REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal No.865 of 2021

THE STATE OF UTTAR PRADESH & ORS. **…Appellants**

VERSUS

PRINCIPAL ABHAY NANDAN INTER COLLEGE & ORS. **…Respondents**

WITH
C.A. No. 2816/2021
C.A. No. 2817/2021
C.A. No. 2753/2021
C.A. No. 866/2021
C.A. No. 2754/2021
C.A. No. 2819/2021
C.A. No. 2820/2021
C.A. No. 2818/2021
C.A. No. 2815/2021

J U D G M E N T

M.M. SUNDRESH, J.

1. Heard learned counsel for the parties.

2. We have also perused the documents filed and carefully considered the affidavits of the parties along with the written arguments filed.

3. Appeals have been preferred by the State of Uttar Pradesh laying a challenge to the judgment of the Division Bench of the Allahabad High Court dated 19.11.2018 holding that Regulation 101 framed under The Intermediate Education Act, 1921 (hereinafter referred to as "the Act") as amended is

unconstitutional. Incidentally, few other appeals were disposed of by taking note of the aforesaid decision. Applications have also been filed to intervene/implead by such of those persons who are also appointed by these institutions as Class "IV" employees. Thus, appositely all these appeals are disposed of by a common order.

THE ACT: -

4. The Intermediate Education Act, 1921 is of vintage origin having its existence prior to independence and surviving to date. The object of the enactment is to regulate and supervise high schools and intermediate education. Sub-Section 4 of Section 9 of the Act speaks of the powers of the State Government and facilitates the State Government to pass appropriate orders or to take adequate action consistent with the provisions of the Act and the State Government may modify or rescind or make any regulation in respect of any matter:

> ***"Section 9- Power of State Government***
>
> *… (4) Whenever, in the opinion of the State Government, it is necessary or expedient to take immediate action, it may, without making any reference to the Board under the foregoing provisions, pass such order or take such other action consistent with the provisions of this Act as it deems necessary, and in particular, may by such order modify or rescind or make any regulation in respect of any matter and shall forthwith inform the Board accordingly."*

5. Section 16G of the Act deals with conditions of service of the head of institutions, teachers and other employees. Sub-section (2) facilitates the introduction of regulation which could be extended to various activities such as probation, scale of pay, transfer of service, grant of leave etc. Needless to state

that this provision speaks of the conditions of service of the person employed in such institutions:

> *"**Section 16G- Conditions of Service of Head of Institutions, teachers and other employees***
> *(1) Every person employed in a recognized institution shall be governed by such conditions of service as may be prescribed by regulations and any agreement between the management and such employee insofar as it is inconsistent with the provisions of this Act or with the regulations shall be void.*
>
> *(2) Without prejudice to the generality of the powers conferred by sub-section (1), regulations may provide for-*
>
> > *(a) the period of probation, the conditions of confirmation and the procedure and conditions for promotion and punishment 2[(including suspension pending or in contemplation of inquiry or during the pendency of investigation, inquiry or trial in any criminal case for an offence involving moral turpitude)] and the emoluments for the period of suspension and termination of service with notice;*
> > *(b) the scales of pay and payment of salaries;*
> > *(c) transfer of service from one recognized institution to another;*
> > *(d) grant of leave and Provident Fund and other benefits; and*
> > *(e) maintenance of record of work and service."*

6. Regulations have been framed under the Act dealing with various subjects, however, for the present case only Chapter III of the said regulations is relevant, which deals with "conditions of service".

