

(2019) 08 GAU CK 0081

In the Gauhati High Court

Case No : Writ Petition (C) No. 348, 1721 Of 2016

Ratan Kumar Ghosh And 3 Ors

APPELLANT

Vs

State Of Assam And 3 Ors

RESPONDENT

Date of Decision : 28-08-2019

Acts Referred:

All India Council For Technical Education Act, 1987 — Section 3, 10(i), 10(v), 23, 23(1), 26

Assam Technical Education Service (Amendment) Rules 2008 — Rule 8, 10(8), 12(3) (ii), 12(4), 14(2)

Constitution Of India, 1950 — Article 245, 246, 246(1), 254, 309, 372

Citation : (2019) 08 GAU CK 0081

Hon'ble Judges : N. Kotiswar Singh, J

Bench : Single Bench

Advocate : D. Das, P. K. Deka, I. H. Laskar, K. Gogoi, S. K. Talukder, P. Kakati, S. Chutia, K. Mohammad, D. Mazumder, J. H. Laskar, K. N. Choudhury, J. Patowary, M. Barman, S. Saikia

Final Decision : Disposed Off

Judgement

1. Heard Mr. D. Das, learned senior counsel assisted by Mr. P. K. Deka, learned counsel for the petitioners in both the petitions. Also heard Mr. K. Gogoi, learned Standing Counsel, Higher Education (Technical Department), Assam for respondent Nos. 1 to 4 and Mr. K. N. Choudhury, learned senior counsel assisted by Mr. J. Patowary for the private respondent Nos. 5, 7, 9 and 10 in WP(C) No. 1721/2016.

2. The core issue involved in these petitions relates to requirement of possession of Ph.D. for appointment to the post of Principal in the Government Polytechnic Colleges under the Directorate of Technical Education Department, Assam and if so required, as to whence. Accordingly, these two petitions, WP(C) 348/2016 and WP(C) 1721/2016 are heard together and disposed of by this common judgement.

3. All the petitioners are presently serving as Heads of Department (HODs) in Bongaigaon Polytechnic, Nagaon Polytechnic, Electrical Engineering Department, Assam Engineering Institute, Chandmari, Electrical Engineering Department, Nagaon Polytechnic respectively.

All the petitioners claim to have been discharging their duties as Heads of Departments (HODs) for more than ten years.

The petitioner Nos. 1 and 2 were also appointed as In-Charge Principals of Bongaigaon Polytechnic and the Nagaon Polytechnic respectively.

4. According to the petitioners, even though they are not Ph.D. holders, they are all eligible for promotion to the posts of Principal of the Government Polytechnics but they have been now denied the opportunity of being considered for promotion/appointment to the posts of Principal by the State authorities only on the ground that, as per the essential qualifications prescribed by All India Council for Technical Education (AICTE) for appointment to the post of Principal, one must possess Ph.D. in Engineering/equivalent field, which the petitioners do not possess.

5. In the State of Assam, the service conditions of the employees working in the Technical Institutes are governed by the Assam Technical Education Service Rules, 1981, hereinafter referred to as the "Assam Rules".

It is the case of the petitioners that appointment to the post of Principal is governed by the aforesaid Assam Rules read with the rules or regulations as may be framed by the All India Council for Technical Education and to the extent the same are adopted by the State of Assam as provided under Rule 12(4) of the Assam Technical Education Service Rules as amended in 2008 vide Assam Technical Education Service (Amendment) Rules, 2008.

Rule 12(4) of the amended Assam Rules provides that,

"Subject to suitability, an officer shall be eligible for promotion if he possesses the qualification and experience as prescribed by the AICTE from time to time as adopted by the State of Assam".

6. The focussed submission of the petitioners is that as provided under Rule 12(4) of Assam Rules as amended in 2008, the rules or regulations prescribing qualifications and experience by the AICTE will become operative only when these are adopted by the State of Assam.

7. According to the petitioners, for appointment to the post of Principal by way of promotion, possession of Ph.D. by a prospective candidate was not a requirement under the relevant rules as applicable in the State of Assam. The same became part of the recruitment rules for the post of Principal in Assam only after the relevant provisions of the AICTE were adopted by the State Government only in the year 2016 vide Office Memorandum issued by the State Government dated 18.01.2016.

The aforesaid Office Memorandum dated 18.01.2016 adopted the qualifications and experience as prescribed by the AICTE for direct recruitment and promotion of officers in Polytechnics in Assam. Thus, possession of Ph.D. became a necessary qualification for appointment to the post of Principal in Engineering/ Technical Institutions only after the said Office Memorandum was issued on 18.01.2016 adopting the norms of the AICTE by the State Government.

8. The petitioners, therefore, contend that accordingly, prior to issuance of the aforesaid Office Memorandum dated 18.01.2016 there was no requirement for possession of Ph.D.in Engineering/Technology for promotion to the post of Principal in Government Polytechnic /Institution.

9. All of the petitioners are not Ph.D. holders and as such, they are not eligible for promotion to the post of Principal after issuance of the aforesaid Office Memorandum. According to the petitioners, however, as the existing vacancies to the posts of Principal had occurred prior to issuance of the said Office Memorandum on 18.01.2016, and since at the relevant time, possession of Ph.D. was not an essential qualification for appointment to the post of Principal, the petitioners were eligible for promotion at the relevant time and as such they can be considered for promotion to the posts of Principal of Government Polytechnics in respect of vacancies occurring prior to 18.01.2016.

10. In order to appreciate the case of the petitioners it may be necessary to refer to certain facts in brief.

11. In the year 1987, the Parliament enacted an Act, namely, All India Council for Technical Education Act, 1987 (hereinafter referred to as "AICTE Act") to provide for establishment of an All India Council for Technical Education with a view to proper planning and coordinated development of technical education throughout the country, promotion of qualitative improvements of such education in relation to planned quantitative growth and regulation and proper maintenance of norms and standards in the technical education system and for matters connected therewith. The said Act was enacted on 23.12.1987 which came into effect on being notified in the Official Gazette of India on 28.03.1988.

