
(1981) 03 GUJ CK 0032
In the Gujarat High Court

Sameen Banu Makrani and Others

APPELLANT

Vs

State of Gujarat and Another

RESPONDENT

Date of Decision : 11-03-1981

Acts Referred:

Bombay Revenue Jurisdiction Act, 1876 — Section 11
Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8
Constitution of India, 1950 — Article 133(1)

Citation : (1981) 22 GLR 1084

Hon'ble Judges : B.J. Divan, C.J;B.K. Mehta, J

Bench : Division Bench

Judgement

B.K. Mehta, J.—A few relevant facts need be noticed in order to appreciate the questions raised in this group of appeals being Letters Patent Appeals Nos. 208 to 216 and 218, 222 and 232 ail of 1980 and No. 53 of 1981.

2. The dispute centers round the impugned order of the Director of Education of the Government of Gujarat being No. Training-Admission 91/7/920 of November 6, 1980 canceling the earlier orders of the same authority dated August 29, 1980; September 17, 1980; September 22, 1980; October 3, 1980 and October 9, 1980, which directed the different teachers training schools-Government as well as private-in the State of Gujarat to admit all the 430 candidates named therein out of which some are appellants before us in this group of appeals, and about 44 are arrayed as respondents No. 3 to 47 in Letters Patent Appeal No. 209 of 1980, and the others are the petitioners in the various Civil Applications preferred by them for being joined as parties. The impugned order was required to be made in the following circumstances:

3. Since the Primary Teachers Training Course (hereinafter referred to as "the PTC") provides openings in primary schools in the State as well as outside the State, it attracts a very large number of students who can take this short course of about two years after the passing the Secondary School Certificate (hereinafter referred to as -"the SSC") Examination so as to qualify them as

trained teachers eligible for being appointed as Primary Teachers in the various schools in the State. The Director of Education has provided a broad guideline to regulate the method and manner of admission and other incidental matters connected therewith in view of the large number of aspiring candidates who were, we are told, as many as 36000 in the last academic year while the number of seats, if provided according to the State directive to admit 20 students more in each class of 40 in that behalf, is only 7000 though these directions were issued by the Director on his own without the concerned institutes seeking permission in that behalf. Broadly stated, the salient features of the guideline issued by the State Government as contained in the Government Resolution in Education Department of April 28, 1980 are, inter alia, as under:

(1) Each institution will have two classes for each year's course and each class will have not more than 40 seats.

(2) Out of 40 seats, the following shall be the reserved seats:

(a) 12 seats (about 30%) are reserved for the candidates belonging to Scheduled Castes, Scheduled Tribes and Educationally and Socially backward classes as recommended in the Baxi Commission's report.

(b) One seat each reserved for Physically Handicapped candidates and for widows.

(c) Two seats are reserved for the candidates hailing from economically backward talukas as specified in the accompaniment list to the said Resolution.

(d) Five seats are reserved for the children or spouses of active and ex-servicemen.

(e) 10 seats are reserved for the children of freedom fighters and teachers who have won National or State Awards or the spouses of those who have died during employment.

The reservations provided at (d) and (e) above are not institute wise but are from the aggregate seats available for all the institutes in the State.

(3) The admission to the unreserved and reserved seats would be given strictly in accordance with the merits of each candidate judged by the percentage of marks obtained at the SSC examination.

(4) The minimum percentage of marks which each candidate has to obtain for being eligible for admission is 50%, save and except those belonging to Scheduled Castes and Scheduled Tribes who, in order to be eligible, have to obtain minimum percentage of 45% at the aforesaid examination.

(5) All the candidates seeking admission to the training institutes have to apply to the Principal of the concerned institutes within 10 days of the declaration of the results of the SSC examination, and the Principals have to prepare a list of the admitted candidates according to merits and get the same approved by the

District Education Officer of the concerned District where the institute is located.

(6) No relaxation in the directions contained in the aforesaid resolutions can be made without the prior sanction of the Government in that behalf.

This is in the guideline prescribed by the State Government regulating the manner and method of admission to these institutes.

4. It appears that respondent No. 3 of Letters Patent Appeal No. 209 of 1980 applied for admission in as many as five institutes in the State for PTC Course but she could not secure the admission since the percentage of marks of the last candidate in each of the institutes where she applied was higher than her percentage of marks which was 56% at the SSC examination. It also appears that she could not secure the admission even on additional seats created by the different institutes under the directions of the State Government. The entire procedures and work of admission to the PTC Course is required to be completed, as soon as possible, after the period of making applications for admission, which is prescribed under the said Resolution as 10 days, is over, so that the institutes can commence their teaching programme by about June 16th or thereabout. It is not in dispute that the results of the SSC examination are declared either in the end of May or the beginning of June of each year. It is also a common ground that the Director of Education had issued five orders dated August 29, 1980; September 17, 1980; September 22, 1980; October 3, 1980, and October 9, 1980, directing different institutes in the State to admit as many as 430 candidates specifically named therein in the respective institute named against each of the candidates. It cannot be gainsaid that the aforesaid five orders were issued by the Director of Education in flagrant violation of the guideline issued by the State Government in its resolution of April 29, 1980, particularly without regard and consideration to the merits as Judged by the percentage of marks obtained at the SSC examination, and clearly without any permission of the State Government. It should also be noted that the aforesaid orders directing admission were issued after lapse of considerable period of about 2 months to 3 months after the commencement of the term, that is, on or about the beginning of the second fortnight of June, 1980. The said orders were passed admittedly without stating any reasons justifying the issuance of such directions for giving preferential treatment to the candidates specified in the said orders over those included in the waiting lists of the different institutes. The Government had also by its two separate orders of September 26, 1980 and October 9, 1980 warned the institutes of the penal consequences for their failure to admit the sponsored candidates as per the aforesaid five orders though those two orders threatening the likely penal action for failure to comply with the directions as to admission, were withdrawn afterwards. Respondent No. 3 of Letters Patent Appeal No. 209 of 1980, therefore, moved this Court for appropriate writ, order and direction to quash and set aside the aforesaid five orders of the Government by her petition, being Special Civil Application No. 2939 of 1980, inter alia, on the grounds of the said orders being violative of Articles 14 and 16 of the Constitution inasmuch as