REGULATION 101: -

7. Regulation 101 was inserted vide Parishad 9/592 dated 28.08.1992 and was notified by way of Govt. Notification No. 400/15-7-2(1)-90 dated 30.07.1992 in the following manner:

> *"Appointing Authority except with prior approval of Inspector shall not fill up any vacancy of non-teaching post of any recognized aided institution."*

8. It was substituted through the Notification No. 300/XV-7-2(1)/90 dated 02.02.1995 as under:

> *"Appointing Authority except with prior approval of Inspector shall not fill up any vacancy of non-teaching post of any recognized aided institution:*
>
> *Provided that filling of the vacancy on the post of Jamadar may be granted by the Inspector."*

9. On 23.01.2008 with a view to regulate and curtail staff expenditure a policy decision was taken by the State of Uttar Pradesh (the 1st Appellant) to not create any new post in Class 'IV' category and wherever it may be necessary, the work may be carried out through "Outsourcing". Thereafter, the recommendation was made by the Sixth Central Pay Commission in the month of March, 2008 to the effect that it would only be appropriate to have "Outsourcing" of Class 'IV' employees instead of seeking any new recruitment.

10. Regulation 101 once again went through an amendment by way of Notification No.9/898 dated 31.12.2009, which reads as under:

> *"The appointing authority shall not fill any vacancy of the non-teaching staff of recognised aided institutions, except with the approval of Inspector, subject to a restriction that District Inspector of Schools shall make available total number of vacancies to Director of Education (Secondary Education), and showing the number of students put forth justification for the filling of the vacancies. On receipt of order from the Director of Education (Secondary Education), the District Inspector of Schools shall, for filling said vacancies, give permission to the appointing authority; and while giving such permission he shall ensure to follow the reservation rules specified by the government and the prescribed norms in justification for the posts.*
>
> *The aforesaid amendment in the Regulation shall come into force immediate effect."*

11. Taking into consideration the recommendations made by the Sixth Central Pay Commission, Government Orders were passed on 08.09.2010 and 06.01.2011 making it applicable to all Government departments and aided schools, thus, deciding not to go for fresh recruitment of Class "IV" employees and further directing that any arrangement concerning the post to be vacated may be made only through "Outsourcing". Appropriate communications were sent to all the stakeholders intimating them of the decision taken.

12. Following the said decision, Regulation 101 was once again amended by Government Order dated 04.09.2013, which was accordingly notified on 24.04.2014. The effect of the said amendment is to make the post of Class "IV" employees which was hitherto supposed to be filled up by the institutions through "Outsourcing". Therefore, the permanent posts were accordingly abolished, thereby, replacing the method of appointment by way of "Outsourcing. An exception has been carved out only for the dependants of those employees died in harness during employment.

AMENDED REGULATION:

> *"101. The appointing authority, except for the prior approval of the inspector, shall not fill any vacant post of non-teaching staff (clerical cadre) in any recognised or aided institution; with the restriction that the District Inspector of Schools shall make available the total number of vacancies to the Director of Education (Secondary Education) and also put forth justification for filling of the posts, showing the strength of the students in the institution. On receipt of the order from Director of Education (Secondary Education), the District Inspector of Schools shall give permission to the appointing authority for filling the said vacancies (except the vacancies of Class-IV posts) and while giving the permission, he shall ensure compliance of the*

reservation rules specified by the government as also of the prescribed norms in justification for the posts.

With respect to the Class-IV vacancies, arrangements shall be made by way of outsourcing only; but the relevant rules, 1981, as amended from time to time, for recruitment of dependants of teaching or non-teaching staff of the nongovernment aided institutions dying in harness shall be applicable in relation to the appointments to be made on the vacant posts of Class-IV category."

SEVENTH CENTRAL PAY COMMISSION: -

13. By the Seventh Central Pay Commission Report, the recommendations made in the Sixth Central Pay Commission were reiterated with a word of 'caution' in its implementation. Accordingly, the need to go for "Outsourcing", keeping in view of the financial constraints and efficiency, was once again reiterated:

PARAGRAPH 3.72 AND 3.83 OF THE REPORT

"3.72 The General Financial Rules provide for outsourcing of services in the interest of economy and efficiency. Broad guidance is provided in the Rules on identification of contractors and the tendering process.
There are three kinds of contractual appointments:

i. Tasks of a routine nature, typically those relating to housekeeping, maintenance, related activities, data entry, driving, and so on, which are normally bundled and entrusted to agencies. These agencies then depute the necessary persons to carry out these tasks…