Prior to enactment of this AICTE Act, the State of Assam had made the rules called the "Assam Technical Education Service Rules, 1981" in exercise of the powers conferred under Proviso to Article 309 of the Constitution of India which govern the service conditions of the employees including Principal of the Government Polytechnics in the State of Assam.

12. Under the aforesaid AICTE Act of 1987, a "Council" was established under Section 3 thereof which has been empowered to make regulations not inconsistent with the provisions of the Act, to carry out the purpose of the Act as provided under Section 23 of the AICTE Act.

Thus, any regulation made by the Council will partake the nature of delegated legislation, which would have equally binding character as that of a law made by

the Parliament.

13. After coming into force of the aforesaid AICTE Act in 1987, the Council made certain "recommendations" in the year 1999 about fixation of pay scales of teachers and other academic staff with corresponding qualifications required for appointment to the posts in the technical educations (Diploma) which were notified on 30.12.1999. The Government of India examined these recommendations and suggested circulation to all the concerned.

The forwarding letter dated 30.12.1999 addressed to all the State Governments and Union Territories by the AICTE reads as follows:-

"ALL INDIA COUNCIL FOR TECHNICAL EDUCATION

(A STATUTORY BODY OF THE GOVERNMENT OF INDIA)

F.No. 1-65/CD/NCE/98-99 Date: December 30, 1999

To,

The Secretaries

Dealing with Technical Education

Of All State Govts. And Union Territories

Sub: Recommendations of the All India Council for Technical Education (AICTE) regarding revision of pay Scales and Service Conditions of Teachers of Technical Institutions (Diploma)

Sir,

You are aware that All India Council for Technical Education (AICTE) has been established by an Act of parliament for proper planning and co-ordinated Development, regulation and maintenance of Norms and Standards in the Technical Education Systems throughout the Country. Consequent upon revision of Pay Scales based on the recommendations of the Central with pay commission, AICTE formulated a revision of pay Scales and Service Conditions for Diploma Level Technical Institutions in the Country. The recommendations of AICTE were sent to Govt. of India for approval. The Govt. of India examined these recommendations and suggested that the revised pay Scales and service Conditions may be circulated and appropriate action. Accordingly, the recommendations of the AICTE are hereby communicated to all concerned.

These recommendations are applicable to all Diploma Level Technical Institutions falling under the purview of the All India Council for Technical Education.

Yours faithfully,

(R.S. Nirjar)

Member Secretary, (AICTE)

Copy forwarded for Information and appropriate action to the following:

Xxxxx

Xxxxx"

14. A reading of the aforesaid forwarding letter indicates that the regulations contained in the said notification issued by the AICTE were not in the nature of binding regulations, which the Council was empowered to make under Section 23 of the Act, but were merely recommendations. Nothing is mentioned in the said notification that the said recommendations were made by invoking the power conferred under Section 23 of the Act.

The said communication merely mentions these to be recommendations of the AICTE. Accordingly, considering the language used to describe these as recommendations, this Court would hold that that the said notification dated 30.12.1999 was not mandatory but directory in nature. By the said notification, the pay structures of the teachers had been revised and the qualification required for appointment to the teaching posts including Principal had been mentioned.

In respect of the post of the Principal, the qualification and experience have been provided as follows:

"Qualification and Experience Master's Degree in appropriate branch of Engineering/Technology with First Class at Master's or Bachelor's Level.

15 years experience in teaching out of which at least 5 years shall be at the level of Head of Department or equivalent.

OR

Ph.D. in appropriate branch of Engineering/Technology Technician Education.

10 years experience in teaching out of which at least 5 years shall be at the level of Head of Department or equivalent

NOTE: Candidates from industry/with First Class Bachelor's Degree in appropriate branch of Engineering/Technology, & with industrial experience which is equivalent to Master's degree, with total 15 years of experience of which at least 5 years would be at a level comparable with Head of Department, will also be eligible.

15. Under the aforesaid notification dated 30.12.1999 of the AICTE, if a person possesses Master's degree in an appropriate branch of Engineering/Technical education with First Class at Master's or at Bachelor's level, he would be eligible for appointment to the post of Principal even if he does not possess Ph.D. However, he must have 15 years' experience in teaching, out of which at least five years shall be at the level of HOD or equivalent.

At the same time, a person possessing Ph.D. in appropriate branch in

Engineering/Technology is also eligible for appointment to the post of Principal if he has experience of 10 years out of which 5 years at the level of HOD or equivalent.

Thus, as per the aforesaid notification issued by the AICTE, possession of Ph.D. was not an essential qualification for appointment to the post of Principal provided he fulfils the other conditions prescribed relating to experience.

16. The Government of Assam adopted the aforesaid recommendations made by the AICTE regarding recruitment of Lecturer/Career Advancement Scheme in Polytechnics of Assam by issuing the Office Memorandum dated 20.05.2004. While adopting the said recommendations of the AICTE, the State of Assam did not include possession of Ph.D. as an essential qualification for appointment to the post of Principal. Thus, as far as the State of Assam is concerned, possession of Ph.D. was not an essential requirement for appointment to the post of Principal even after the State Government adopted some of the aforesaid AICTE recommendations, which incidentally was not also insisted upon by the AICTE.

17. Subsequently, the Assam Technical Education Service Rules, 1981 were amended in the year 2008 by the State Government in exercise of the power conferred under Proviso to Article 309 of the Constitution of India by which Rules 8 and 12(4) of the aforesaid Rules were substituted, which were notified on 21.01.2008. Rule 8 relates to direct recruitment and Rule 12(4) to promotion. Substituted Rule 8 provided that the minimum academic qualification and experience of a candidate for direct recruitment shall be as prescribed by the AICTE from time to time, as adopted by the Government of Assam. Similarly, the amended Rule 12(4) as quoted above provided that subject to suitability, an officer shall be eligible for promotion if he possesses the qualification and experience as prescribed by the AICTE from time to time, as adopted by the Government of Assam.

Thus, the position obtaining so far was that, after the amendment of the Assam Technical Education Service Rules in 2008, only such qualifications as prescribed by the AICTE and which were adopted by the State Government would be applicable in the State of Assam.

