to some of the facts pleaded and remained un-rebutted are as follows:--(i) Kishori Sinha Manila College, Aurangabad was established in 1980. It was granted affiliation on 4.1.1983 that is after petitioners' college and after the notified unaided education policy. The post of Principal itself was sanctioned on 21.8.1985 but it was taken over and made a constituent college with effect from 1.12.1986, thus, giving it 100% financial support, (ii) We then have Manila College, Dalmiya Nagar which was granted affiliation in 1982. When Viable Committee inspected it, the report submitted was that the college has no land of its own, no building of its own yet the college was made constituent with effect from 1.12.1986, (iii) Ganga Devi Mahila College, Patna was established in 1971. It got affiliation in 1980. It was running on rented premises and the Viable Committee clearly reported that it did not fulfill the criteria to be made a constituent college yet, with effect from 1.12.1986, it was made a constituent college, (iv) Similarly, Sher Shah College, Sasaram, which has adverse remarks by the Viable Committee not recommending it for takeover, was taken over and made constituent again with effect from 1.12.1986, (v) Abdul Bari Memorial College, Jamshedpur again, in spite of adverse remarks by the Viable Committee as it did not have its own premises, was made constituent with effect from 1.12.1986. The list is unending.

20. If one refers in detail to the Viable Committee report, which is Annexure-16, it would be found that the Viable Committee visited many of the colleges which were neither recommended by the University nor by the State Government, the colleges themselves appeared to have approached the Committee. In some cases, the report was not favourable to the college for take over as a constituent college still those colleges were taken over. The list is Annexure-26 to the writ petition. The facts are not dispute by the State nor the reason for this action is stated yet large number of colleges, which had adverse remarks by the Viable Committee, were taken over as constituent college but for some inexplicable reason, petitioners' college was neither asked to be inspected nor inspected and consequently not taken over as a constituent college. The chart Annexure 26 would further show some very surprising features. One Madan Ahilya College, Naugachhia was established in 1986. It was granted affiliation by the Tilka Manjhi Bhagalpur University, on approval by the State Government, in 1986. It was made constituent with effect from 31.7.1987 when the first post itself was sanctioned by the State on 17.9.1987. There are many such illustrations but not a single word by the State as to what happened to petitioners' college and why People, like the Governor who is the Chancellor, praises the institution after physical inspection. Recommends for takeover. The Chief Minister, the Education Minister, the University everyone is in praise and makes recommendation for takeover but when the stage implementing the same comes, suddenly there is a vacuum and the vacuum is not removed by anything filed or supplied by the State to this Court. While noticing these facts as to how and why large numbers of colleges were made constituent, one has to keep in mind that at that time, the

Government policy professedly was not to permit setting up of aided colleges or in other words not to grant any financial aid to any new college. Therefore, on one hand, we have the Government Policy of not providing any financial aid to a college, the ground on which aid was refused to petitioners' college which was subsequently granted and the recurring grant was then cancelled on grounds of the said policy. Yet, in between, large number of colleges not only under Tilka Manjhi Bhagalpur University but also under other Universities of Bihar were made constituent thereby the Government taking over the entire financial burden of the colleges on itself. Regrettably, in spite of repeated efforts by this Court, in spite of directions to the Principal Secretary, Department of Education, no counter affidavit was filed explaining as to why and how this departure.

21. Thus, in my view, this conduct of the Government itself shows that the policy of unaided college was a mere paper formality. It was obeyed more in breach and there were more exceptions to it than the rule itself. This fortifies another principle. In administrative actions, a body like Government cannot be bogged down by any policy decision. It is open to it to depart. Why it departed in cases of large number of colleges and why it refused to depart in case of petitioners' college is not being disclosed in spite of repeated adjournments granted. This is so far as colleges that were made constituent colleges.

22. Before proceeding further, it would be relevant to notice one short aspect. As noticed earlier, it was on 9.12.1982 that the policy of non-aided college education was notified by the State Government. From 1988, petitioners' college started receiving recurring annual grants of Rs. 10 lacs. On 27.12.1989 that is virtually seven years thereafter, State Government took a decision to abolish the non-aided education policy. This is Annexure-9 to the writ petition but in 1997, the recurring grant being given by the Government to the petitioners' college was withdrawn on the plea that it was started in 1988 when the non-aided education policy was in vogue forgetting that in 1989, the said non-aided policy had been scrapped. The reason for this strange and dubious action of the Government is not available in Government affidavit but becomes available from other facts on record. It appears one college that is Soghra College, Biharsharif, District-Nalanda which was established in the year, 1980 and got affiliation to Magadh University in 1984-1985 when it was also declared a minority institution, the first teaching post that was sanctioned was in July, 1985 applied to the State Government for aid/grant. This was refused on ground of State's Non-aid Education Policy, 1982. They then brought to the notice of the Government that petitioners' college had been granted a recurring grant. To remove the discrimination, instead of granting them aid, it was decided by the Government to scrap aid to petitioners' college and it is for that reason that the recurring grant was stopped.