they were arbitrary, without authority and power and in flagrant violation of the guideline issued by the State Government.

5. Some 4 trusts, namely (1) Vasumati Charity Trust, (2) Kasturba Trust, (3) Harijan Ashram Trust and (4) Lok Bharti Trust also challenged the aforesaid orders and also the order of October 9, 1980 threatening penal consequences for failure to comply with those orders and asked for appropriate writ, order and direction to quash and set aside the said orders for admission to the sponsored candidates by Special Civil Application No. 2948 of 1980 on the same grounds as urged in Special Civil Application No. 2939 of 1980 by respondent No. 3 of Letters Patent Appeal No. 209/80.

6. It appears that another eligible candidate one Prafullaben Madhavij Mehta also challenged the aforesaid five orders of admission by Special Civil Application No. 2982 of 1980 praying for appropriate writ, order or direction to quash and set aside the orders on similar grounds.

7. The learned Single Judge of this Court (Coram: P.D. Desai, J.) issued notice to the State Government in pursuance of which the learned Government Pleader Mr. J.R. Nanavati appeared before the learned Single Judge on October 23, 1980 at the hearing of Special Civil Applications Nos. 2939 and 2940 of 1980 and conceded before the Court that the State Government has decided to withdraw and cancel the aforesaid five orders for admission. Similarly, in pursuance of the notice directed to be issued by the learned Single Judge (Coram: P.D. Desai, J.) in Special Civil Application No. 2982 of 1980, the learned Government Pleader Mr. J.R. Nanavati again appeared on October 24, 1980 and made the concession in identical terms. In view of these concessions made in behalf of the State Government by the learned Government Pleader; the petitioners of Special Civil Applications Nos. 2939/80, and 2940/80 and 2982/80 sought the permission of the Court to withdraw the petitions as they had become in fruituous. The learned Single Judge allowed the petitions to be withdrawn by his two orders of October 23, 1980 and October 24, 1980. The State Government has accordingly withdrawn the aforesaid five orders of admission by its order of November 5, 1980 which is the impugned order before us.

8. It appears further that as a sequel to the impugned order the admissions granted to the candidates sponsored in the aforesaid five orders were also consequently withdrawn and cancelled. The appellants before us in Letters Patent Appeal No. 209 of 1980 filed Special Civil Application No. 3357 of 1980 before this Court praying for appropriate writ, order and direction to quash and set aside the impugned order inasmuch as it was bad in law and void since no opportunity of hearing was given to the appellants before withdrawing the aforesaid five orders of admission. Similarly, the appellants of Letters Patent Appeal No. 208 of 1980 who were also some of the sponsored candidates in the aforesaid five orders of the Government by their Special Civil Application No. 3230 of 1980 moved this Court for appropriate writ, order and direction to quash and set aside the impugned order cancelling the admission on the same grounds.

9. P.D. Desai, J., by his order of December 3, 1980 dismissed both the Special Civil Applications Nos. 3230/80 and 3357/80. The reasoned order is made in Special Civil Application No. 3230/80 out of which Letters Patent Appeal No. 208/80 arises. Special Civil Application No. 3357/80 has been dismissed by the order of even date for the reasons stated in the main judgment in Spl. Civil Application No. 3230/80. The ground on which both the aforesaid special civil applications have been dismissed was that the orders of this Court (Coram: P.D. Desai, J.) of October 23, 1980 and October 24, 1980 allowing the withdrawal of Special Civil Applications Nos. 2939/80, 2940/80 and 2982/80 challenging the aforesaid five orders for admission were for all intents and purposes judicial orders which could not have been challenged by seeking a writ of Certiorari even in a petition under Article 32 of the Constitution before the Supreme Court as held in Naresh Shridhar Mirajkar and Others Vs. State of Maharashtra and Another, and the proper remedy would be not by way of a petition under Article 226 of the Constitution in the High Court but by preferring an appeal against the said order in a competent Court, and even if the persons who are not parties to such a petition are affected by such an order which is a judicial one, it would be competent for them to prefer an appeal as held in Naresh's case (supra), in that view of the matter, the learned Single Judge dismissed both the aforesaid petitions.

10. Similarly all the other Letters Patent Appeals have been preferred by those sponsored candidates who felt aggrieved by the impugned order resulting in the cancellation of their admissions to the different institutes. It should also be noted at this stage that 9 civil applications filed in Letters, Patent Appeal No. 209/80 are by the affected sponsored candidates who have prayed before this Court for joining them as parties in the said appeal. On these civil applications, this Court has issued Rule and posted them for hearing along with the main appeals viz; Letters Patent Appeals Nos. 208 and 209 of 1980.