18. It is also the case of the petitioners that as far as the essential qualifications prescribed by the AICTE are concerned, these will not be applicable in the State of Assam so long these are not adopted by the State Government. These will become applicable in the State of Assam only when these are adopted by the State Government as provided under Rule 12(4) of the Assam Rules.

19. Subsequent to the aforesaid recommendations made by the AICTE in the year 1999 relating to revision of pay-scale and service conditions and essential qualifications for the teaching posts, the AICTE in exercise of the powers conferred under Sub-section 1 of Section 23 read with Section 10(i) and (v) of the AICTE Act, 1987 framed certain regulations known as "All India Council for Technical Education (Pay-Scale, Service Conditions and Qualifications) for the

Teachers and other Academic Staff in Technical Institutions (Diploma) Regulations, 2010", which were notified on 05.03.2010.

As per the aforesaid Regulations notified in 2010, Ph.D. became an essential qualification for appointment to the post of Principal as quoted below:

Qualification

Experience

"Qualification as above for the post of Head of Department and Ph.D. in Engineering

OR

Minimum of 10 years relevant experience in teaching/research/industry out of which at least 3 years shall be at the level of head of Department or equivalent.

Qualification as above for the post of Head of Department

In case of Architecture, professional practice of 10 years as certified by the Council of Architecture shall also be considered valid."

20. It may be mentioned that though the AICTE framed the Regulations in the year 2010 prescribing the qualifications for appointment of teachers and other academic staff, the State Government in exercise of power conferred under Rules 10(8) and 12(4) of Assam Technical Education Service Rules as amended in 2008, adopted the AICTE Regulations to determine the minimum qualification and experience required for appointment of officers for direct/promotion in Polytechnics in Assam only in the year 2016 by issuing the Office Memorandum on 18.01.2016.

By the aforesaid Office Memorandum dated 18.01.2016 issued by the State of Assam, the educational qualifications and experience required for appointment to the post of Principal prescribed by the AICTE were adopted which are as follows:

Post

Qualifications

Experience

Principal

Bachelor's and Master's Degree in appropriate Branch in Engineering/Technology with 1st Class or equivalent either in Bachelor's or Master's level and Ph.D. in Engineering.

Minimum of 10 years relevant experience in Teaching/Research/Industry out of which at least (a) 3 years shall be at the level of HOD or (b) 6 years as the level of Lecturer Selection Grade.

OR

Bachelors' and Master's Degree in appropriate Branch in Engineering/Technology with 1st Class or equivalent either in Bachelor's or Master's level and Ph.D. or equivalent in appropriate discipline/Technology

21. According to the petitioners, it was only after issuance of the Office Memorandum dated 18.01.2016 by the State government that possession of Ph.D. in Engineering/Technology became an essential qualification for appointment to the post of Principal and prior to it, there was no requirement for possession of Ph.D. for appointment to the post of Principal. According to the petitioners, since possession of Ph.D. became an essential qualification only w.e.f. 18.01.2016, when the said Office Memorandum was issued by the State Government adopting the regulations of the AICTE, the vacancies which occurred prior to issuance of the Office Memorandum dated 18.01.2016 are to be filled up by the rules existing at the relevant time in the State of Assam under which, possession of Ph.D. in Engineering/Technology was not an essential qualification.

According to the petitioners, it is only in respect of such vacancies which came into existence after the issuance of the Office Memorandum dated 18.01.2016 that the authorities can insist on possession of Ph.D. for appointment to the post of Principal.

22. The petitioners contend that as many as nine vacancies in the post of Principal in different Government Polytechnics had occurred prior to issuance of Office Memorandum dated 18.01.2016 which would be required to be filled up by promotion amongst those eligible candidates including the present petitioners without insisting upon the possession of Ph.D.

23. It is also the case of the petitioners that, in fact, the authorities had initiated the process for filling up the vacant posts of Principal by way of promotion amongst candidates including the petitioners on the basis of the earlier recruitment rules existing prior to adoption of the AICTE Regulations of 2010 by the State Government in the year 2016. According to the petitioners, however, for reasons best known to the authorities, they aborted the process and instead proceeded to fill all these vacant posts of Principal on the basis of the AICTE norms as adopted by the State Government in 2016, and have recommended the private respondents for appointment to the posts of Principal, which according to the petitioners, is not permissible in law.

24. According to the petitioners, promotional vacancies are to be filled up according to the service rules as applicable when the vacancies arose and not by rules coming into force after the vacancies arose.

25. The petitioners have also assailed the process for appointment of the private respondents as Principals on the ground that the State Government while adopting norms prescribed under the AICTE Regulations of 2010, added an alternative provision relating to experience. The petitioners contend that while under the AICTE Regulations, the experience required for appointment to the post of Principal is possession of minimum of 10 years of relevant experience in

teaching/research/industry out of which at least 3 years shall be at the level of Head of Department or equivalent, the State Government have added an alternative experience qualification of possession of experience of "6 years at the level of Lecturer Selection Grade" without any experience as Head of Department (HOD). This insertion of an alternative experience criterion, dispensing with the requirement of experience as HOD, according to the petitioners, is merely to accommodate the private respondents as none of them have the experience at the level of Head of Department (HOD) as required under the AICTE Regulations.

26. On the other hand, the case of the respondent authorities is that the post of Principal is to be filled up as per the AICTE norms and since the AICTE norms had been already adopted by the State Government vide Office Memorandum dated 18.01.2016, the vacancies have to be filled up in accordance with the AICTE norms and accordingly, those candidates who do not possess Ph.D. in Engineering/Technology cannot be considered for promotion to the post of Principal.

27. From the above, what is evident is that the disputes essentially revolve round the issue as to the applicability of the norms laid down by the AICTE including as to whether possession of Ph.D. in Engineering/Technical Education is an essential qualification for appointment to the post of Principal in government polytechnics in Assam or not, and if so, from which date the same will become applicable.

