A.F.R.
Reserved on 10.03.2021
Delivered on 14.06.2021

1. Case :- SERVICE SINGLE No. - 5995 of 2018

Petitioner :- Subhash Kumar And 78 Ors.
Respondent :- State Of U.P. Thru Prin.Secy.Seconadry Edu.Civil Sectt.&Ors.
Counsel for Petitioner :- Laltaprasad Misra,Hari Krishna Srivastava,Prafulla Tiwari,Surendra Kumar Tripathi
Counsel for Respondent :- C.S.C.

CONNECTED WITH

2. Case :- SERVICE SINGLE No. - 9389 of 2018

Petitioner :- Ramesh Babu Pal And 98 Ors.
Respondent :- State Of U.P.Thru Prin.Secy.Secondary Edu.Civil Sectt.& Ors.
Counsel for Petitioner :- Hari Krishna Srivastava,Akber Ahmad,Dinesh Kumar,Gaurav Mehrotra,Pawan Bhardwaj,Pramod Bhardwaj,Rani Singh,Surya Narayan Mishra
Counsel for Respondent :- C.S.C.

WITH

3. Case :- SERVICE SINGLE No. - 22948 of 2019

Petitioner :- Vikas Sinha & Ors.
Respondent :- State Of U.P. Thru. Prin. Secy., Secondary Education & Ors.
Counsel for Petitioner :- Hari Prasad Gupta
Counsel for Respondent :- C.S.C.

WITH

4. Case :- SERVICE SINGLE No. - 24443 of 2020

Petitioner :- Arvind Kumar & Ors.
Respondent :- State Of U.P.Thru.Prin.Secy.Secondary Education & Ors.
Counsel for Petitioner :- Hari Krishna Srivastava,Surya Narayan Mishra
Counsel for Respondent :- C.S.C.

WITH

5. Case :- SERVICE SINGLE No. - 13641 of 2018

Petitioner :- Aseem Shukla And Ors.
Respondent :- State Of U.P. Thru. Prin. Secy. Secondary Edu. And Ors.
Counsel for Petitioner :- Bal Keshwar Srivastava,Hari Prasad Gupta
Counsel for Respondent :- C.S.C.

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Hon'ble Rajesh Singh Chauhan,J.

1. Heard Sri Prashant Chandra, Sri J.N. Mathur, learned Senior Advocates assisted by Sri H.K.Srivastava and Sri Akbar Ahmad appearing on behalf of the petitioners in Writ Petition No.9389 (S/S) of 2018, Dr. L.P. Mishra, Advocate assisted by Sri Mukund Madhav Asthana in Writ Petition No.5995 (S/S) of 2018, Sri Hari Prasad Gupta, learned counsel for the petitioners in Writ Petition No.22948 (S/S) of 2019 and Writ Petition No.13641 (S/S) of 2018 and Sri Ramesh Kumar Singh, learned Additional Advocate General of U.P. assisted by Sri Pratyush Tripathi, learned Standing Counsel for the State Respondents.

2. Learned Standing Counsel has submitted that the counter affidavit of the State filed in Writ Petition No.13641 (S/S) of 2018 may be read as counter affidavit in Writ Petition No.22948 (S/S) of 2019. Likewise, the counter affidavit of the State filed in Writ Petition No.9389 (S/S) of 2018 may be read as counter affidavit in Writ Petition No.24443 (S/S) of 2020.

3. Since the rejoinder affidavits have also been filed in those writ petitions and parties are agreeable that those affidavits may be treated sufficient for all the writ petitions, therefore, those

affidavits shall be treated sufficient for disposal of the bunch of these writ petitions.

4. This is the bunch of writ petitions having similar question of fact and law, therefore, with the consent of learned counsels for the respective parties of the writ petitions, these writ petitions are being decided by a common judgment and order.

5. In all the writ petitions, there are mainly two prayers; (i) quashing of the Government Order dated 13.02.2018 issued by the Secretary, Government of U.P. , Department of Education (8) Anubhag, addressing to the Director of Education (Secondary), U.P., cancelling the earlier Government Order dated 23.12.2016 whereby some Educational Institutions had been provincialised; (ii) commanding the Competent Authority to accord necessary approval under sub-para (4) of paragraph-4 of the Government Order dated 23.12.2016 and pay regular salary to the petitioners along with arrears with effect from 23.12.2016 with interest.

6. Notably, none of the writ petition has been filed by the Educational Institution which had been provincialised vide Government Order dated 23.12.2016, which has been cancelled by the impugned Government Order dated 13.02.2018. Actually, these writ petitions have been filed by the teachers and non-teaching staff, e.g. Class-II and Class IV employees, who have allegedly been teaching and serving in those Institutions taking ground that the impugned order dated 13.02.2018 is directly affecting them as despite those teachers having imparted education to the students and others have been serving in those Institutions, they are not being paid salary etc. with effect from 23.12.2016, the date when those Institutions have been

provincialised by the State Government after taking over the possession of all the properties of such Institutions allegedly as per law. Further, as per learned counsel for the petitioners that since all the assets and liabilities have been taken over by the State Government so the Committee of Management of the Institutions or Institutions alone may not assail the impugned Government Order dated 13.02.2018.