23. Here, it may also be pertinent to note that having stopped the recurring grant to the petitioners' college, they (State) refused permission to Soghra College in respect of grants. This forced Soghra College to come to this Court.

They filed CWJC No. 146 of 1996 which was heard and ultimately disposed of on 17th December, 2007. The order is Annexure-18 to the supplementary affidavit by the petitioners. While disposing of the writ petition, this Court noted that while denying deficit grant status to Soghra College, State had granted deficit grant status to one Allama Eqbal College, Biharsharif. Accordingly, State was directed to examine the matter and take a decision within three months. The result was that in the year 2010, Soghra College was now granted deficit grant status while all along, State has maintained that it is unable to, being bound by its policy, to extend the said facility to the petitioners. In the counter affidavit all that is said about this sordid affair is that as per Court directive, Soghra College has been granted deficit grant status. Unfortunately, the order of this Court is short and brief and does not contain any such directive. It leaves it to the discretion of the State to take a final decision in the matter.

24. Now, I may note another important feature. State has maintained in its counter affidavit that it has a policy now not to make any college constituent. That statement is noted only to be rejected. State's own conduct, as noted earlier, would show that notwithstanding the non-aided education policy of 1982, large number of colleges all over Bihar, we're made constituent what to talk of deficit grant. Then we still have several colleges which even recently have been granted the status of deficit grant contrary to State's own stand. Court wonders why whenever it comes to petitioners' college which is the only women's college in that urban area, suddenly State puts up a resistance and refuses to grant it financial aid or grant it deficit grant status or make it constituent college but when it comes to other institutions, State forgets this policy and takes them over with open hands. In spite of repeated opportunities, State has not come forward with any justification for this gross hostile discriminatory act.

25. Coming to the question of deficit grant. Soghra College is not the only exception. It starts with Allama Eqbal College. This college that is Allama Eqbal College is also from Biharsharif, District-Nalanda. This Allama Eqbal College was granted affiliation for university education in February, 1983 after the 1982 Policy. It was declared a minority institution in 1988. It is not in dispute that when it was granted affiliation or for that matter when newer courses were sanctioned by the State upto 1991-1992, State categorically stated that affiliation was without any commitment to meet any financial burden but then suddenly State agreed to aid the said college and when that was not forthcoming, they, the College approached this Court in CWJC No. 12329 of 2001 and one analogous case which were heard and disposed of by judgment and order dated 5.3.2002 and pursuant to the orders of this Court, State granted the status of deficit grant college to this college in the year, 2005.

26. Then we have yet another college that is Al Hafiz College, Ara, another minority institution. They moved this Court on parity of reasoning of Soghra College and Allama Eqbal College for grant of deficit grant status and this Court vide judgment and order dated 29.11.2012 in CWJC No. 12711 of 2011 granted

the relief.

27. These are some of the incidents where while resisting the plea of grant of aid or grant of deficit grant status or takeover of the institution in case of petitioners, State has been doing just the opposite all along in respect of other colleges.

28. Noticing the facts above, Court specifically questioned whether there was any State policy which provided for grant of deficit grant status to minority institutions exclusively. The answer was no and rightly so. That would have been unconstitutional.

29. To this Court, the situation seems quite diabolical. On one hand, the present Government speaks of the cause of empowerment of women through education. That is publicity, but when it comes to practicality, we have the case of petitioners' college receiving step motherly treatment. It is an exclusive women's college in a rural area. It was recommended for takeover by the Chancellor of the Universities who is the Governor of the State as well. It was recommended for taking over by the Chief Minister, by Education Minister of the State. It was granted a small annual recurring grant which was then stopped. It was inspected and approved by University Grants Commission as meeting UGC norms for a college which in itself was a unique distinction. UGC funded exclusive women's hostel in this college yet when this institution goes to the State for grant to survive, the State, which processes the women's empowerment policy through education, flatly turns it down while extending this financial benefits to other colleges which were co-educational but for some undisclosed reason, as noted above, this college is left out of consideration. Again repeated opportunities were given to the State. Specific directions were made to the Principal Secretary, Department of Education to file affidavits justifying the action but nothing was done and no affidavit was filed taking a clear stand that State did not intend to controvert the facts, as brought on record by the petitioners. It is in these perspectives this Court has to judge whether the plea of the petitioners can be entertained or not.