28. In order to narrow down the scope of the disputes, certain undisputed facts may be highlighted.

The petitioners do not dispute the fact that possession of Ph.D. is now an essential qualification for appointment to the post of Principal of a Government Polytechnic College/institute. However, the case of the petitioners is that the requirement has become mandatory only after issuance of the Office Memorandum dated 18.01.2016 by the State Government when the State Government adopted the AICTE norms by invoking Rule 12(4) of Assam Technical Education Service Rules, which provides that the qualification and experience as prescribed by the AICTE from time to time will be applicable as adopted by the Government of Assam.

29. According to the petitioners, since the aforesaid norm laid down by the AICTE requiring possession of Ph.D. in Engineering/Technology was adopted by the State Government only in 2016, and not prior to it, it cannot be an essential qualification for appointment to the post of Principal in the Polytechnic/Technical Institute under the State of Assam, in respect of vacancies which occurred prior to 2016.

30. In this regard, the petitioners have referred to the Office Memorandum dated 20.05.2004 issued by the State Government whereby AICTE's recommendations made in 1999 regarding recruitment of Lecturer/Career Advancement Scheme for Polytechnics were adopted by the State Government. While doing so, the State Government did not adopt the alternative criteria of possession of Ph.D. in

Engineering/Technology for appointment to the post of Principal but adopted the qualification prescribed which did not require possession of Ph.D., i.e., Master's Degree in appropriate branch of Engineering/Technology with First Class at Master's or Bachelor's level with fifteen years of experience of teaching, out of which, at least five years' at the level of Head of Department or equivalent. According to the petitioners, the State Government consciously did not adopt the criterion requiring possession of Ph.D. for appointment to the post of Principal in the year 2004.

31. According to the petitioners, the aforesaid Office Memorandum dated 20.05.2004 adopting the qualifications for the post of Principal held the field till Government of Assam issued the subsequent Office Memorandum dated 18.01.2016 by which the State of Assam adopted the qualification requiring possession of Ph.D. for appointment to the post of Principal.

32. As we proceed to resolve the issues raised, it would be necessary to refer to the relevant law governing the field.

33. "All India Council for Technical Education Act, 1987" was enacted by the Parliament relating to a subject which is covered by Entry 66 of List I under the Seventh Schedule of the Constitution of India.

Entry 66 of List I reads as follows:

"66. Coordination and determination of standards in institutions for higher education or research and scientific and technical institutions"

There is another entry in List III, the Concurrent List, to which the subject covered by the aforesaid AICTE Act could be related, viz., Entry 25, which reads as follows:

"25. Education, including technical education, medical education and universities subject to provision of Entries of 63, 64, 65 and 66 of List I; vocational and technical training of labour."

34. Article 246 of the Constitution lays down the respective domain within which the Parliament and State Legislatures may make laws. The legislative powers of the Parliament and the State Legislatures are respectively governed by the relevant entries in the three lists given in the Seventh Schedule. While the Parliament will have exclusive power to make laws in respect of the subjects covered by the Union List or List I, the State Legislature will have exclusive power in respect of the State List or List II and in respect of Concurrent List or List III, both the Parliament and State Legislatures will have concurrent jurisdiction, with the law enacted by the Parliament to prevail over the State law, in case of any conflict between the two laws. The extent and power of the Union Government and State Government to make laws correspond to the aforesaid Lists.

35. It may be also noted that prior to the 42nd Amendment of the Constitution,

"education" including "universities" was covered by Entry 11 of List II i.e. the State List but was subject to the provisions of Entries 63, 64, 65 and 66 of List I. However, by the 42nd Amendment of the Constitution which came into effect from 01.03.1977, Entry 11 of List II of the State List was omitted and it was added as Entry 25 in List III as in the present.

36. The aforesaid AICTE Act enacted by the Parliament in the year 1987 which came into effect on 28.03.1988 is covered by Entry 66 of the List I, and as such the provisions of the aforesaid Act, being a parliamentary enactment, and covering a subject coming within the purview of Entry 66 of the Union List would govern the field relating to technical education. Assuming also that this enactment comes under Entry 25 of the Concurrent List, to the extent it is in conflict or contrary to the law made by the State Legislature or the State Government, this enactment made by the Parliament will prevail over the State law.

37. It may be noted that even though the AICTE Act, 1987 does not lay down the qualifications required for appointment to posts under technical institutes, the Act has empowered the Council established under Section 3 to frame regulations under Section 26 to give effect to the provisions of the Act.

38. It is in exercise of the power conferred under Section 26 of the Act that the AICTE framed the Regulations which lay down the pay scales, service conditions and qualifications required for the teachers and other academic staff in technical institutions teaching diploma courses which were notified on 5.3.2010, which came into effect from the date of publication in the official gazette.

39. As mentioned above, even though the functioning and management of the State Government Polytechnics are within the purview of the State Government, as regards qualifications for appointment to the post of Principal in the Government Polytechnics in the State of Assam, this is a subject which is covered by Entry 66 of List I of the Seventh Schedule.

40. In view of Article 254 of the Constitution, a law made by the Parliament relating to a subject covered by Entry 66 of List I or Entry 25 of List III cannot be allowed to be contradicted or conflicted by another law made by the State Legislature or the State Government. Article 254 of the Constitution reads as follows.

"254. Inconsistency between laws made by Parliament and laws made by the Legislatures of States.-(1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State:

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State.

41. Thus, law made by the Parliament or by the statutory authority created by the Parliamentary statute covering the subjects falling under the aforesaid Entry 66 would hold the field and would have to be followed by all the States and even if there be any existing law made by the State legislature or the State government, to that extent, these would be inapplicable.

Even if the rules made by the statutory authority are relatable to Entry 25 of List III of the Concurrent List, the laws made by the State Legislature would be applicable so long as these are not inconsistent with the laws made by the Parliament or by the authority created by the Parliamentary statute, for the reason that if there be any inconsistency or conflict in the law made by the State Legislature vis-à-vis the law made by the Parliament, to the extent of inconsistency or conflict, the law made by the Parliament will prevail.