10A. It should be noted that the learned Single Judge (Coram: P.D. Desai, J.) in his order of Decembers, 1980 passed in Special Civil Application No. 3357 of 1980 out of which Letters Patent Appeal No. 209 of 1980 has arisen, clearly recorded that the petitioners of the said special civil application did not press their prayer with regard to the review of the orders of the learned Single Judge of October 23, 1980 and October 24, 1980 allowing withdrawal of the said petitions. It should also be recalled at this stage, since it has a bearing on one of the contentions before us, that some of the aggrieved sponsored candidates whose admissions were cancelled as a sequel to the impugned order, challenged it in the Supreme Court by a writ petition being No. 5872 of 1980 on the sole ground that the impugned order was made in violation of the principles of natural justice and fair play and, therefore, the impugned order is a nullity and could not affect their vested right of admission in the institutes.

11. When this present group of appeals was called out for hearing before us on 20-1-1981, it was stated on behalf of the appellants that such a petition was filed

before the Supreme Court, and it was listed on the board for admission. Respondent No. 3 of Letters Patent Appeal No. 209/80, through her father and guardian, made an application for joining her as party in the said writ petition before the Supreme Court. The said writ petition came up for hearing before a Bench, consisting of Bhagwati and Baharul Islam JJ., In the said writ petition notice was issued on the State Government which also made its appearance before the Supreme Court. After hearing the Counsel for the petitioners before the Supreme Court the petition was rejected which, according to the guardian of respondent No. 3 before us, was on merits while according to the appellants the dismissal was not on merits but in limine. We will refer to this aspect, of the question while dealing with the relevant contention in that behalf.

12. Three questions arise for our consideration in this group of appeals. They are:

(1) What is the effect of the order of the Supreme Court dismissing Writ Petition No. 5872 of 1980 filed by some of the aggrieved sponsored candidates whose admissions were cancelled as a sequel to the order impugned in these appeals.

(2) Whether the rule of audi alteram partem can be invoked for assailing the impugned order of November 6, 1980.

(3) If yes, whether we should remand the matter back to the learned Single Judge.

13. We will deal with the second contention first and then address ourselves to the first question as to the affect of the order of the Supreme Court dismissing the writ petition of some of the aggrieved sponsored candidates.

14. In *S.L. Kapoor Vs. Jagmohan and Others*, , the circumstances under which the principle of audi alteram partem can be invoked and applied were examined in the context of an order of supersession of a municipal committee u/s 238(1) of the Punjab Municipal Act, 1911 which required that an opportunity should be given to the Committee before the order of supersession is made. In that context Chinnappa Reddy. J., speaking for the Court, referred to the decision of the Privy Council in *Alfred Thangarajah Jurayappah v. W. 3. Fernando* (1967) 2 SC 337, where the order of dissolution and supersession of the Municipal Council of Jaffna by the Governor-General was questioned. One of the questions, which arose in Alfred's case (supra), was whether, as a matter of interpretation, natural justice was not excluded from action u/s 277 of the Municipal Ordinance under which Jaffna Municipal Council was dissolved and superseded. The Supreme Court of Ceylon in that case ruled that the obligation to comply with the principles of natural justice was excluded having regard to the relevant provisions of law. The Privy Council, disagreeing with that approach, observed that there are three important matters which are to be borne in mind before the principle of audi alteram partem can be invoked and applied. The three important matters are; according to the Privy Council:

First, what is the nature of the property, the office held, status enjoyed or

services to be performed by the complainant of injustice. Secondly, in what circumstances or upon what occasions is the person claiming to be entitled to exercise the measure of control entitled to intervene. Thirdly, when a right to intervene is proved, what sanctions in fact is the latter entitled to impose upon the other. It is only upon a consideration of all these matters that the question of the application of the principle can properly be determined.

15. The first matter which we have, therefore, to consider is: what is the nature of the status enjoyed by the appellants herein who are aggrieved by the impugned order of cancellation of their admissions to the different institutes. It is claimed on behalf of the appellants before us that they were admitted in the different institutes, no doubt, under the aforesaid five orders of the Directors of Education which have been subsequently withdrawn and cancelled, and their fees were accepted in pursuance of their admission by the different institutes and, therefore, they had the status of students validly and legally admitted under the orders of the Director of Education, and in fact admitted by the institutes by acceptance of their fees and allowing them to Till in their terms as a result of which they had studied in the said institutes for about 1? months. It is claimed by the appellants that if this status of theirs as students in these institutes which entitled them to continue till the full term of the Course is over, is sought to be disturbed, affected or cancelled by an order of the State Government, or for that matter by the institutes concerned, without giving them any opportunity of making their submission, such action would be clearly in violation of the principles of natural justice and, therefore, void ab initio and must be set aside; and, in so far as the learned Single Judge dismissed their petitions, the orders dismissing their petitions are also vitiated and, therefore, liable to be reversed in these appeals.

15A. The above contention appears to be attractive but would not stand the scrutiny if we closely examine the same. The real question is, whether, the appellants before us had any valid and legal status which they can claim under the aforesaid five orders of admission and their acceptance by the institutes concerned. If the said five orders are bad ab initio or nullity, the appellants, who claim under the said orders, would have no right whatsoever much less the right of hearing.