7. The relevant facts, briefly, are being considered here-in-below:-

8. On 23.12.2016, the State Government issued a Government Order deciding to take over seven Educational Institutions, out of those seven Institutions, teachers and non-teaching staff of five Institutions have filed writ petitions which are before this Court for adjudication. The properties including the assets and liabilities of these Institutions have been acquired by the State Government for converting those Institutions from 'Un-aided Management Institutions' to the Government Institutions.

9. The aforesaid decision has been taken and approved by the then Chief Minister of the State of U.P. on 08.03.2017 for taking over Self-Finance Institutions by the State Government. This exercise has been allegedly carried out in terms of Uttar Pradesh Provincialised National Institution (Absorption of Employees in the Government Service) Rules, 1992 (here-in-after referred to as the 'Absorption of Employees Rules, 1992').

10. After the aforesaid decision being taken, required exercise is said to have been carried out e.g. physical possession of the properties of the Institutions including the assets and liabilities as

well as administrative control has been taken over by the legal authority i.e. the District Inspector of Schools (here-in-after referred to as the 'D.I.O.S.') concerned. Thereafter, a certificate to this effect has been issued by the Manager/ Principal of the Institution and the D.I.O.S. concerned, vide which the Management of the Institution has been handed over to the Administrator appointed by the State Government. Whereafter a transfer deed was also executed.

11. It has been submitted that the teachers and other non-teaching staff were appointed in the Institutions in question by following due procedure of law and were imparting education to the students and were serving even after the aforesaid exercise of transfer of the Institutions to the State Government is carried out. However, those teachers and other non-teaching staff are not being paid salary with effect from 23.12.2016 when the Government Order was issued taking over the Institutions by the State Government for the reason that the necessary approval from the Finance Department was to be accorded under the Government Order dated 23.12.2016. However, such approval was not accorded rather the Government Order dated 23.12.2016 has been cancelled by the subsequent Government Order dated 13.2.2018.

12. Learned counsels for the petitioners have submitted that the Institutions in question have been acquired by the State Government strictly in accordance to law and after completing all the required exercise the transfer deed was executed so the impugned order dated 13.02.2018 withdrawing the earlier Government Order dated 23.12.2016 is absolutely illegal and

malafide exercise of powers and without having any cogent reasons to that effect.

13. Learned counsels for the petitioners have further submitted that it is the government which functions irrespective of the political fitment to which the ruling party for the time being might belong. A decision taken by the Cabinet of a previous government, as approved by the Chief Minister of the time governing the affairs of the State, cannot be overturned by a subsequent government belonging to another political fitment. The decision to provincialise the educational Institutions in which the petitioners have been working after their appointment duly made has been cancelled after change of the government in the year 2018, the few months after the Government Order dated 23.12.2016 provincialising the petitioners' Institutions were acted upon and implemented by taking over the assets, properties, both movable and immovable and the Management at a stage when the landed properties were duly mutated in the name of State Government through concerned D.I.O.S. The overturning of conscious decision so taken by the State Government and having duly been acted upon ultimately resulting in the final taking over of the assets and liabilities of educational Institutions and also after taking over of the management of these Institutions, management and control by vesting the same in the State Government cannot at all be set at naught subsequently. In this regard, it has been further submitted that a purposeful and objective imparting of education is the very edifice and back-bone of a developing or even a developed society and a decision taken in public interest for imparting a quality education in some Institutions cannot at all be termed as a step contrary to public

interest, rather, such steps are in furtherance of the public policy of a welfare State.

14. Further, the recital in the impugned Government Order dated 13.02.2018 has been given vide paragraph 2 (1) that there is no provision under the U.P. Intermediate Education Act, 1921 in regard to provincialisation of non-governmental Intermediate Colleges not receiving grant-in-aid nor there is any such policy prevalent in the State of U.P. nor there is any statutory rules providing for such a contingency of provinciliasation suffers from extreme arbitrariness and non-application of mind inasmuch as there has been a constant policy prevalent in the State of U.P. for provincialisation of non-aided non-governmental educational Institutions as government colleges and there are statutory rules framed in that regard in exercise of power under Article 309 of the Constitution of India known as Uttar Pradesh Provincialised National Institution (Absorption of Employees in the Government Service) Rules, 1992. Undisputedly, these rules having been framed under Article 309 of the Constitution of India were given effect to with effect from 22.07.1992 when they were published in the official gazette. This necessarily infers that there has been a policy prevalent in the State of U.P. for provincialisation of the Educational Institutions as Government Institutions.

15. Further, once rules under Article 309 of the Constitution of India have been framed laying down the conditions for exercise of power for an action on the part of the Executive Authorities of the State, it cannot at all be said, as stated in the impugned order vide paragraph-2 (2) that the proceedings for provincialisation of the petitioners' colleges was not taken after prescribing any

policy nor was transparent. In this regard, the attention of this Court is invited to the rigorous conditions put in the government order to the effect that the colleges should not have any debt liability, that there should be no encumbrance on the college properties, that there should not be any dues and that there should be no dispute in regard to the Management . Therefore, it cannot at all be said reasonably that the action of taking over/ provincialisation of the colleges was not transparent.

16. Learned counsels for the petitioners have vehemently submitted that despite the impugned exercise having taken at a stage when the provincialisation was fully given effect to by taking over the movable and immovable properties including cash and fee etc. by the State Government and at a stage when even the Management of the colleges stood transferred and the transfer of immovable properties was duly affected in the village revenue records, the consequential impugned exercise of non-payment of salary to the petitioners by the State Government is violative of the fundamental right to life guaranteed to them under Article 21 of the Constitution of India and all the petitioners have been working in their respective capacities since after taking over the colleges and they have been subjected to a 'Begar' as well which is again prohibited under the Constitutional Scheme of this great Nation.