30. The first thing one must keep in mind is that right to receive aid or right to be made a constituent or the right to be granted deficit grant status is neither a statutory right nor prima facie a right which is defined and controlled by statutory parameters. It is the discretion of the State. In order that the exercise of discretion is not arbitrary, it has to be exercised in a reasonable manner. State cannot say that I have the discretion in the matter I may or may not do it. I cannot be compelled to do it. My answer to this would be the decision of the Apex Court in the case of *L. Hirday Narain Vs. Income Tax Officer, Bareilly*, . Here, Section 35 of the Income Tax Act, 1922 as it then stood, gave power to the Income Tax Officer to rectify a mistake. The statute provided that Income Tax Officer may rectify a mistake apparent on the face of the record. An application was made by the assessee to the Income Tax Officer pointing out a mistake in the order of assessment and sought rectification. The Income Tax Officer rejected the same saying that it was not obligatory upon him to rectify. The matter came

in writ petition to the High Court which writ petition was dismissed on ground of alternative remedy but while doing so, the High Court also held that the power conferred on the Income Tax Officer was discretionary. The matter was then taken in appeal to the Apex Court and in no uncertain terms, the Apex Court said that the High Court was clearly in error. The Apex Court held thus:--

12.

... .. If a statute invests a public officer with authority to do an act in a specified set of circumstances, it is imperative upon him to exercise his authority in a manner appropriate to the case when a party interested and having a right to apply moves in that behalf and circumstances for exercise of authority are shown to exist. Even if the words used in the statute are prima facie enabling, the Courts will readily infer a duty to exercise power which is invested in aid of enforcement of a right--public or private--of a citizen.

13. In *Julius v. Lord Bishop of Oxford*, (1880) 5 AC 214 it was observed by Cairns LC at pp. 222-223 that "the words "it shall be lawful" conferred a faculty or power, and they did not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed to exercise that power when called upon to do so". Lord Blackburn observed in the same case at pp. 244-245 that the enabling words give a power which prima facie might be exercised or not, but if the object for which the power is conferred is for the purpose of effectuating a right there may be a duty cast upon the donee of the power to exercise it for the benefit of whose who have that right when required on their behalf. Lord Penzance and Lord Selborne made similar observations at pp. 229 and 235.

14.

15. The High Court was, in our judgment, in error in assuming that exercise of the power was discretionary and the income tax Officer could, even if the conditions for its exercise were shown to exist, decline to exercise the power.

... ..

31. Thus seen, State has been unable to bring on record any reason or rational to deny petitioners the reliefs it seeks for their college. Why large number of colleges, during subsistence of Non-aided Education Policy, were made constituent thereby giving 100% financial assistance and petitioners' college was left out is not explained. What is the legal difference between petitioners' college and other colleges which have been recently granted deficit grant status has never been spelt out. I may, at this stage, also clear one doubt. The power to grant affiliation, the power to grant aid, the power to declare a deficit grant or

the power to takeover a college and make it a constituent college is not absolutely unguided discretionary power conferred on the State. It cannot say that I will takeover a college, I will grant aid to a college who I please or who pleases me while I could justifiably refuse to other who deserves it. Gone are the days of lassi fare. Government, while granting aid or granting deficit grant status or making an institution constituent, is dealing with public finance. It is public money and has to be used in public interest. It is not dependent upon the whims and caprice of the Government. That would be contra Article 14 of the Constitution.

32. At this juncture, I can refer to two decisions of the Apex Court in relation to exercise of controlled discretion and quote relevant passages from them. The first would be the case of Suman Gupta and Others Vs. State of Jammu & Kashmir and Others, and what their Lordships said in paragraph 6 of the reports:--

6. After considering the matter carefully, we confess, we are unable to subscribe to the view that the selection of candidates for that purpose must remain in the unlimited discretion and the uncontrolled choice of the State Government. We think it beyond dispute that the exercise of all administrative power vested in public authority must be structured within a system of controls informed by both relevance and reason--relevance in relation to the object which it seeks to serve, and reason in regard to the manner in which it attempts to do so. Wherever the exercise of such power affects individual rights, there can be no greater assurance protecting its valid exercise than its governance by these twin tests. A stream of case law radiating from the now well known decision of this Court in Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, has laid down in clear terms that Art. 14 of the Constitution is violated by powers and procedures which in themselves result in unfairness and arbitrariness. It must be remembered that our entire constitutional system is founded on the Rule of Law, and in any system so designed it is impossible to conceive of legitimate power which is arbitrary in character and travels beyond the bounds of reason. To contend that the choice of a candidate selected on the basis of his ability to project the culture and ethos of his home State must necessarily be left to the unfettered discretion of executive authority is to deny a fundamental principle of our constitutional life. We do not doubt that in the realm of administrative power the element of discretion may properly find place, where the statute or the nature of the power intends so. But there is a well recognized distinction between an administrative power to be exercised within defined limits in the reasonable discretion of designated authority and the vesting of an absolute and uncontrolled power in such authority. One is power controlled by law countenanced by the Constitution, the other falls outside the Constitution altogether. Proceeding from there it is evident that if the State Government desires to advance the objective of national integration it must adopt procedures which are reasonable and are related to the objective. In this Age of Reason, all law must measure up to that standard, and necessarily so also must all executive