16. In *Abdullamiyan Abddlrahman v. The Government of Bombay* (1974) 44 BL R 577 a question arose whether u/s 11 of the Bombay Revenue Jurisdiction Act, 1976, the suit of the plaintiff there was barred unless he had exhausted all the remedies allowed by law for the time being in force. The Full Bench, speaking through Beaumont C.J. held that it was an established principle that where an authority which purports to pass an order is acting without jurisdiction, the purported order is a mere nullity, as Sir Lawrence Jenkins puts it, it is mere waste paper; and it is not necessary for anybody, who objects to that order, to apply to set it aside. It is held that he can rely on its invalidity when it is set up against him, although he has not taken steps to set it aside, and that such an

order without jurisdiction is a nullity and it cannot give rise to any right whatever, not even to a right of appeal and that such an invalid purported order does not, therefore, create a bar under the Bombay Revenue Jurisdiction Act. The observation of the Full Bench of the Bombay High Court in Abdullamiyan Abdulrehman's case (supra) has been quoted with approval by the Full Bench of this Court in Ahmedabad Cotton Mfg. Co. Ltd v. Union of India and Ors. 1977 (18) Guj.L.R. 714 where the Full Bench was constituted to consider the question whether an aggrieved party can move this Court under Article 226 of the Constitution without availing of the alternative remedy as provided under the 42nd Amendment to the Constitution of India.

17. In Ramrao Jankiram Kadam Vs. State of Bombay, a question arose whether the suit to declare the purchase made by the Government of the defaulter's property at a nominal bid of Re. 1/- could be said to be a sale by public auction within the terms of Section 167 of the Bombay Land Revenue Code which passes no title to the Government and, therefore, void being barred u/s 11 of the Bombay Revenue Jurisdiction Act. The Supreme Court in that connection ruled as under:

(35) Nor is there any scope on the facts of the present case to attract the application of Section 11. The section is based on the principle that a party must exhaust the remedies provided by the Act before he can seek the assistance of the Civil Court in respect of a claim against the Government. It therefore posits three matters before its protection could be invoked: (1) There must be an act or omission of a revenue officer which gives rise to a claim against the Government; (2) the Act must provide for appeals against the said act or omission and (3) lastly, the party should have failed to avail himself of the remedy by way of appeal to obtain redress for his grievance. The only "act" of which, on the facts, the appellant could be said to complain would be the direction by the Collector authorising the Mahalkari to offer the nominal bid of Re. 1/- and purchases the property....

The Supreme Court held that there was no bar u/s 11 since such a sale is void and no title would pass to the Government by reason of such a sale and in any case there was no decision or order from which the plaintiff could have competently preferred an appeal.

18. In the State of Punjab Vs. Jagdip Singh and Others, , it has been held that where a Government servant has no right to a post or to a particular status, though an authority under the Government acting beyond its competence had purported to give that person a status which it was not entitled to give, he will not in law be deemed to have been validly appointed to the post or given the particular status, and, therefore, he cannot claim protection under Article 311(2) of the Constitution. The question arose in the context of the respondents having been appointed as Officiating Tahsildars in the erstwhile State of Pepsu. By a notification made by the Financial Commissioner they were confirmed as Tahsildars with immediate effect. As vacant posts were not available, the Raj

Pramukh of Pepsu sanctioned the creation of seven supernumerary posts, of Tahsildars to provide for the respondents. The State of Pepsu merged with the State of Punjab on November 1, 1955. The Punjab Government reconsidered the matter and by a subsequent notification of October 31, 1957, the respondents were disconfirmed. This action of disconfirmation was challenged on two grounds, namely (i) it amounted to reduction in rank without compliance with the requirements of Article 311(2), and (ii) the status of the respondents could not have been disturbed in view of the guarantee of the service conditions in the States Reorganisation Act, 1956. Mudholkar J., speaking for the Court first addressed himself to the question whether the order of the Financial Commissioner had any legal foundation under the Punjab Tehsildari Rules as applicable in the former State of Pepsu and held that the order was wholly void. The Court thereafter considered as to what is the effect of cancelling an order which is void ab initio by the Government on its own. It was held:

(8) The question then is as to the effect of a void order of confirmation. When an order is void on the ground that the authority which made it had no power to make it, it cannot give rise to any legal rights, and as suggested by the learned Advocate-General any person could have challenged the status of the respondents as Tahsildars by instituting proceedings for the issue of a writ of quo warranto under Article 226 of the Constitution. Had such proceedings been taken it would not have been possible for the respondents to justify their status as permanent Tahsildars and the High Court would have issued a writ of quo warranto depriving the respondents of their status as permanent Tahsildars. Now, where the Government itself realises that an order made by an authority under the Government is void, is it powerless to do anything in the matter? Is it bound to give effect to a void order and treat as confirmed Tahsildars persons who have no legal right to be treated as confirmed Tahsildars? Is it not open to the Government to treat the confirmation, as void and notify the, persons affected and the public in general of the fact of its having done so by issuing a notification of the kind it made on October 31, 1957? In our opinion where a Government servant has no right to a post or to a particular status, though an authority under the Government acting beyond its competence had purported to give that person a status which it was not entitled to give he will not in law be deemed to have been validly appointed to the post or given the particular status. No doubt, the Government has issued the expression "de-confirming" in its Notification which may be susceptible of the meaning that it purported to undo an act which was therefore valid. We must, however, interpret the expression in the light of actual facts which led up to the notification. These facts clearly show that the so called confirmation by the Financial Commissioner of Papsu was no confirmation at all and was thus invalid. In view of this, the notification of October 31, 1957 could be interpreted to mean that the Government did not accept the validity of the confirmation of the respondents and other persons who were confirmed as Tahsildars by the Financial Commissioner, Pepsu.