17. Learned counsels for the petitioners have cited the dictum of Hon'ble Supreme Court in re: ***State of Tamil Nadu and others vs. K. Shyam Sunder and others reported in (2011) 8 SCC 737*** by submitting that the action taken by a previous government for betterment of the education in the Educational Institutions, where a large number of students have been taking education, cannot be

and should not be nullified so arbitrary. They have mainly referred paras-31 to 35 of the aforesaid judgment, which are being reproduced here-in-below:-

> *"31. The Government has to rise above the nexus of vested interests and nepotism and eschew window-dressing.*
>
> *"36..... the principles of governance have to be tested on the touchstone of justice, equity, fair play and if a decision is not based on justice, equity and fair play and has taken into consideration other matters, though on the face of it, the decision may look legitimate but as a matter of fact, the reasons are not based on values but to achieve popular accolade, that decision cannot be allowed to operate". (Vide: Onkar Lal Bajaj v. Union of India & Anr., AIR 2003 SC 2562).*
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> *32. In State of Karnataka & Anr. v. All India Manufacturers Organisation & Ors, this Court examined under what circumstances the government should revoke a decision taken by an earlier Government. The Court held that an instrumentality of the State cannot have a case to plead contrary from that of the State and the policy in respect of a particular project adopted by the State Government should not be changed with the change of the government. The Court further held as under:- (SCC p.706, para-59)*
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> *"59.....It is trite law that when one of the contracting parties is 'State' within the meaning of Article 12 of the Constitution, it does not cease to enjoy the character of 'State' and, therefore, it is subjected to all the obligations that 'State' has under the Constitution. When the State's acts of omission or commission are tainted with extreme arbitrariness and with mala fides, it is certainly subject to interference by the Constitutional Courts....."*
>
> *(Emphasis added)*
>
> *33. While deciding the said case, reliance had been placed by the Court on its earlier judgments in State of U.P. & Anr. v. Johri Mal and State of Haryana v. State of Punjab & Anr.. In the former, this Court held that the panel of District Government Counsel should not be changed only on the ground that the panel had been prepared by the earlier Government. In the latter case, while dealing with the river water-sharing dispute between two States, the Court observed thus: (SCC p.538, para-16)*
>
> *"16.....in the matter of governance of a State or in the matter of execution of a decision taken by a previous Government, on the basis of a consensus arrived at, which does not involve any political philosophy, the succeeding Government must be held duty-bound to continue and*

> *carry on the unfinished job rather than putting a stop to the same."*
>
> *34. In M.I. Builders (P) Ltd. v. V. Radhey Shyam Sahu & Ors., while dealing with a similar issue, this Court held that Mahapalika being a continuing body can be estopped from changing its stand in a given case, but where, after holding enquiry, it came to the conclusion that action was not in conformity with law, there cannot be estoppel against the Mahapalika.*
>
> *35. Thus, it is clear from the above, that unless it is found that act done by the authority earlier in existence is either contrary to statutory provisions, is unreasonable, or is against public interest, the State should not change its stand merely because the other political party has come into power. Political agenda of an individual or a political party should not be subversive of rule of law."*

18. Therefore, on the basis of the aforesaid judgment, learned counsels for the petitioners have reiterated that the law of land is that the decision taken by the previous government cannot be changed by the subsequent government which is under legal obligation to complete decision so taken or announced by the previous government.

19. Learned counsels for the petitioners have further submitted that in an identical case decided by Hon'ble Supreme Court vide judgment and order dated ***February 25, 2015 in the case of State of Madhya Pradesh and others vs. Ram Babu Tyagi and others rendered in Civil Appeal No.2329 of 2010 and other connected appeals,*** wherein the identical controversy was involved and the direction issued by the Hon'ble Madhya Pradesh High Court directing the State Government to absorb the staff members and the teachers of the school after provincialization of those schools, rejected the contention of the State Government that taking over was not in accordance with the policy and rejecting the contention raised on behalf of the State, upon the direction issued by the Hon'ble Madhya Pradesh High Court.

20. Sri Prashant Chandra, learned Senior Advocate has vehemently submitted, during course of final arguments, that if it is presumed however not admitted, that there was no specific legislation or statutory provisions in the State of U.P. regarding provincialisation of the educational Institutions, the Constitutional mandate would be used to fill the void. Further, it is the duty of the Constitutional Courts to ensure that the Constitutional guarantees are upheld and the Article under Part III of the Constitution are to be given full effect with or without any legislation in place.

21. In support of his argument, he has submitted that the provincialisation of educational Institution by various State Governments was an exercise which was being performed for quite some time. This was directly attributable to provisions contained in Article 45 of the Constitution of India. The said Article had required the State to impart free education upto the age of 14 years, but in practice, it was found that State had failed to fulfill this solemn obligation. This gave rise to dispute between private Institutions and the State Governments and the matter finally reached the Hon'ble Apex Court. After so many judgments of Hon'ble Apex Court in various matters, in ***T.M.A. Pai Foundation. vs. State of Karnataka, (2002) 8 SCC 481,*** the necessity to impart free education the children of tender age was emphasized and this judgment is being consistently considered even now. Thus, in its wisdom, Parliament inserted Article 21-A by replacing Article 45 of the Constitution and a mandate to impart free quality education by the State was incorporated with effect from 2002. As per Sri Chandra for provincialising the Institutions the State appears to have promulgated the absorption Rules, 1992. Therefore, Sri Chandra has submitted vehemently

that provincialising the Institutions in question vide order dated 23.12.2016 was perfectly valid and inconformity with the Constitutional provisions and with the Absorption Rules, 1992.