42. It has been held by the Hon'ble Supreme Court in *Government of AP and Anr. Vs. J.B. Educational Society and Anr.*, (2005) 3 SCC 212 as follows,

"11. With respect to matters enumerated in the List III (Concurrent List), both the Parliament and the State legislature have equal competence to legislate. Here again, the courts are charged with the duty of interpreting the enactments of Parliament and the State legislature in such manner as to avoid a conflict. If the conflict becomes unavoidable, then Article 245 indicates the manner of resolution of such a conflict.

12. Thus, the question of repugnancy between the Parliamentary legislation and the State legislation can arise in two ways. First, where the legislations, though enacted with respect to matters in their allotted sphere, overlap and conflict. Second, where the two legislations are with respect to matters in Concurrent List and there is a conflict. In both the situations, Parliamentary legislation will predominate, in the first, by virtue of the non-obstante clause in Article 246(1), in the second, by reason of Article 245(1). Clause (2) of Article 245 deals with a situation where the State legislation having been reserved and having obtained President's assent prevails in that State; this again is subject to the proviso that the Parliament can again bring a legislation to override even such State legislation."

43. Similarly, in *State of T.N. & Anr. Vs. Adhiyaman Educational & Research*

Institute &Ors., (1995) 4 SCC 104, Hon'ble Supreme Court dealt with the functioning of All India Council of Technical Education Act and the scope of All India Council of Technical Education Act, 1997 in the following words:

"22. The aforesaid provisions of the Act including its preamble make it abundantly clear that the Council has been established under the Act for coordinated and integrated development of the technical education system at all levels throughout the country and is enjoined to promote quantitative improvement of such education in relation to planned quantitative growth. The Council is also required to regulate and ensure proper maintenance of norms and standards in the technical education system. The Council is, further to evolve suitable performance appraisal system incorporating such norms and mechanisms in enforcing their accountability. It is also required to provide guidelines for admission of students and has power to withhold or discontinue grants and to derecognise the institutions where norms and standards laid down by it and directions given by it from time to time are not followed. This duty and responsibility cast on the Council implies that the norms and standards to be set should be such as would prevent a lopsided or an isolated development of technical education in the country. For this purpose, the norms and standards to be prescribed for the technical education have to be such as would on the one hand ensure development of technical educational system in all parts of the country uniformly; that there will be a coordination in the technical education and the education imparted in various parts of the country and will be capable of being integrated in one system; that there will be sufficient number of technically educated individuals and that their growth would be in a planned manner; and that all institutions in the country are in a position to properly maintain the norms and standards that may be prescribed by the Council. The norms and standards have, therefore, to be reasonable and ideal and at the same time, adaptable, attainable and maintainable by institutions throughout the country to ensure both quantitative and qualitative growth of the technically qualified personnel to meet the needs of the country. Since the standards have to be laid down on a national level, they have necessarily to be uniform throughout the country without which the coordinated and integrated development of the technical education all over the country will not be possible which will defeat one of the main objects of the statute. This country as is well-known, consists of regions and population which are at different levels of progress and development or to put it differently, at differing levels of backwardness. This is not on account of any physical or intellectual deficiencies but for want of opportunities to develop and contribute to the total good of the country. Unnecessarily high norm or standards, say for admission to the educational institutions or to pass the examinations, may not only deprive a vast majority of the people of the benefit of the education and the qualification, but would also result in concentrating technical education in the hands of the affluent and elite few and in depriving the country of a large number of otherwise deserving technical personnel. It is necessary to bear this aspect of the norms and standards to be prescribed in

mind, for a major debate before us centered around the right of the States to prescribe standards higher than the one laid down by the Council. What is further necessary to remember is that the Council has on it representatives not only of the States but also of the State Universities. They have, therefore, a say in the matter of laying down the norms and standards which may be prescribed by the Council for such education from time to time. The Council has further the Regional Committees, at present, at least, in four major geographical zones and the constitution and functions of the Committees are to be prescribed by the regulations to be made by the Council. Since the Council has the representation of the States and the professional bodies on it which have also representation from different States and regions, they have a say in the constitution and functions of these Committees as well. That is further important to note is that the subject covered by this statute is fairly within the scope of Entry 66 of List I and Entry 25 of List III. Further, these regulations along with other regulations made by the Council and the rules to be made by the, Central Government under the Act are to be laid before the Parliament. Hence, on the subjects covered by this statute, the State could not make a law under Entry 11 of List II prior to Forty-Second Amendment nor can it make a law under Entry 25 of List III after the Forty-Second Amendment. If there was any such existing law immediately before the commencement of the Constitution within the meaning of Article 372 of the Constitution, as the Madras University Act, 1923, on the enactment of the present Central Act, the provisions of the said law if repugnant to the provisions of the Central Act would stand impliedly repealed to the extent of repugnancy. Such repugnancy would have to be adjudged on the basis of the tests which are applied for adjudging repugnancy under Article 254 of the Constitution."

Thus, it has been held that where there is a Parliamentary statute covering a subject under Entry 66 of List I and Entry 25 of List III, the State cannot make any law repugnant to the provisions of Central Act and to the extent of the repugnancy, the Parliamentary enactment would prevail over the State law.

44. We will now accordingly proceed to examine the issues raised in these petitions, keeping in mind the aforesaid legal principles.

45. As mentioned above, the All India Council for Technical Education (AICTE) for the first time issued certain notification prescribing the qualifications required for appointment to various teaching and academic staff in the year 1999 which was circulated to all the State Governments and Union Territories on 30.12.1999, but the prescriptions were in the nature of recommendations as discussed above.

As per the said qualifications recommended by the AICTE for the post of Principal, a person without having Ph.D. still could be appointed to the post of Principal. The said recommendations were adopted by the State Government in the year 2004.

Subsequently, the AICTE framed the regulations known as "All India Council for Technical Education (Pay-Scale, Service Conditions and qualifications) for the

Teachers and other Academic Staff in Technical Institutions (Diploma) Regulations, 2010" by which Ph.D. became an essential qualification for appointment to the post of Principal which were notified on 05.03.2010.

Before the said notification was issued by the AICTE, the State Government amended the Technical Education Service Rules, 1991 by amending Rule 12(4) in the year 2008 in which it was provided that eligibility will be in terms of the qualification and experience prescribed by the AICTE from time to time "as adopted" by the Government of Assam.