(9). ...We have already held that the respondents could not be validly confirmed

as Tehsildars by the Financial Commissioner of Pepsu. Therefore even though upon their allocation to the State of Punjab as from November 1, 1956, they were shown as confirmed Tahsildars they could not in law be regarded as holding that status. Legally their status was only that of officiating Tahsildars. The notification in question in effect recognises only this as their status and cannot be said to have the effect of reducing them in rank by reason merely of correcting an earlier error. Article 311(2) does not, therefore, come into the picture at all.

19. The question whether the principle of audi alterant partem can be invoked and applied by persons who appear to have been affected by an order which is a void order has been considered by the Division Bench "of Himachal Pradesh High Court in Shri D.K. Bhatnagar and Anr. v. The State of Himachal Pradesh 1979 (2) SLR 693. The question of application of the principle arose in the context where promotion was granted contrary to the provisions contained in the Himachal Pradesh Territorial Council Secretariat Subordinate Services (Class III and IV) Recruitment, Promotion and Conditions of Service Rules and Regulations, 1958 which provided seniority-cum-merit as the basis for promotion-while the promotion was granted by adopting the formula of merit-cum-seniority. The Division Bench of Himachal Pradesh High Court, speaking through T.U. Mehta C.J. (as he then was) found that the promotion was illegal and void ab initio. The question further arose whether disturbing that promotion the employees affected should be given an opportunity of being-heard the Division Bench ruled:

57. It is apparent by reference to the above cited cases that the rule of natural justice is applicable only in those cases wherein the person adversely affected by the order of reversion has a right to hold the higher post from which he is reverted. If no such right exists in this favour, and if his promotion to the higher post is found to be void ab initio then the ratio of the decisions above cited as regards the applicability of the principle of natural justice cannot be invoked.... Now, speaking of the facts of the present case, we find that the impugned orders found at Annexure H to O have been passed on the view of the State government that the previous confirmation of the services of the petitioners as Assistants was void ab initio as it was against the rules. If this view of the State Government is found to be correct, then the question is how far the petitioners are prejudiced for want of show cause notice before these orders were issued. There was nothing which the petitioners could have urged as the time when the impugned orders Annexure H to O were passed and which they could not have urged in this writ petition to show that these orders were not void ab initio

20. In view of this settled legal position, we are of the opinion that the appellants before us who are the apparently aggrieved persons cannot invoke the principle of audi alteram partem, as they have not acquired any legal right or status under the aforesaid "five orders of admission. It cannot be gainsaid that the said orders were without any jurisdiction or authority and in flagrant violation of the directives issued by the State Government. The reasons of our view are obvious.

The aforesaid five orders by which the appellants of all these appeals and the applicants of various civil applications praying for being joined as parties in the said appeals were directed to be admitted to different institutes were issued by the Director of education in blatant contravention of the discretions contained in the resolution of the State Government of April 25, 1980 regulating and controlling the manner and method of admission to these different institutes. In the said resolution, it was clearly provided that no relaxation in the said directions could be granted by the institutes or any other authority without the previous approval of the State Government. The Director of Education, therefore, could not have directed the institutes to grant admissions to these appellants and similarly situated sponsored candidates without consideration of their merits. It is not clear from the said five orders whether the candidates specified and named therein had obtained the minimum qualifying marks prescribed under the aforesaid resolution of the Government regulating admissions to those different institutes. No justification has been made in these orders as to why such orders were required to be made. The said orders were made 2 to 3 months after the opening of the term in these different institutes. The Director of Education was not the competent authority to give admissions to these different institutes. He had no power or authority under any rules or regulations to give such directions and that too for admission of a few candidates named in the said orders. No affidavit has been filed on behalf of the State Government either before the learned Single Judge or before us to support the aforesaid five orders granting admission to the appellants and other sponsored candidates as none could have been conceivably filed in support thereof. At the first appearance in response to the notice issued to the State Government, the learned Government Pleader conceded on behalf of the State Government that the State Government has withdrawn those five orders and, therefore, it can be inferred without fear of contradictions that the said orders of admission were not sustainable at all either on facts or in law. In any view of the matter, to issue such orders for admission of named and specified persons two months or so after the opening of the first term without inviting applications in that behalf of other such candidates who must have been included in the waiting list for admission to these different institutes, was clearly violative of Articles 14 and 16 of the Constitution and, therefore void ab initio.

21. In *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, , Bhagwati J, speaking for the Court, held:

(12). ...It must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licenses or granting other forms of largess, the Government cannot act arbitrarily at its sweet will and like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norm which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largess including award of jobs, contracts, quotas, licenses etc. must be confined and structured by rational, relevant and

non-discriminatory standard or norm and if the Government depart from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory.