22. Per contra, Sri Ramesh Kumar Singh, learned Additional Advocate General of U.P. assisted by Sri Pratyush Tripathi, learned Standing Counsel has submitted with vehemence that the required exercise, before issuing the provincialisation order of the Institutions in question, has not been carried out. Though there is no Policy, Act or Rules etc. provincialising the Institutions in question but in exceptional circumstances some Institutions were provincialised on earlier occasion without treating them as precedence. At least, before issuing the provincialisation order of the Institutions in question the posts were created/ sanctioned by the State Government with necessary financial approval after proper assessment/ examination of financial burden and another necessary aspects of the matter, whereas in the issue in question, the State Government did not perform any such burden and the order of provincialisation was passed without any assessment of financial burden and without creation of any post for the concerned Institutions, even without getting necessary financial approval from the Finance Department. He has drawn attention of this Court towards the Government Order dated 23.12.2016 wherein all the aforesaid modalities have been indicated and these modalities / conditions have not been followed by the then authorities, therefore, the said Government Order cannot be executed. The undue haste has been shown by the then authorities for provincialising seven educational Institutions for no cogent reasons, even in contravention of the specific conditions of Government Order dated 23.12.2016. As a matter of fact, the Government Order dated 23.12.2016 was conditional order and

execution thereof was subject to fulfillment of those conditions which have not been followed in the present case.

23. Hence, the demand of the present petitioners for payment of salary from the State Exchequer is not appropriate, just and proper in the absence of sanctioned posts of their respective Institutions. Therefore, as per Sri Singh, the earlier instances of provincialisation of the Institutions may not be cited inasmuch as even in the exceptional circumstances at that point of time required exercise was carried out, e.g. posts were created, sanctioned by the State Government with necessary financial approval for those Institutions after proper assessment/ examination of financial burden and other necessary aspects.

24. Sri Singh has further submitted that it is clear from perusal of the note of note-sheet dated 08.03.2017, as annexed by the petitioners themselves in the writ petition, as Annexure No.2, that approval for payment of salary by the then Chief Minister was given on the basis of list approved by those concerned Institutions and without any approval of the same from the Finance Department and without sanctioning/ creating any post by adopting due procedure for the same in the concerned Institutions, makes it clear that the entire exercise is nullity in the eyes of law inasmuch as in the absence of any sanctioned post with necessary financial approval, the payment of salary against the non-existing post is not possible.

25. In support of his submissions, Sri Singh has cited the judgment of Hon'ble Full Bench of this Court dated 12.05.2015 rendered in ***Special Appeal Defective No.673 of 2014; State of U.P. through Secretary, Secondary Education & Ors. vs. C/M***

Sri Sukhpal Intermediate College, Tirhut, Sultanpur & Ors., whereof the operative portion is as under:-

> *"In the absence of a sanctioned post, a direction cannot be issued to the state in the exercise of powers under Article 226 of the Constitution for the payment of salary. The position in law, with which we respectfully concur, is as laid down in the judgment of the Full Bench in Gopal Dubey's case. The judgment in Om Prakash Verma is consistent with the law laid down in Gopal Dubey's case. In the absence of a sanctioned post, the High Court under Article 226 of the Constitution would not be justified in issuing a mandamus for the payment of salary, particularly since a mandamus cannot lie in the absence of a legal right, based on the existence of a statutory duty."*

26. Sri Singh has also submitted that there is no quarrel on the point that the subsequent government should not change the stand of earlier government if the said stand is reasonable and has been taken in public interest with bonafide intention and the same qualifies the tests on touchstone of justice, equity and fair play. However, in the present case, when the date of Assembly Election was to be announced any day the provincialisation order was passed on 23.12.2016, even without determining any policy, as submitted above. He has apprised that the election notification for Assembly Election of the State of U.P. was issued by the Election Commission of India on 04.01.2017 for holding election in the State of U.P. besides other States. Accordingly, Model Code of Conduct was implemented on 04.01.2017. The election process initiated on 17.01.2017. The date of voting started from 11.02.2017 to 08.03.2017 and all the required exercise regarding election was to be finalized on 15.03.2017. Notably, all the required exercise with respect to Assembly Election was to be carried out from 17.01.2017 to 15.03.2017. If Annexure No.2 is seen for a moment, as submitted by Sri Singh, it would reveal to this Court that the then Chief Minister has given approval either on 08.03.2017 or 14.03.2017 as the Principal Secretary of the

Department has noted the date as 08.03.2017 and his last signatures, after completing the exercise of getting approval from the then Chief Minister, were made on 14.03.2017 as may be seen on running page 65 of Writ Petition No.5995 (S/S) of 2018. However, no date has been indicated by the then Departmental Minister and the then Chief Minister in the said approval. Therefore, the said approval by the then Chief Minister would have been given either on the date of election i.e. 08.03.2017 or after the counting of votes.