3.83 The Following are the conclusions and recommendations:

…vii. The Commission is of the view that a clear guidance from the government on jobs that can and should be contracted out would be appropriate. While doing so the concerns of confidentiality and accountability may be kept in view. Further, to bring about continuity and to address the concerns regarding exploitation of contractual manpower, uniform guidelines/model contract agreements may be devised by the government…"

14. From the aforesaid facts it is abundantly clear that a decision was made way back on 08.09.2010 to do away with the recruitment to the post of Class "IV" employees, by replacing the process with the utilization of the service through "Outsourcing". It was accordingly made by taking note of the recommendations of the Pay Commission, with the primary concern being financial difficulty, followed by efficiency. The regulation was brought forthwith as an abundant caution by way of a subsequent act to complete the formalities. Institutions were being put on notice about the decision to withhold any fresh recruitment. However, recruitments have been made *de hors* the same either with or without the court orders, by the institutions. It was also done without obtaining the prior permission as per the mandate of the un-amended Regulation 101 except in one case which is the subject matter of Civil Appeal No.2753 of 2021. In Civil Appeal No.2754 of 2021 a direction to grant prior permission was obtained from the High Court.

BEFORE THE HIGH COURT: -

15. With the aforesaid backdrop, writ petitions have been filed before the Allahabad High Court. The Division Bench of the Allahabad High Court in the lead judgment dated 19.11.2018 was pleased to allow the writ petitions filed, *inter alia* holding that there is a violation of Article 14 of the Constitution of India. Incidentally, reliance has also been made on the provisions of Uttar Pradesh High Schools and Intermediate Colleges (Payment of Salaries of Teachers and Other Employees) Act, 1971 (hereinafter referred to as 'UP Act,

1971') which speaks about the payment of salary including the manner of disbursement. The Division Bench was of the opinion that Regulation 101 is unconstitutional being repudiate to Section 16G of the Act and the provisions of the UP Act, 1971, and went onto observe that "Outsourcing" as a concept of making available the staff to perform Class "IV" jobs is unconstitutional, arbitrary and illegal. Section 9(4) of the Act cannot be interpreted to give sufficient ammunition to sustain the impugned regulation. Seeking to impugn and set aside the said judgment which ratio was followed in other cases, these appeals are before us.

16. Having narrated the background facts, we would place on record the respective contentions of the counsel.

SUBMISSIONS OF THE APPELLANT: -

17. Ms. Aishwarya Bhati, Ld. Additional Solicitor General appearing for the appellants raised the primary objection on the right of the writ petitioners to challenge the impugned regulation. According to the Ld. ASG, this being a policy decision carefully introduced after considering the relevant materials based on the opinion of experts in the field of finance and administration and widespread consultation with stakeholders, including the recommendations made by the Sixth Central Pay Commission and Seventh Central Pay Commission, is not amenable to challenge by invoking the jurisdiction of the High Court under Article 226 of the Constitution of India. The institutions

being the recipients of aid are bound by the conditions attached, as there exists neither a fundamental right to receive aid nor a vested one. It is not open to the respondents to question the policy decision of the appellants, considering the fact that the said policy is applicable uniformly across all departments of the State and does not in any manner affect the rights of the existing employees.

18. The Ld. ASG has further submitted that the other respondents having been selected contrary to law cannot seek equity. This situation has been created only by the overzealous management in recruiting them despite clear directions by the appellants to the contrary. Even otherwise, any appointment made is subject to the orders of the Court.

19. The Division Bench has taken the role of an expert in going into the wisdom of the appellants, while dealing with a policy decision based on various relevant factors. Section 9(4) of the Act gives adequate power to the State Government to change, modify and rescind the regulation accordingly without reference to the Board under the Act. It is submitted that the amendment is only a consequence to the decision made by the appellants.