22. We do not think that the five orders of the Director of Education directing admission to the appellants and other sponsored candidates can be said to have been made on any rational basis without violence to the language. As a matter of fact no attempt has been made by the State Government to support these orders. If these orders were irrational and arbitrary and discriminated between persons similarly situated, or for that matter they were made to extend preference and protection to a number of candidates without consideration of merits against candidates who have been included in the waiting list, like respondent No. 3 and other such meritorious candidates who were not successful in obtaining admission in the different institutes, we do not think that such orders can be held to be anything but arbitrary and patently discriminatory and therefore void ab initio. If that, is so, and if the Government realised that the orders were bad in law and void ab initio, it could certainly rectify the situation and withdraw and/or cancel the orders. If, therefore, the orders which were void ab initio have been withdrawn by the Government after releasing the mistake, the Director of Education had committed, we do not think that the persons who have obtained the so called benefit under void and illegal orders can successfully invoke and press into service the principle of *audi alteram partem*. We are, therefore of the opinion that the impugned order of November 6, 1980 withdrawing the aforesaid five orders of admission and consequently withdrawing the admissions granted to the appellants and other sponsored candidates, cannot be assailed on the ground of it being violative of the principles of natural justice and fair play.

23. The first question, therefore, which arises before us is: what is the effect of the order the Supreme Court dismissing the writ petition of about 16 such sponsored candidates who got the admission under those five void orders. The said candidates had preferred the writ petition before the Supreme Court challenging the impugned order of November 6, 1980 solely on the ground of it being violative of the principles of natural justice and fair play. The Supreme Court had issued notice to the State Government. It is also common ground that the respondent No. 3 herein and certain other trusts-the petitioners in Special Civil Application No. 2930/80 before the learned Single Judge had made an application in the said writ petition to be joined as parties which was ultimately not considered since the writ petition was dismissed. The controversy before us is, whether the order dismissing the writ petition of those 16 sponsored candidates aggrieved by the impugned order withdrawing the aforesaid live orders was made by the Supreme Court on merits or in limine.

24. The learned Advocate for the appellants in Letters Patent Appeal No. 209/80

has invited our attention to the decision of Karnataka High Court in *Basappa and Ors. v. The Textile Commissioner Bombay* AIR 1980 Kar 130 where one of the questions with which the learned Single Judge of the Karnataka High Court was concerned was, whether the order of dismissal of a writ petition preferred in the Supreme Court under Article 32 of the Constitution will operate as a *res judicata* to the writ petition filed in the High Court against an order of the Joint Textile Commissioner of the Government of India under Clause 20 of the Cotton Textile (Control) Order, 1948 issuing various directions regulating the production of cotton textiles by different manufacturers in the country. It appears that the said directions were challenged before the Supreme Court by a writ petition under Article 32 of the Constitution. The said petition was dismissed at the preliminary hearing stage and the order of dismissal was made in the following terms:

Upon hearing counsel, the Court dismissed the writ petition.

A preliminary objection was raised before the High Court when the same order of the Joint Textile Commissioner was sought to be challenged in a petition under Article 226 of the Constitution that the order of the Supreme Court operated as *res judicata*. Negating this contention, the learned Single Judge of the Karnataka High Court held:

From this order it appears to me, the Supreme Court dismissed the said writ petition on the stand taken by the Central Government in para 3 of its counter-affidavit and has not examined the validity of the impugned directions on merits. As the petitioners were not parties to the above case, the decision of the Supreme Court thereto cannot bind them and does not operate as *res judicata*. Assuming, that the petitioners were parties even then as ruled by the Supreme Court in *Daryao and Others Vs. The State of U.P. and Others*, , the dismissal of that writ petition at the preliminary hearing stage in which reasons are not given, would not operate as *res judicata*....

Relying on this decision, the learned Advocate for the appellants urged that inasmuch as the order dismissing the writ petition No. 5872/ 80 was made in similar terms it cannot operate as *res judicata*. The crux of the problem is whether the order of Supreme Court dismissing the writ petition No. 5872/80 preferred by some sponsored candidates who got the admission under the aforesaid five orders which were ultimately withdrawn and cancelled by the State Government, was on merits and consequently whether the appellants before us who admittedly were not parties to that petition and who are similarly situated in the sense (hat they have got admission under the aforesaid five orders could be bound by that decision of the Supreme Court.

25. So far as the second question is concerned, we do not think that it can be urged successfully that inasmuch as they were not parties to that petition No. 5872/80 it would not bind them. In *Makhanlal Waza and Others Vs. State of Jammu and Kashmir and Others*, one of the questions which arose was whether inspite of the earlier decision of the Supreme Court in *Trilaki Nath v. State of*

Jammu and Kashmir 1969 (1) SCR 103 by which the State policy of distributing the vacancies community wise declared to be bad in law and contrary to the constitutional guarantee (Reproduction from under Articles 16, if the State Government had continued some of the officers who were affected by the said decision in Trilaki Nath's case (supra) could urge that that decision was not binding to them since they were not parties to that decision. The Court held that the continuation of the respondents in Makhanlal's case (supra) was contrary to the decision of Trilaki Nath's case (supra) which merely did not declare the promotion granted to the respondents in the writ petition filed at the previous stage as unconstitutional not also laid down in clear and unequivocal terms that the distribution of appointments, posts or promotions made in implementation of the communal policy was contrary to the Constitutional guarantee of Article 16, and the law so declared by the Court was binding on the respondent-State and its officers and they were bound to follow it whether a majority of the present respondents were parties or not to the previous petition.