acts. Viewed in this context, the claim of the State Government in these cases that the nature of the objective and the means adopted to serve it entitle it legitimately to vest in itself an absolute power in choosing candidates for nomination cannot be allowed to prevail. It is incumbent on the State Government to adopt a criterion or restrict its power by reference to norms which, while designed to achieve its object, nevertheless confine the flow of that power within constitutional limits. We are not convinced that an adequate system of standards cannot be devised for that purpose.

33. Then I would refer to the case of S.G. Jaisinghani Vs. Union of India (UOI) and Others, , and what is said in paragraph (14) of the reports:--

(14) In this context it is important to emphasize that the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, discretion, when conferred upon executive authorities, must be confined within clearly defined limits. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the rule of law. (See Dicey--"Law of the Constitution"--Tenth Edn., Introduction ex). "Law has reached its finest moments," stated Douglas, J. in United States vs. Wunderlich, (1951) 342 US 98V , "when it has freed man from the unlimited discretion of some ruler. ... Where discretion is absolute, man has always suffered". It is in this sense that the rule of law may be said to be the sworn enemy of caprice. Discretion, as Lord Mansfield stated it in classic terms in the case of John Wilkes, (1770) 4 Burr 2528 at p. 2539 "means sound discretion guided by law. It must be governed by rule, not by humour: it must not be arbitrary, vague, and fanciful."

34. Mr. Pushkar Narain Shahi, learned Senior Counsel and AAG-XIV submits that State was making various colleges constituent in the latter half of 1980's. It granted deficit grant status to colleges thereafter. If the petitioners' institution was really interested, it should have come to the Court at the appropriate time. Now, the Government has decided not to make any college constituent nor there being any policy of deficit grant status, the petitioners cannot get any relief. The first answer to this is that factually it is wrong. When colleges were being taken over and made constituent, there was recommendation in favour of the petitioners' college from the Chancellor of the University, from the Vice-Chancellor, from the Chief Minister, from the Education Minister but the secretariat refused to take note of any such recommendation. Then, as noted earlier, petitioners started receiving recurring grant which, by the standard of the day, was quite substantial. It was abruptly stopped and that is what brought the petitioners before this Court immediately. While the matter was pending before this Court, several institutions were granted deficit grant status, some of them as

late as in 2010 but petitioners" case was resisted saying that Government is pursuing in non-aid education policy. Learned counsel for the State submits that only minority institutions have been granted deficit grant status. As noted above, State conceded that there was no such policy as in fact there could not be such a policy because if such a policy, if at all be there, would be ultra vires to the Constitution. Still, on some pretext or the other, some institutions have been granted the status. The case of petitioners is no different. Looked at it from other point of view. In this connection, I may refer to the case of Mangalore Chemicals and Fertilisers Ltd. Vs. Deputy Commissioner of Commercial Taxes and others, . In that case, there was a scheme of State Government granting certain incentive. The appellant made an application which was kept pending. The period for exemption expired. The Government then rejected the application saying that as the period expired, nothing can be done. This brought the petitioner to the Apex Court where again the same justification was given. This is what the Apex Court had to say:--

11.

... .. The words are that he "will grant". There is no dispute that appellant had satisfied these conditions. Yet the permission was withheld--not for any valid and substantial reason but owing to certain extraneous things concerning some inter-departmental issues. Appellant had nothing to do with those issues. Appellant is now told "we are sorry. We should have given you the permission. But now that the period is over, nothing can be done". The answer to this is in the words of Lord Denning:--"Now I know that a public authority cannot be estopped from doing its public duty, but I do think it can be estopped from relying on a technicality and this is a technicality" (See Wells vs. Minister of Housing and Local Government, (1967) 1 WLR 1000 at p. 1007).

Francis Bennion in his "Statutory Interpretation", 1984 edition, says at page 683.