46. The aforesaid notification dated 05.03.2010 issued by the AICTE, however, was not adopted by the State Government in terms of Rule 12(4) of the Assam Rules. It came to be adopted by the State Government later on only on 18.01.2016. Thus, the position obtaining was that though the AICTE prescribed the qualification of Ph.D. in Engineering/Technical Education as an essential qualification for appointment to the post of Principal as far back in 2010, the said requirement was not adopted by the State Government at that time. It came to be adopted much later, only in the year 2016.

47. It is this intervening period between the dates of notification issued by the AICTE on 05.03.2010 laying down the qualifications, and that of adoption of the norms of AICTE by the State Government on 18.01.2016, which would be crucial for deciding the claim made by the petitioners.

48. If the claim of the petitioners that, in terms of Rule 12(4) of the Assam Technical Education Service Rules, 1981 as amended in the year 2008, the regulations of the AICTE cannot be applied till the same are adopted by the State Government, is to be accepted, there is nothing more to be considered as requirement of Ph.D. for appointment to the post of Principal had not become part of the rules till 2016, as far as the State of Assam is concerned, for appointment to the post of Principal.

However, it has been contended by the Respondents that it does not matter, whether the State government adopts the prescriptions of the AICTE or not, for the reason that, once the AICTE, which is the competent authority established under an Act of Parliament and which is empowered to take decisions in matters relating to Entry 66 of List I, has made certain regulations relating to determination of qualifications for appointment to the post in Technical institutions, these regulations framed by the AICTE become binding on the State Government. The State Government would have no option but to follow the same whether they formally adopt the same or not.

49. In that regard, it has been submitted by the Respondents that Rule 12(4) of Assam Technical Services Rules cannot come in the way of the applicability of AICTE norms, once the same had been laid down by the AICTE in exercise of the powers conferred under Section 26 of the AICTE Act, 1987 and accordingly notified.

50. It has, however, been emphatically contended by the petitioners that there are binding statutory rules framed by the State Government under Proviso to Article 309 of the Constitution of India, namely, Assam Technical Education Service Rules, 2001 which govern the field as far as the service conditions of the employees of the technical education, including Principal are concerned and Rule 12(4) of the Assam Technical Education Service Rules specifically provide that only such qualifications prescribed by the AICTE as adopted by the State Government will be applicable in the State of Assam.

51. It has been contended by the petitioners that to give effect to any AICTE Notification in the State, the Government of Assam has to adopt it and to the extent of such adoption, it will hold the field. The Government has to exercise its power under Rule 12(4) of the Assam Rules, for adoption of revised qualification of the said AICTE Notification. The promotion to the post of Principal or other posts should be made on the basis of the State Service Rules and such AICTE norm as may be adopted by the State Government. It has been submitted that in the present case, the Office Memorandum dated 20.05.2004 is clearly applicable to all the vacancies which arose till issuance of the Office Memorandum dated 18.01.2016 and therefore, all the vacancies occurring prior to 18.01.2016 should be filled up in accordance with the said Office Memorandum dated 20.05.2004.

52. It has been contended on behalf of the petitioners that mere publication of a Notification by the AICTE does not mean that it would be applicable with effect from the date of its publication for the reason that Rule 12(4) of the Assam Technical Education Service Rules, has made it clear that the Regulations of the AICTE are to be adopted by the State Government and, thus, unless and until the Regulations of the AICTE are adopted by the State Government, as provided under Rule 12(4) of the Assam Rules, the Regulations of the AICTE would have no force of law or applicability within the State of Assam.

53. It has been also contended relying on the decision of the Hon'ble Supreme Court in *Dr. Rajinder Singh vs. State of Punjab and others*, AIR 2001 SC 1769 that no Government order, notification or circular can be a substitute of statutory rules and doing so would tantamount to amending service rules ignoring the mandate of Article 309 of the Constitution. Accordingly, it has been submitted that the Notification issued by the AICTE cannot substitute the Assam Service Rules framed in 1981, unless adopted by the State Government.

54. Similarly, reliance has been placed on a decision of this Court in *Binoy Ch. Sarma - Versus- State of Assam and Ors.*, (2014) 3 GLT 215 to contend that until and unless the extant Rules framed under Article 309 of the Constitution of India are suitably amended to incorporate the new eligibility criteria prescribed by AICTE, if there be any, the instructions or regulations made by the AICTE cannot be enforced. It has been submitted that the law is now well-settled that where there is a conflict between rules framed under Article 309 of the Constitution and an executive instruction, the former will prevail.

55. Accordingly, it was contended that executive instructions/Regulations of AICTE cannot prevail over Rules framed by the State Government under Proviso to Article 309, unless those Rules are amended to incorporate new eligibility criteria. Since the Government of Assam had not incorporated the requirement of Ph.D. as a mandatory qualification for appointment to the post of Principal in the Assam Technical Education Service Rules, 1981 till 2016, the petitioners would be entitled to be promoted to the vacant posts of Principal of Polytechnics under Rule 12 (3) (ii) of the Assam Rules occurring prior to 2016.

56. As discussed above, there are certain norms stipulated by the AICTE for appointment to the post of Principal. i.e., possession of Ph.D. in Engineering/Technology as one of the essential qualifications for appointment to the post of Principal in Technical Institutions as provided under the AICTE Regulations notified on 05.03.2010.

On the other hand, there is another set of rules for appointment to the post of Principal in the Government Polytechnics under the State of Assam namely, the Assam Technical Education Service Rules, 1981 under which possession of Ph.D. would not be an essential qualification.

As the said norm of the AICTE as per Regulations 2010 was adopted by the State Government only in the year 2016, the question which would arise is, as to whether both these laws, one requiring Ph.D. for appointment to the post of Principal as under the AICTE Regulations and another set of rules as under the Assam State Rules which do not require possession of Ph.D. for appointment to the post of Principal in Polytechnics, can co-exist.

The answer obviously is a "No". It is for the reason that once a conflicting situation has arisen qua the essential qualifications for appointment to the post of Principal of a technical institution, this cannot be permitted to subsist for the reasons hereinabove discussed that the law made by the Parliament or its delegated authority will prevail.