20. The Order of the Division Bench would have a far-reaching financial and economic impact on the entire recruitment process throughout the State of Uttar Pradesh in view of its interpretation of “Outsourcing”. Article 162 of the Constitution has got no rationale to impugned amendment. This is a case of the

abolishment of the posts and as such, Section 9(4) of the Act being of wider import, the impugned regulation is sustainable in the eyes of law.

21. To strengthen the aforesaid submissions, reliance has been placed on the following decisions:

i. Federation of Railway Officers Association & Ors. vs. Union of India (2003) 4 SCC 289;

ii. Directorate of Film Festivals & Ors. vs. Gaurav Ashwin Jain & Ors. (2007) 4 SCC 737;

iii. State of Punjab & Ors. vs. Ram Lubhaya Bagga & Ors. (1998) 4 SCC 737;

iv. Vasavi Engineering College Parents Association vs. State of Telangana & Ors. (2019) 7 SCC 172.

v. Ramji Dwivedi vs. State of Uttar Pradesh (1983) 3 SCC 52;

vi. Union of India vs. Pushpa Rani (2008) 9 SCC 242;

vii. SK Md. Rafique vs. Management Committee Contai Rahamania High Madrasah & Ors. (2020) 6 SCC 689;

viii. Tamil Nadu Education Department Ministerial and General Subordinate Services Association & Ors. vs. State of Tamil Nadu & Ors. (1980) 3 SCC 97.

SUBMISSIONS OF BEHALF OF RESPONDENTS: -

22. Submissions on behalf of the respondents would include that of the management and the candidates selected by them. These candidates obviously

came into picture through the recruitment process adopted by the management, notwithstanding, the orders dated 08.09.2010 and 06.01.2011 followed by the impugned Regulation 101.

23. Regulation 101 as framed under the Act, as it stands, is a clear violation of Article 14 of the Constitution of India in filling the sanctioned post of Class "IV" employees alone by way of "Outsourcing". Before the Division Bench, the appellants were not able to place the relevant material to substantiate the rationale behind the implementation of the policy of "Outsourcing" in filling the post of Class "IV" employees and the method of implementation.

24. There is no power or authority for the introduction of the amended Regulation 101 under Section 16G of the Act. The power available to the State Government under Section 9 of the Act cannot be extended to make the impugned regulation.

25. Section 16G of the Act is sought to be impliedly overruled by the impugned regulation. As the term recruitment and conditions of service are not synonyms, the power given to the State Government cannot be extended to alter the conditions of recruitment itself. It is further contended that the exercise of the power under Section 9(4) of the Act, especially while amending the regulations has to be consistent with the other provisions, as such, the impugned subordinate legislation is bound to be struck down. In support of the aforesaid contention the following judgments have been relied upon, namely.

(i) Keshav Chandra Joshi vs. Union of India 1992 Supp (1) SCC 272; (ii) Syed Khalid Rizvi vs. Union of India 1993 Supp (3) SCC 575; (iii) Kerela Samsthana Chethu Thozhilali Union vs. State of Kerela (2006) 4 SCC 327; and (iv) Vasu Dev Singh vs. Union of India (2006) 12 SCC 753.

26. A distinction has to be carved out among the institutions viz minority institutions on one hand, as against non-minority institutions, otherwise the main regulation violates the fundamental rights granted to minority institutions under Article 30(1) of the Constitution of India, in light of the judgments of this Court in the case of, (i) Ahmedabad St. Xavier's College Society & Ors. vs. State of Gujarat & Ors. (1974) 1 SCC 717; (ii) St. Stephens College vs. University of Delhi (1992) 1 SCC 558; (iii) T.M.A Pai Foundation vs. State of Karnataka (2002) 8 SCC 481; (iv) Secy. Malankara Syrian Catholic College vs. T. Jose & Ors. (2007) 1 SCC 386; and (v) Chadana Das vs. State of West Bengal (2020) 13 SCC 411.