27. Therefore, Sri Singh has submitted that in the given circumstances the date of approval for payment of salary i.e. 08.03.2017 or 14.03.2017 cannot be said to be just, appropriate and proper and even this action does not quantify the touchstone of justice, equity and fair play. It, prima-facie, appears that there might have been some extraneous considerations. As per Sri Singh, the aforesaid sole reason makes the Government Order dated 23.12.2016 nullity in the eyes of law and the same may be treated as *no nest* for all practical purposes. Hence, the impugned order dated 13.02.2018 cancelling the Government Order dated 23.12.2016 does not suffer from voice of illegality and arbitrariness and should not be interfered by this Court and the writ petitions may be dismissed with costs.

28. Sri Ramesh Kumar Singh, learned Additional Advocate General has reiterated that even as per aforesaid note sheets annexed with the writ petition, it is clear that no required ground work in respect of assessment of financial burden and exercise for creation/sanction of posts was done and excessive financial burden of the same has been ignored and in absence of any

sanctioned post with necessary financial approval, the payment of salary against non-existing posts was not possible. Therefore, the matter was again brought into the notice of State Government after formation of new Government for the necessary direction in accordance with law. Accordingly, on 13.2.2018, the matter was reconsidered at the level of Cabinet and after due consideration, the earlier Government Order dated 23.12.2016 was withdrawn with the Cabinet approval, which has been assailed by the petitioners in all the writ petitions.

29. Sri Singh has submitted that mainly on four grounds the Government Order dated 23.12.2016 was withdrawn vide impugned Government Order dated 13.2.2018. So far as the first ground of cancellation is concerned, Sri Singh has submitted that there is no specific policy with the State Government for provincialisation of the institutions run by the private management and there is no Statute for the same under which the institutions run by the private management could be taken under the Government establishment in the name of provincialisation. Sri Singh has submitted that he has already addressed on the point that earlier instance of provincialisation may not be cited here as such provincialisation was done in exceptional circumstances even following the due procedure of law which has not been followed in the present cases.

30. Regarding the second ground of cancellation, Sri Singh has submitted that before issuing the order of provincialisation of the institutions in question, no policy was determined for conducting the exercise of provincialisation and the same was not transparent because those institutions were provincialised after elections notification of the Assembly Election and even the approval was given by the then Chief Minister either on the last date of voting

i.e. 8.3.2017 or after the completion of counting as counting completed on 11.3.2017 whereas another date as indicated in such noting is 14.3.2017.

31. So far as the third ground of cancellation is concerned, Sri Singh has submitted that the State Government is not supposed to discriminate other institutions and the provincialisation of the institutions in the aforesaid arbitrary manner will increase the demand of provincialisation in a similar manner by the similarly situated institutions or by the institutions, which might be on the better footing.

32. Regarding the fourth ground of cancellation, Sri Singh has submitted that the process of selection of the Teachers was not available with the State Government and it had not been ascertained before issuing the order of provincialisation of these institutions. Even the process of selection of teaching staff was not conducted properly. As a matter of fact, the approval for payment of salary by the then Chief Minister was given on the basis of the list provided by these concerned institutions without any approval of the same from the Finance Department and without sanctioning or creating any post in the concerned institutions.

33. Sri Singh has also submitted with vehemence that when no proper exercise has been carried out before issuing the Government Order dated 23.12.2016 regarding provincialisation of certain institutions, the factum of transfer of movable or immovable property of the institutions to the State Government would not extend any benefit to the petitioners.

34. As per Sri Singh, so far as the Absorption Rules, 1992 are concerned, it is to submit here that this Rule does not prescribe any manner of provincialisation and it has nothing to do with the provincialisation of an institute. This Rule of 1992 was promulgated with the view to absorb the services of the teaching staff against the newly created post in the provincialised institutions. He has further submitted that in the aforesaid Rules of 1992, there is no provision for absorption of the services of non-teaching staff, hence non-teaching staff cannot claim any benefit under the said Rules of 1992, even in case of validly created posts in a provincialised institution.

35. Sri Singh has drawn attention of this Court towards one relevant fact that in the bunch of these writ petitions the petitioners are Teachers, Class-III & Class-IV employees of various Institutions, meaning thereby the petitioners are teaching and non-teaching staff and undisputedly the Absorption Rules, 1992 shall not be applicable on non-teaching staff. Therefore, in the bunch of these writ petitions the benefit of Absorption Rules, 1992 may not be claimed.

36. This fact is very much clear by perusal of Rules 2 (Ka) and 2 (Kha) of the said Rules of 1992, which are as under:-

> "2. परिभाषाएँ– जब तक कि विषय या संदर्भ में को प्रतिकूल बात न हो, पद–
>
> (क) संस्था के प्रान्तीयकरण के समय सृजित पद के सम्बंध में "नियुक्ति प्राधिकारी" का तात्पर्य किसी ऐसे प्राधिकारी से है जिसे ऐसे पद पर नियुक्त करने के लिए सशक्त किया गया हो।
>
> (ख) किसी प्रान्तीयकृत संस्था के संबन्ध में "कर्मचारी" का तात्पर्य ऐसे व्यक्ति से है जो शिक्षण संस्था के प्रान्तीयकरण के ठीक पूर्व प्रधानाचार्य या प्रधान अध्यापक या प्रवक्ता या एल.टी. ग्रेड अध्यापक के रुप में कार्य कर रहा था और जिसे ऐसी संस्था के प्रान्तीयकरण के दिनांक को नवसृजित पद के प्रति अस्थायी नियुक्ति दी गई थी और जो

तब से निरन्तर राज्य सरकार के अधीन किसी पद पर कार्य कर रहा है।....."