57. In the present case, in the teeth of certain specific prescription made by the AICTE under the Regulations in relation to a subject covered by Entry 66 of List I or Entry 25 of List III, any law made by the State which is inconsistent and repugnant to the Regulations would be invalid.

Therefore, the statutory rules made by the State of Assam as provided under Assam Technical Education Service Rules, 1981 as amended from time to time, would be of no avail if these relate to a subject already covered by the Regulations of the AICTE and to the extent these are inconsistent.

58. It may be also mentioned that as far as the law made under Entry 66 of List I is concerned, the State is devoid of any jurisdiction or authority to make any law relating to such a subject which is clearly covered by the Union List. It is only in certain subjects which come under the Concurrent List that the State Legislature would also have jurisdiction to make laws, but any such law made by the State

Legislature or the State Government, to the extent is inconsistent or repugnant to the law already made or later on by the Parliament, would be invalid.

59. It may be mentioned that a regulation made by the AICTE would be in the nature of delegated legislation, delegated by the Parliament to the Council to make laws and as such, would have the same binding nature as a Parliamentary statute. The Regulation of 2010 was made by the AICTE in exercise of powers conferred under Section 23 of the AICTE Act and such the Regulation would have the same effect as that of a statute made by the Parliament as far as the subjects covered by Entry 66 of List I or Entry 25 of List III are concerned and accordingly to that extent, if there be any law made by the State Legislature or the State Government, to the extent the same is repugnant to the Regulations of the AICTE, will be invalid.

There could not be any law made by the State which would defeat or has the effect of nullifying the Parliamentary enactment or the mandatory regulations amounting to delegated legislation made by an authority created under as Parliamentary Act, in matters covered by Entry 66 of List I or Entry 25 of List III and if there be any such law made by the State, to the extent it is repugnant to the Parliamentary enactment or the delegated legislation, will be invalid.

60. Thus the State Government cannot, through a law enacted by the State Legislature or by making a law invoking Proviso to Article 309 of the Constitution, defeat or delay or render any such law made by the Parliament or by its delegated authority, ineffective. Any such law made by the Parliament or the delegated authority relating to a subject covered by Entry 66 of List I or Entry 25 of List III will prevail and accordingly, provisions of Rule 14 (2) or Rule 8 which provide for adopting such norms of the AICTE by the State Government will have no effect as the State is bound to follow the rules and norms laid down by the AICTE. The State Governments have not been given the option or discretion to adopt the norms laid down by the AICTE as they may wish or consider appropriate.

61. Accordingly, Rule 14 (2) of the Assam Rules, would be ineffective to the extent it gives authority and empowers the State Government to adopt AICTE norms as they may deem fit. The question of adopting a mandatory and binding provision of law does not arise. When the law itself is mandatory, the question of adopting such a law does not arise. It would operate *ex proprio vigore*. Adoption of a law would arise only when the adopting authority has discretion either to adopt it or not. In the present case, no such discretion is given to the State Governments. Consequently, whether the State Government adopts the norms of the AICTE as contained in the Regulations or not, the norms would operate in the State of Assam also. The State authorities are bound to follow the AICTE norms and they cannot delay or prevent implementation of the AICTE norms as regards educational qualifications and other essential qualifications required for teaching posts in technical education which are prescribed by the AICTE. Any law made by the State Government which comes in the way of implementation of the AICTE

norms would be invalid.

62. For the reasons discussed above, this Court would hold that once the AICTE norms as contained in the Regulations framed by the AICTE in 2010 were notified and became effective, the State Government was under the obligation to follow the same and cannot ignore and delay their implementation or partially adopt the said norms or alter the norms as had been done by the State Government by issuing belatedly the Office Memorandum dated 18.01.2016. Even if the State Government formally adopts the AICTE norms from a later date, it would be irrelevant, as the said norms by virtue of Articles 246 and 254 would become applicable to all the States, including the State of Assam from the date the said AICTE Regulations were notified and became effective.

63. As regards the submissions of the petitioners relying on the decision of the Hon'ble Supreme Court in *Dr. Rajinder Singh (supra)* and also on a decision of this Court in *Binoy Ch. Sarma (supra)*, that no Government order, notification or circular can be a substitute for statutory rules, there cannot be any dispute about the aforesaid general proposition of law. However, what had been missed by the petitioners is that the subject relating to prescription of qualifications for appointment to teaching and other academic staff in polytechnics squarely falls within the ambit of Entry 66 of List I and also Entry of List III and to that extent, either the State does not have the jurisdiction to make laws relating to this subject or even if there be jurisdiction under List III, to the extent it is contrary or in conflict with the law made by the Parliament or the delegated authority, will be a nullity as provided under Article 254 of the Constitution. This aspect did not arise for consideration in the aforesaid cases and hence, was not considered by the Supreme Court and by this Court. Hence, the said decisions will not be applicable in the facts of the present case.

64. This Court, however, finds force with the submission advanced by the petitioners that the private respondents, if they do not fulfil the requirement of experience prescribed by the AICTE, will not be eligible for appointment to the posts of Principal, even if they possess Ph.D.

The Office Memorandum dated 18.01.2016 issued by the State Government adopting the qualifications prescribed by the AICTE vide Notification dated 05.03.2010 also provides that the candidates having 6 years' experience at the level of Lecturer Selection Grade are also eligible for promotion to the post of Principal of Polytechnics, whereas the AICTE Notification dated 05.03.2010 did not recommend the same and as such, it is clearly contrary to the AICTE Notification dated 05.03.2010.

There is also nothing on record to indicate that the experience gained by Lecturers in Selection Grade can be treated to be similar to the experience gathered by the Heads of Department.

65. The State Government cannot substitute the criterion of experience prescribed by the AICTE by providing another criterion with lesser stringency.