27. The respondents who were recruited had the *bona fide* belief that they were employed in accordance with law, and they cannot be made to suffer, especially in light of the fact that some of them have been recruited in pursuance to prior approval given, thereby found to be qualified. Principle of undue hardship is to be applied while dealing with marginalized poor persons. Article 162 would stand infringed if the impugned amendment is allowed to be sustained.

28. As held by this Court in Catering Cleaners of Southern Railway vs. Union of India & Anr. (1987) 1 SCC 700, "Outsourcing" as a method of recruitment itself is illegal and unconstitutional as it attempts to bring back contract labour.

DISCUSSION AND CONCLUSION: -

RIGHT TO AID: -

29. We will first take up the right of institutions qua the aid. A decision to grant aid is by way of policy. While doing so, the government is not only concerned with the interest of the institutions but the ability to undertake such an exercise. There are factors which the government is expected to consider before taking such a decision. Financial constraints and deficiencies are the factors which are considered relevant in taking any decision qua aid, including both the decision to grant aid and the manner of disbursement of an aid.

30. Once we hold that right to get an aid is not a fundamental right, the challenge to a decision made in implementing it, shall only be on restricted grounds. Therefore, even in a case where a policy decision is made to withdraw the aid, an institution cannot question it as a matter of right. Maybe, such a challenge would still be available to an institution, when a grant is given to one institution as against the other institution which is similarly placed. Therefore, with the grant of an aid, the conditions come. If an institution does not want to accept and comply with the conditions accompanying such aid, it is well open to it to decline the grant and move in its own way. On the contrary, an

institution can never be allowed to say that the grant of aid should be on its own terms.

31. We are dealing with a case where aid is not denied in toto but sought to be given in different form. The reason for such a decision is both efficiency and economy. When such a decision is made as a matter of policy and is being applied not only to educational institutions but spanning across the entire State in every department, one cannot question it and that too when there is no express arbitrariness seen on the face of it.

MINORITY AND NON-MINORITY: -

32. When it comes to aided institutions, there cannot be any difference between a minority and non-minority one. Article 30 of the Constitution of India is subject to its own restrictions being reasonable**.** A protection cannot be expanded into a better right than one which a non-minority institution enjoys. Law has become quite settled on this issue and therefore does not require any elaboration.

33. Thus, on the aforesaid issue we have no hesitation in reiterating the principle that an institution receiving aid is bound by the conditions imposed and therefore expected to comply. Once we hold so, the challenge made on various grounds, falls to the ground.

34. The haze between a minority and non-minority institution is no longer in existence. This Court in ***SK Md. Rafique (supra)*** has dealt with the same through the following paragraphs:

> *"41. In the backdrop of the decisions of this Court referred to hereinabove, we must now consider whether the relevant provisions of the Commission Act, 2008 transgress upon the rights of a minority institution or the said provisions can be termed as "tenable as ensuring the excellence of the institution without injuring the essence of the right" [Expression used by Krishna Iyer J. in Gandhi Faiz-e-am-College v. University of Agra, (1975) 2 SCC 283 : 1 SCEC 277] of a minority institution. Right from Kerala Education Bill, 1957, In re case [Kerala Education Bill, 1957, In re, 1959 SCR 995 : AIR 1958 SC 956] the issue that has engaged the attention of this Court is about the content of rights of minority educational institution and the extent and width of applicability of regulations and what can be said to be permissible regulations. If the cases in the first segment i.e. up to the decision in T.M.A. Pai Foundation [T.M.A. Pai Foundation v. State of Karnataka, (2002) 8 SCC 481 : 2 SCEC 1] are considered…*
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> *42. We now turn to T.M.A. Pai Foundation case [T.M.A. Pai Foundation v. State of Karnataka, (2002) 8 SCC 481: 2 SCEC 1] and consider the principles that it laid down and whether there was reiteration of the principles laid down in the decisions of this Court in the earlier segment or whether there was any change or shift in the emphasis:*
>
> > *42.1. In para 50, five incidents were stated to comprise the "right to establish and administer" and three of them were stated to be:*
> > *(a) right to admit students;*
> > *(b) right to appoint staff — teaching and non-teaching; and*
> > *(c) right to take disciplinary action against the staff.*
> >
> > *The discussion in the leading judgment was under various headings and the important one being "5. To what extent can the rights of aided private minority institutions to administer be regulated?"*
> >
> > *42.2. The earlier decisions of the Court were considered and while considering the judgment of this Court in Sidhrajbhai Sabhai case [Sidhrajbhai Sabhai v. State of Gujarat, (1963) 3 SCR 837: AIR 1963 SC 540] it was observed: (T.M.A. Pai Foundation case*