37. In view of the above, it is very much clear that the aforesaid Rules of 1992 were promulgated with the view to absorb the services of those teachers only, who were working in the provincialised institute before its provincialisation and also working against the duly sanctioned posts after its provincialisation. Further, it has nothing to do with the process of provincialisation of an institute. In this case the provincialisation order was issued in hurry/haste manner under the above-mentioned circumstances, without creation of any post and the main ingredient of creation of post was left out for future, hence the process of provincialisation cannot be said as completed. Besides, the Absorption Rules, 1992 shall not be applicable in the present case.

38. Sri Singh has submitted that he is also placing reliance upon the dictum of the Hon'ble Apex Court in re; **Shyam Sunder** (supra), which has been cited by the learned counsel for the petitioners referring para-35 of the said judgment wherein the Hon'ble Apex Court has clearly held that 'unless it is found that act done by the authority earlier in existence is either contrary to statutory provisions, is unreasonable, or is against public interest, the State should not change its stand merely because the other political party has come into power'.

Therefore, he has submitted that the act of provincialisation vide Government Order dated 23.12.2016 is not only contrary to the statutory provision but the same is unreasonable, against public interest and does not qualify the test on the touchstone of justice, equity and fair play.

39. Sri Singh has also submitted that the judgment cited by the learned counsel for the petitioners in re; **Rambabu Tyagi** (supra) would not be applicable in the present case inasmuch as the facts and circumstances of that case of State of Madhya Pradesh are not applicable in the present case inasmuch as in the State of Madhya Pradesh, there was clear cut policy of provincialisation whereas no specific policy was applicable in the State of Utter Pradesh. Further, in the present case, no ground work of any kind whatsoever, as submitted above, had been carried out and the order of provincialisation vide Government Order dated 23.12.2016 was issued in a haste manner and approval thereof was given by the then Chief Minister on 8.3.2017, in the last phase of Assembly Election, or on 14.3.2017 i.e. after completion of counting of votes on 11.3.2017, meaning thereby if the then Chief Minister had made signature on 14.3.2017, by that time he (his political party) had been defeated the Assembly Election. As per Sri Singh each cases decided by the Hon'ble Apex Court or by any Constitutional Court depend upon its own peculiar facts and circumstances and if the facts and circumstances of the case decided by the Hon'ble Apex Court are different from the case being adjudicated, that shall not be applicable thereon.

40. Sri Singh has placed reliance upon the judgment of the Hon'ble Apex Court in re; **Onkar Lal Bajaj and others Vs. Union of India and another, (2003) 2 SCC 673**, in which it is observed by the Hon'ble Apex Court in paragraph 36 of the judgment as under:-

> *"36. The role model for governance and decision taken thereof should manifest equity, fair play and justice. The cardinal principle of governance in a civilized society based on rule of law not only has to base on transparency but must create an impression that the decision-making was motivated on the consideration of probity. The*

> *Government has to rise above the nexus of vested interests and nepotism and eschew window-dressing. The act of governance has to withstand the test of judiciousness and impartiality and avoid arbitrary or capricious actions. Therefore, the principle of governance has to be tested on the touchstone of justice, equity and fair play and if the decision is not based on justice, equity and fair play and has taken into consideration other matters, though on the face of it, the decision may look legitimate but as a matter of fact, the reasons are not based on values but to achieve popular accolade, that decision cannot be allowed to operate."*

41. In view of the above, Sri Singh has vehemently submitted that since the decision, vide Government Order dated 13.2.2018, of cancellation of provincialisation orders is just and proper and all necessary factual and legal aspects have been considered thoroughly so it needs no interference under extra-ordinary remedy under Article 226 of the Constitution of India and therefore, the present writ petitions may be dismissed with heavy cost being misconceived.

42. As per Sri Singh, so far as the argument of Sri Prashant Chandra, learned Senior Advocate, regarding applicability of Article 21-A is concerned that is absolutely misplaced argument in the backdrop of the facts and circumstance of the present case inasmuch as it is nobody's case that on account of Government Order dated 13.2.2018 the students of tender age, below 14 years, are facing any difficulties in getting education.

43. Having heard learned counsel for the parties and having perused the material available on record, I am of the considered opinion that the purpose, authenticity, relevance and exigency in issuing the Government Order dated 23.12.2016 and its execution i.e. direction to give accord for necessary approval thereof would have to be examined carefully.

44. By means of the Government Order dated 23.12.2016, certain educational institutions were provincialised. Then Government decided to take over seven educational institutions and assets and liabilities thereof were acquired to become those unaided management institutions a Government institution.