The requirement of minimum of 10 years relevant experience in teaching/ research/ industry out of which at least 3 years shall be at the level of Head of Department or equivalent, cannot be replaced by an alternative experience of possession of experience of 6 years at the level of Lecturer Selection Grade as sought to be done by the State Government. The experience one gathers as a Head of Department cannot be equated with the experience gained at the level of Lecturer (Selection Grade) unless the AICTE recognises as such. The State Government cannot without any basis treat 6 years' experience at the level of Lecturer at the Selection Grade to be equivalent to 3 years' experience at the level of HOD, when the duties and functions of an HOD indisputably entail more onerous responsibilities than the Lecturer (Selection Grade). The HOD apart from discharging academic duties also discharges administrative functions.

Thus, only such persons who possess Ph.D. in Engineering/Technology as prescribed under the AICTE Regulation and having minimum teaching/research/ industry experience of 10 years, with minimum 3 years' experience at the level of HOD or equivalent can be appointed as a Principal.

66. The State Government cannot lay down any norm below the standard set by the AICTE or place any condition which is contrary to or not conforming to the minimum standard laid down by the AICTE, as otherwise, the mandate of law under Article 254 of the Constitution would be defeated.

67. The petitioners have made a vain attempt to contend that the AICTE Regulations do not provide for possession of PH.D. in respect of those candidates who are already appointed as HODs. According to them, Ph.D. will be required for those who are presently not serving as HODs. According to the petitioners, the AICTE Notification dated 05.03.2010 prescribes the minimum qualification for the post of HOD and Principal as follows :

Post

Qualification

Experience

HOD

Bachelor's degree and Master's degree of appropriate branch in Engineering / Technology with First Class or equivalent either Bachelor's or Master's level.

OR

Bachelor's degree and Master's degree of appropriate branch in Engineering / Technology with First Class or equivalent either Bachelor's or Master's level and Ph. D. or equivalent in appropriate discipline in Engineering /Technology.

Minimum of 10 years relevant experience in teaching / research /industry

Minimum of 5 years relevant experience in teaching / research / industry

Principal

Qualification as above for the post of Head of Department and Ph. D. in Engineering

Or

Qualification as above for the post of Head of Department

Minimum of 10 years of relevant experience in teaching / research / industry out of which at least 3 years shall be at the level of head of department or equivalent. In case of Architecture, professional practice of 10 years as certified by the Council of Architecture shall also be considered valid.

Referring to the second alternative qualification laid down for the post of Principal, where there is no reference to Ph.D., it has been submitted that Ph.D. is not an essential requirement for appointment to the post of Principal, if one is serving as an HOD. However, it may be observed that the second alternative qualification is meant for HOD, who already has Ph.D., as no one can be appointed to the post of HOD without having Ph.D., under the second category of candidates for appointment as HOD in the column meant for HOD. Hence, reference to Ph.D. was omitted in the corresponding column relating to Principal. The second alternative qualification for appointment to the post of Principal corresponds to the second alternative qualification prescribed for appointment to the post of HOD, where Ph.D. is required. In fact, because of such a confusion arising in many quarters, the AICTE clarified about the requirement of possession of Ph.D. as evident from the AICTE letter dated 21.11.2013 addressed to the Director of Technical Education and Training, Kolkata.

Hence, this Court holds that possession of Ph.D. would be a necessary qualification for appointment to the post of Principal in terms of the Regulation of the AICTE as notified on 05.03.2010.

68. Accordingly, this Court would hold as follows and issue the following directions:

(1) The requirement of Ph.D. as an essential qualification for appointment to the post of Principal of Government Polytechnics in the State of Assam would become operative from the date of issuance of the Notification by the AICTE on 05.03.2010 and not from any subsequent date as may be decided by the State Government.

(2) Since the requirement of Ph.D. as an essential qualification for appointment to the post of Principal of Polytechnic/Technical institution came to be effective in terms of Regulations made by the AICTE in 2010 which were notified on 05.03.2010, and since there was no such mandatory requirement of possession of Ph.D. prior to the notification of the AICTE Regulations, the vacancies to the posts of Principal which arose only after issuance of the Notification by the AICTE on 05.03.2010 will have to be filled up by the candidates possessing Ph.D. and

other qualifications prescribed by the AICTE and vacancies occurring prior to 05.03.2010 can be filled up by candidates even if they do not possess Ph.D. in Engineering/Technical Education provided they fulfil other conditions mentioned under the Assam Technical Education Service Rules, 1981.

(3) As regards the validity of the Office Memorandum dated 18.01.2016 by which the State Government has inserted an alternative experience criterion for appointment to the post of Principal, i.e. experience of six years at the level of Lecturer Selection Grade without having any experience as HOD for minimum 3 years, as the same is not provided under the AICTE Regulations of 2010, to that extent, the aforesaid alternative experience criterion, cannot be made the experience qualification for appointment to the post of Principal even if one possesses Ph.D., in lieu of the requirement of minimum of 10 years relevant experience in teaching/research/industry out of which at least 3 years shall be at the level of Head of Department or equivalent, and in case of Architecture, professional practice of 10 years as certified by the Council of Architecture as prescribed by the AICTE in the Regulations notified on 05.03.2010. The experience criterion prescribed by the AICTE in the Notification dated 05.03.2010 could not be substituted by another criterion by the State Government as an alternative criterion by lowering down the standard. While the State may provide additional criteria, the same cannot be in derogation of the criteria laid down by the AICTE.

(4) Consequently, any recommendation/appointment made contrary to the above directions have to be recalled and fresh consideration for promotion to the vacant posts of Principals have to be made in terms of the directions issued above.

Resultantly, if the private respondents, do not fulfil the qualifications and experience prescribed by the AICTE as notified on 05.03.2010 as discussed above, their recommendation and appointment as Principals of the Polytechnic Colleges/Technical Institutes in terms of the recommendation of the DPC meeting dated 27.01.2016 would be liable to be set aside.

(5) Till such exercise for consideration for promoting/appointing such eligible persons to the posts of Principals on regular basis as directed above is completed, these vacant posts of Principals have to be filled up on officiating/temporary/in-charge basis from amongst the candidates in the posts/grade just below the posts of Principals on the basis of seniority, and if any of the petitioners are already serving as Principals on in charge basis on the basis of seniority, they may be allowed to continue till regular appointments are made as directed above.

69. With the above directions, these two petitions are disposed of.