26. Therefore, the only question which remains before us is whether the order of the Supreme Court dismissing the writ petition No. 5872/80 was on merits or not. We do not feel any doubt in our mind that the said order dismissing the writ petition was made on merits. The reasons for our view are obvious. In the first place, the order was made after issuing notice to the State, Secondly, in the affidavit filed on behalf of respondent No. 3 by her father and guardian what actually transpired at the hearing of the said writ petition is set out in details. It is do doubt true that the deponent of the said affidavit was not present in the Court when the hearing took place in the said writ petition. But the affidavit which he has filed in the Court is on the basis of the information which he received from the letter of his counsel Mr. K.H. Kaji a copy of which letter is also annexed to the said affidavit. In the affidavit of Shri Ramanlal Girdharlal Trivedi, the father and guardian of respondent No. 3, it has been, inter alia, stated as under:

1. I say that 1 had learnt that Miss Gayatrikumari Narmadashanker Purani and 16 others had filed a writ petition under Article 32 of the Constitution of India before the Supreme Court of India, being Writ Petition No. 5872 of 1980, for the identical relief's as claimed by the petitioner-appellants herein, namely to the effect that the order of cancellation of admission to the Primary Teachers Training Colleges passed by the State Government pursuant to the orders passed by the High Court was bad in law. 1 hid filed an application before the Supreme Court for intervention and for joining party respondents to the said writ petition. I say that the said writ petition had come up for hearing before the Bench consisting of Hon'ble Mr. Justice Bhagwati and Mr. Justice Baharul Islam. After hearing our advocate, the said writ petition was rejected by the Supreme Court on merits. An application for withdrawal was made by the petitioners. However, the Court did not grant the said application and rejected the writ petition on merits. The Supreme Court was pointed out by our advocate that similar such petitions were pending before the High Court of Gujarat and that it would be in the fitness of

things that the Supreme Court finally determines the merits of the matter. Our advocate Shri C. H. Kaji had addressed a letter to our advocate herein respect of the writ petition No. 5872 of 1980. Annexed hereto and marked Exh. 1 is a copy of the said letter.

In the copy of the letter annexed to the said affidavit, it has been inter alia, stated as under:

...The arguments went on for about an hour and after hearing the matter fully on merits, the Court dismissed the writ petition. In the course of arguments, the court observed that it was shocking and surprising that the State Government had by its earlier orders admitted 307 students to various Institutions in P.T.C. Courses by name without any principle or policy or criteria. Moreover, addresses of some of the students had been described as C/o M.L.As. They further observed that it was open to the Government to cancel its earlier orders which were obviously unjustified. The petitioners' Counsel Shri Mrudul requested the Court to call upon the State Government to file its affidavit as to why the admissions were cancelled by subsequent orders. The Court did not see the necessity of adjoining the matter as the State had not chosen to file an affidavit though notice was issued to the State, However, the State was represented by Shri M.N. Shroff at the hearing and the Court asked him as to what was the stand of the State Government. It was pointed out by Mr. Shroff that the said Government orders granting admissions were a mistake and, therefore, the State cancelled the said orders of admission. It was further pleaded by Shri Mrudul for the petitioners that as the students admitted, who were petitioners had already put in one term and had appeared for the examination, their admissions should not be disturbed till the end of the year. The Court, however, observed that those students were beneficiaries of an illegal order issued by the State admitting them and, therefore, if that order is cancelled by the State, nothing can be done and they must come for admission in due course along with other students on merits next year. The Court also pointed out that the orders of the State Government had kept out large number of students who were more deserving of admission on merits and, therefore, there was no justice in allowing those students to suffer at the cost of the students admitted under the wrong orders of the State....

After full arguments, the petitioners' Counsel requested the Court that he be allowed to withdraw the writ petition. The said request was opposed by me and it was pointed out that some matters were pending in the Gujarat High Court on the same point and if the writ petition was allowed to be withdrawn, the students would continue the said proceedings in the said High Court and reagitate the issue about the validity of the State Government's order cancelling admissions. The Court agreed with my submissions" and, therefore, dismissed the writ petition in merits and did not allow the petitioner's counsel to withdraw the same.

As against this affidavit of the guardian of respondent No. 3 in Letters Patent Appeal No. 209/80, and the contents of the letter of her Advocate Mr. K.H. Kaji in support of that affidavit, no affidavit in rejoinder controverting the contents of

the letter of Mr. Kaji or for that matter stating as to what actually transpired before the Supreme Court, has been filed on behalf of the appellants or any of the sponsored candidates who have made applications in these appeal for being joined as parties though the learned Advocates for all the appellants had sought time to ascertain from the counsel for the petitioners of writ petition No. 5872/80 before the Supreme Court as to what actually transpired in the Court on that day. The time was accordingly granted to them and inspite of obtaining the time, none of the appellants have thought fit to file any affidavit in reply controverting the say of respondent No. 3 in Letters Patent Appeal No. 209/80 in the affidavit of her guardian nor has any material been placed on the record before us to shown that what had been stated in the affidavit in reply on behalf of respondent No. 3 as informed by her counsel Mr. Kaji was not the correct state of affairs. We, therefore, do not feel any doubt in our mind that having repaid to these facts, the order dismissing the writ petition is an order on merits. If the order of the Supreme Court dismissing the writ petition was on merits, the conclusion is inescapable that would bind the appellants and the applicants who are amongst the sponsored "candidates under the aforesaid five orders and, therefore, they are not entitled to reagitate the question and have a second innings before us.