45. Notably, the Government Order dated 23.12.2016 was itself conditional. The Government Order might have not been executed if the conditions mentioned in this Government Order are not satisfied in its letter and spirit. The crux of some conditions of the Government Order for making it effective within four corners of the law, as per my understanding, are that one condition provides that the financial burden for making payment of salary etc. to the teaching and non-teaching staff shall be assessed. Further, before issuing the provincialisation order of the institution, the necessary exercise regarding creation/sanction of posts and factum of financial burden on the State Government would be examined, for making payment of salary to the teaching and non-teaching staff, with the consultation of Finance Department. Further, the teaching staff working in the provincialised institution before its provincialisation should be working against the duly sanctioned post, having proper qualification. Condition No.1 (4) provides that after carrying out required exercise in terms of the Government Order dated 23.12.2016 by the Director (Secondary), U.P., the approval shall be sought from the Hon'ble Chief Minister; thereafter the posts shall be created/ sanctioned for making payment of salary by obtaining specific approval to this effect from the finance department. Like earlier occasion, it has been observed in this order that it shall not be treated as precedent.

46. What has been demonstrated and argued by the learned counsel for the respective parties it has been gathered that the required exercise even as per Government Order dated 23.12.2016 has not been carried out. Since the Government Order dated 23.12.2016 was itself a conditional order, therefore, the execution thereof was dependent upon fulfillment of conditions of the Government Order which have not been fulfilled by the then authorities. Hence, the Government Order dated 23.12.2016 was not worth executable.

47. No doubt, despite the clear cut policy having not been available with the State Government for provincialising the educational institutions, however, such exercise could have been done in exceptional circumstances, as had been done in earlier occasion carrying out necessary exercise for creating and sanctioning the posts by the State Government after proper assessment and examination of financial burden and other necessary aspects of the matter taking necessary approval to that effect from the Finance Department but in the instant matter, no such required exercise has been carried out.

48. The law is trite on the point that in absence of sanctioned post, no direction could have been issued for payment of salary etc. In the case in hand, such exercise has been carried out without taking any approval from the Finance Department or without sanctioning or creating any post, therefore, the writ in the nature of mandamus cannot be issued directing the State Government to make payment of salary to the Teachers in view of the decision of the Full Bench of this Court in re; **C/M Sri Sukhpal Intermediate College, Tirhut, Sultanpur and others** (supra).

49. It would be not out of place to observe here that at the fag end of December 2016 when election notification for Assembly Election could have been issued on any date, the then State Government or the department concerned should have not shown undue haste in making seven particular institutions provincialised knowing fully well that for provincialising the institutions in question, some necessary exercise would be required to be carried out and that exercise would take some substantial time.

50. On 4.1.2017, the Election Commission of India, New Delhi has issued notification for Assembly Election of five States including Uttar Pradesh. Subsequent notification has been issued by the Chief Election Officer, U.P., Lucknow on 4.1.2017 itself. It means model code of conduct was enforced w.e.f. 4.1.2017. All required exercise for filling up nomination form and to withdraw the name was to be completed within time stipulated and date of election for certain phases was fixed from 11.2.2017 to 8.3.2017. The date of counting of the votes was fixed for 11.3.2017 and election process was to be finalized by 15.3.2017. After counting of votes, the final result was to be declared on 11/12.3.2017.

51. Admittedly, the Government Order in respect of provincialisation of seven institutions was issued on 23.12.2016 and approval was given by the then Chief Minister either on 8.3.2017 or on 14.3.2017 inasmuch as Annexure No.2 running page 65 of Writ Petition No.5995 (S/S) of 2018, Subhash Kumar and others Vs. State of U.P. and others, indicates that the Principal Secretary of the Department had completed noting on 8.3.2017 and put up before the Minister of the Department, who made signature thereon but no date has been indicated. Thereafter, the then Chief Minister made signature but no date has been indicated. However, the Principal Secretary of the

Department again made signature below the signature of the then Chief Minister on 14.3.2017. Therefore, there may be every likelihood that the then Chief Minister would have given approval on the said Government Order on 14.3.2017. Even if it is assumed that he had granted approval on 8.3.2017 as submitted by all the learned counsel for the petitioners, the said date was the date for last phase of the Assembly Election, therefore, said approval was accorded after implementation of the model code of conduct and on the last date of election. If that date is 14.3.2017, by that time the final result of Assembly Election was declared and the then Chief Minister and his political party had lost the Assembly Election. Therefore, in that case the approval was granted after loosing the Assembly Election.

52. In the given circumstances, this Court will have to visualize the propriety of the concerning authorities and action thereof carefully. The simple question crops up in the mind of the Court as to whether if the provincialisation order dated 23.12.2016 was not issued and executed, would heavens have fallen. More particularly, in the light of admitted facts and circumstances that before issuing said provincialisation order of these institutions, posts were not sanctioned or created nor approval from the Finance Department was obtained nor proper assessment/ examination of financial burden and other relevant aspects were seen and such approval was given on the basis of list provided by these institutions. Knowing fully well about the legal position that in absence of any sanctioned post with the necessary approval from the Finance Department, payment of salary cannot be made. The said Government Order dated 23.12.2016 appears to be lucrative offer to the persons at large, who are beneficiary of that Government Order, for getting benefit in the forthcoming

election. Therefore, the aforesaid reasons are sufficient to dismiss the writ petitions.