Unnecessary technicality: Modern courts seek to cut down technicalities attendant upon a statutory procedure where these cannot be shown to be necessary to the fulfillment of the purposes of the legislation.

... ..

35. I may next, in this connection, refer to the judgment of Division Bench of the Bombay High Court presided over by Chief Justice Chagla in the case of All India Groundnut Syndicate Ltd. Vs. Commissioner of Income Tax, Bombay City, --

But the most surprising contention is put forward by the Department that because their own officer failed to discharge his statutory duty, the assessee is deprived of his right which the law has given to him under subsection (2) of S. 24. In other words, the Department wants to benefit from and wants to take advantage of its own default. It is an elementary principle of law that no person--we take it that the income tax Department is included in that definition--can put forward his own default in defence to a right asserted by the other party. A

person cannot say that the party claiming the right is deprived of that right because "I have committed a default and the right is lost because of that default".

36. Thus, there is no escape for the State.

37. It is then submitted by learned AAG-XIV that no relief should be granted as the Governing Body of the College is not before the Court. This, argument is noticed only to be rejected. Petitioner No. 1 is the Principal of the College. She is ex-officio member of the Governing Body itself as appointed by the University. The writ petition has not been opposed by any affidavit stating that it is not maintainable as she is not authorized. Neither her status nor her position has been challenged.

38. It is submitted next that recurring grant or declaring a college deficit grant or making a college constituent is not pursuant to any policy. It is further submitted by the State that the recurring grant, as was granted to the petitioners and continued for over a decade, was only pursuant to decision of the Chief Minister. As such, there being no policy and the direction being only of the Chief Minister, the decision of the Government to cancel recurring grant cannot be questioned. Firstly, I have already noted above that it is not the wild prerogative of the Executive to do what they like. There is nothing known as unguided, untrammelled discretion. We are not living in a feudalistic State. We are a sovereign democratic republic. If State decides to aid a deserving institution then it cannot deny aid to other similarly situated institution. When it decides to takeover large number of colleges as constituent colleges, it cannot shut out certain colleges for no disclosed valid reason. None is forthcoming from the State in the present case. When it decides to extend deficit grant status to certain colleges as recently in 2010, it covertly refers to "as per order of the Court" when in fact there is no such positive order of the Court. State professes empowerment of women but when it comes to practice, it appears to be just the opposite. Thus, there being no material difference between petitioners' college and those colleges which were granted deficit grant status, petitioners must receive the same treatment.

39. Before closing, I may notice one aspect. The records of this case reveals that the State took objection that if this Court intended to direct grant of deficit grant status or constituent status to the college concerned, there may be several other colleges in Bihar which would come forward and State would not be in a position to deny them. Court, dealing with the matter at that stage, directed publication of advertisements in this regard calling upon any interested similarly situated women's college to come forward. Advertisements were published in two newspapers, one Hindi and one English having wide circulation in the State but none have come here or approached the State in this regard.

40. I would do no better than to quote from the judgment of the Apex Court in the case of Ex-Capt. Harish Uppal Vs. Union of India (UOI) and Another, and what their Lordships said in paragraph 30 thereof:--

30. Nobody or authority, statutory or not, vested with powers can abstain from exercising the powers when an occasion warranting such exercise arises. Every power vested in a public authority is coupled with a duty to exercise it, when a situation calls for such exercise. The authority cannot refuse to act at its will or pleasure. It must be remembered that if such omission continues, particularly when there is an apparent threat to the administration of justice and fundamental rights of citizens i.e. the litigating public, courts will always have authority to compel or enforce the exercise of the power by the statutory authority. The courts would then be compelled to issue directions as are necessary to compel the authority to do what it should have done on its own.

41. Thus, on consideration of all the facts noted above, I have no option but to hold that cancelling the recurring grant, depriving the petitioners' institution of the status of full deficit grant/constituent status cannot be justified. The State's action, as noted above, has never been consistent with its professed policy. Policy, as shown above, has been obeyed more in breach. No valid distinction for hostile discrimination brought on record by the State.

42. Thus, on the facts above, it would not be out of place to direct that if so many other colleges, who are similarly or worse situated than the petitioners, have been granted the benefit of deficit grant/constituent then petitioners' college deserves the same treatment from the State otherwise actions of the State would be grossly arbitrary and would be highly discriminatory without any lawful reason or rational. The writ petitions are, accordingly, allowed. The impugned order of the Secretary, Department of Education justifying the stoppage of recurring grant is set aside. The recurring grant has to be restored forthwith and continued till a decision is taken by the State with regard to deficit grant status or constituent status to the college which decision must be taken within a period of six months from today.