27. The third question as to whether we should remand the matter or not would not survive in the view which we are taking in this matter. Mr. R.N. Shah, learned Advocate for the appellants of Letters Patent Appeal No. 209/80 urged that we should consider the important question whether the appellants were entitled to move this Court by Special Civil Application challenging the impugned order under Article 226 of the Constitution and: whether the learned Single Judge was right in his view in holding that such an application was not competent in view of his earlier orders of October 23 and 24 of 1980 permitting the "withdrawal of the petitions filed by the petitioners being Special Civil Applications No. 2939, 2940 and 2982 of 1980 since that order was a judicial order and the parties affected by the said order including the strangers who may not be parties to those petitions, can only prefer an appeal. It is not necessary for us to go into this technical question since we have addressed ourselves to the main question as to whether the impugned order can "re assailed on the principle of breach of audi alterant pattern and what is the effect of the Supreme Court's decision.

28. The learned Advocates for the appellants at the end of this judgment appealed to us that we must adopt the course indicated by Krishna Iyer J. in State of Kerala and Anr. v. Dr. K.U Gopalakrishnan and Ors. AIR 1980 SC 1230 , paragraphs 35 and 36. On the facts and in the circumstances of Dr. Gopalakrishnan's case (supra), Krishna Iyer J. directed the State of Kerala and the principal of Medical College, Trivandrum who was the convener of the selection committee as well as two Universities concerned to admit in the post-graduate Ophthalmology course Dr. Naomi and Dr. Gopalakrishnan for the academic year concerned though the Court found that their original admissions were not valid. But while giving directions, the Court made it clear that the directions which they have granted were restricted to the post-graduate course

of Ophthalmology since that was the only branch with which the Court was concerned in that case and no other department or course was sought to be upset. On the facts of the case therefore they allowed the two students to be admitted to the post-graduate course and continue their terms.

29. Similarly the Punjab and Haryana High Court in *The Kurukshetra University and Others Vs. Rural College of Education, Kaithal*, directed that allowance of the appeal would inevitably cause untold hardship to the students admitted to the B.Ed. Class who would be the unfortunate and innocent victims of the controversy between the University and the respondent-college. In that case, the learned Advocate for the University appearing before the Punjab & Haryana High Court conceded that in case the respondent-college would undertake to unreservedly follow the guideline issued by the University, the University would not wish to penalise nearly hundred students who had joined the B.Ed. class and also withdraw the disaffiliation of the College. On behalf of the respondent-college concerned it was assured that the college would abide by the said guideline. In that view it was directed that the students of the B. Ed. class would be duly registered by the University and further that on furnishing of the necessary undertaking by the respondent-college to the University authorities, disaffiliation thereof would be cancelled.

30. We do not think that on the facts of this case we would be justified in adopting the course preferred by the Supreme Court or Punjab & Haryana High Court for different reasons. As far as the case of Dr. Gopalakrishnan was concerned, it was a question of only two students at the post-graduate level and it was only on the interpretation of the admission guideline that the admissions of those two students were found to be invalid. That is not the situation before us. As far as Punjab & Haryana High Court was concerned, the unfortunate situation had arisen as the B. Ed. college concerned violated the guideline prescribed by the University and, therefore, on the concession made on behalf of the University that in case of the undertaking of the college concerned to abide by the guideline, the University would not insist for cancelling the admissions of the students who were admitted contrary to what was prescribed in the guideline. That situation is also not present in the instant case. The candidates who have been admitted under the aforesaid five orders have been admitted by the Director of Education contrary to the policy of the State Government as contained in the Government resolution without regard to the merits and in preference to the candidates included in the waiting list of the institutes. The orders by which these students were admitted have been withdrawn by the State Government, and the Supreme Court had applied its mind to the situation arising as a result of such bad orders and, therefore, refused to interfere or disturb the impugned order.

31. In these circumstances, inspite of our full sympathy for the unfortunate students concerned in this controversy, we cannot adopt either of the courses preferred by the Supreme Court or by the Full Bench of the Punjab and Haryana

High Court.

32. The result is that these letters patent appeals fail and they are Dismissed with no order as to costs. Rules issued on the civil applications are also discharged because the main appeals have been decided on merits and also particularly because the letters patent appeals in which these applications have been made have been preferred and allowed to be filed in representative capacity under Order 1 Rule 8 of the Civil Procedure Code. There should be no order as to costs in the civil applications.

33. The learned Advocates for the appellants of all these appeals make an oral application for leave to appeal to the Supreme Court under Article 133(1) of the Constitution of India. We do not think that the leave as prayed for is justified, inasmuch as there is no substantial question of law of general public importance which, in our opinion, is required to be decided by the Supreme Court. The oral application is, therefore, rejected.

34. On the learned Advoeates for the appellants in all these appeals stating that they will not press the stay order under which their impugned admissions are continued as a justification for claiming any concession or any right, we direct that this order will not be implemented for a period of two weeks from today so as to enable the appellants to move the Supreme Court for obtaining special leave to appeal and obtaining appropriate stay orders in those appeals. It is clarified that this stay order will not apply to the cases of those persons who were petitioners in writ petition No. 5872/80 disposed of by the Supreme Court.