53. Besides, the Absorption Rules, 1992 so cited by the learned counsel for the petitioners would not cover the issue in hand inasmuch as that Absorption Rules, 1992 do not prescribe the manner of provincialisation and it has nothing to do with the provincialisation of the institutions. Such Rules were promulgated with a view to absorb the services of teaching staff against newly created post in the provincialised institutions. In the bunch of the writ petitions, besides teaching staff so many non-teaching staff i.e. Class-III and Class-IV employees have been impleaded as petitioners and the Absorption Rules, 1992 do not cover the service conditions of Class-III and Class-IV employees in any manner whatsoever. Not only the above, said Rules would be applicable on the teaching staff working in the provincialised institute before its provincialisation and also working against the duly sanctioned post after its provincialisation. It has nothing to do with the process of provincialisation of an institute. As a matter of fact, Absorption Rules, 1992 would be applicable on teaching staff, not on non-teaching staff and those teaching staff should be serving in the provincialised institution before its provincialisation serving on duly sanctioned post. Therefore, the ground taken in the impugned order dated 13.2.2018 appears to be valid one and the impugned order dated 13.2.2018 does not require any interference from this Court.

54. Considering the argument of Sri Chandra regarding applicability of Article 21-A of the Constitution in the present case, it is very much clear that Article 21-A of the Constitution mandates that the State shall provide free and compulsory

education to all children of the age of six to fourteen years in such manner as the State may, by law, determine. This constitutional provision itself provides that while following the said provision, the legal requirement would be adhere to by the State Government concerned. In the case in hand, there is no such complaint that provision of Article 21-A of the Constitution is being flouted vide order dated 13.2.2018. Even no specific prayer in any writ petition has been made that the Government Order dated 13.2.2018 be quashed being violative of Article 21-A of the Constitution. As per admitted fact by the petitioners themselves that they are imparting education in those institutions even today. Therefore, considering the rival submissions and provision of law, I am of the considered opinion that the argument placed by Sri Chandra regarding applicability of Article 21-A of the Constitution in the present case is misplaced argument as it would not apply in the case in hand.

55. This is trite law that the role model for governance and decision taken thereof should manifest equity, fair play and justice. The cardinal principle of governance in a civilized society based on rule of law not only has to base on transparency but must create an impression that the decision-making was motivated on the consideration of probity. The principle of governance has to be tested on the touchstone of justice, equity and fair play and if the decision is not based on justice, equity and fair play and has taken into consideration other matters, the said decision may look legitimate but as a matter of fact, the reasons are not based on values but to achieve popular accolade, that decision cannot be allowed to operate. In the light of what has been said above, the Government Order dated 23.12.2016 does not appear to have been issued in a fair manner so it may not

be said to be a justiciable Government Order. In fact, 'justice' means nothing more and nothing less than being fair. Therefore, the said Government Order dated 23.12.2016 has been rightly withdrawn by the impugned Government Order dated 13.2.2018.

56. In the instant case, since apparent haste has been shown in issuing Government Order dated 23.12.2016 provincialising seven educational institutions just before few days from enforcement of model code of conduct for holding Assembly Election, 2017 and without conducting the required exercise, as discussed above, such exercise of the authorities may not be appreciated. Further, the approval of the aforesaid exercise of provincialisation was given by the then Chief Minister either on the last date of election i.e. 8.3.2017 or after counting of votes on 14.3.2017 (date of counting was 11.3.2017). No exceptional circumstance or urgency has been shown by the then Government/authority in issuing such Government Order on 23.12.2016, therefore, the purpose of issuing said Government Order comes under the cloud of suspicion as it appears, prima facie, to be a lucrative Government Order extending the benefits to certain persons/ institutions for forthcoming election.

57. To me, in order to test the authenticity and relevance issuing the Government Order dated 23.12.2016 where it is alleged by the State Government that the required exercise has not been carried out, as considered above, before issuing that Government Order it is necessary to ascertain its motive, as to whether it is purposeful within four corners of the law or it has got some ulterior motive. I am of the considered opinion and it is also a trite law that what cannot be done directly, it is not permissible to be done obliquely. In other words, whatever is prohibited by the law to be done, cannot legally be effected by an

indirect manner. The authority cannot be permitted to evade a law by 'shift or contrivance'.

58. In view of the factual and legal matrix of the issue, there is no specific Act, Rule or statutory backing for passing the provincialisation order as it could have been issued in an exceptional circumstance but following the norms. Further, the Absorption Rules, 1992 are not applicable in the case in hand, therefore, the petitioners are not having any statutory or legal right in their favour to get their institutions provincialised and in absence of any legal or statutory right, the petitioners are not entitled to get any relief under Article 226 of the Constitution of India. Besides, in absence of the posts having been sanctioned with necessary financial approval from the Finance Department, direction for payment of salary to the petitioners may not be issued. Since the required exercise, as has been considered above, has not been carried out before issuing the Government Order dated 23.12.2016, specific exigency in issuing this Government Order has not been demonstrated and the conditions mentioned in the Government Order dated 23.12.2016 have also not been followed in its letter and spirit so no direction for executing the Government Order dated 23.12.2016 may be issued in the ends of justice. It clearly appears that the conscious decision has been taken by the competent authority with the Cabinet approval withdrawing Government Order dated 23.12.2016 by issuing subsequent Government Order dated 13.2.2018, therefore no interference would be required in the impugned Government Order dated 13.2.2018.

59. Accordingly, in view of the facts, circumstances and reasons considered herein above, I do not find any infirmity or illegality in the impugned order dated 13.02.2018 passed by the

State Government, which is contained in Annexure No.1 to the writ petitions. Therefore, all the writ petitions are **dismissed** being devoid of merit and interim orders stand vacated. Consequences to follow.

60. No order as to costs.

[Rajesh Singh Chauhan, J]

Order Date :- June 14, 2021.
Suresh/RBS