[T.M.A. Pai Foundation v. State of Karnataka, (2002) 8 SCC 481: 2 SCEC 1] , SCC p. 563, para 107)

> *"107. … If this is so, it is difficult to appreciate how the Government can be prevented from framing regulations that are in the national interest, as it seems to be indicated in the passage quoted hereinabove. Any regulation framed in the national interest must necessarily apply to all educational institutions, whether run by the majority or the minority. Such a limitation must necessarily be read into Article 30. The right under Article 30(1) cannot be such as to override the national interest or to prevent the Government from framing regulations in that behalf. It is, of course, true that government regulations cannot destroy the minority character of the institution or make the right to establish and administer a mere illusion; but the right under Article 30 is not so absolute as to be above the law."*

42.3.Thus, the principle laid down in Sidhrajbhai Sabhai [Sidhrajbhai Sabhai v. State of Gujarat, (1963) 3 SCR 837: AIR 1963 SC 540] that the right under Article 30(1) cannot be whittled down by the so-called regulative measures conceived in the interest not of the minority educational institution, but of the public or the nation as a whole was not accepted in T.M.A. Pai Foundation [T.M.A. Pai Foundation v. State of Karnataka, (2002) 8 SCC 481: 2 SCEC 1] . The emphasis was clear that any regulation framed in the national interest must necessarily apply to all educational institutions, whether run by the majority or the minority and put the matter beyond any doubt. A caveat was however entered and it was stated that the government regulations cannot destroy the minority character of the institution.

42.4. The leading judgment then observed that the correct approach would be—what was laid down by Khanna, J. in Ahmedabad St. Xavier's College case [Ahmedabad St. Xavier's College Society v. State of Gujarat, (1974) 1 SCC 717: 1 SCEC 125]: (T.M.A. Pai Foundation case [T.M.A. Pai Foundation v. State of Karnataka, (2002) 8 SCC 481: 2 SCEC 1], SCC p. 570, para 122)

> *"122. … a balance has to be kept between the two objectives — that of ensuring the standard of excellence of the institution, and that of*

preserving the right of the minorities to establish and administer their educational institutions. Regulations that embraced and reconciled the two objectives could be considered to be reasonable. This, in our view, is the correct approach to the problem."

42.5. The majority judgment then summed up the matter and stated: (T.M.A. Pai Foundation case [T.M.A. Pai Foundation v. State of Karnataka, (2002) 8 SCC 481: 2 SCEC 1], SCC p. 578, paras 135 & 137)

"135. … It is difficult to comprehend that the Framers of the Constitution would have given such an absolute right to the religious or linguistic minorities, which would enable them to establish and administer educational institutions in a manner so as to be in conflict with the other Parts of the Constitution.

xxx xxx xxx

137. … The right under Article 30(1) has, therefore, not been held to be absolute or above other provisions of the law, and we reiterate the same. By the same analogy, there is no reason why regulations or conditions concerning, generally, the welfare of students and teachers should not be made applicable in order to provide a proper academic atmosphere, as such provisions do not in any way interfere with the right of administration or management under Article 30(1)."

It was further laid down: (SCC p. 579, para 138)

"138. … In other words, the essence of Article 30(1) is to ensure equal treatment between the majority and the minority institutions. … Laws of the land, including rules and regulations, must apply equally to the majority institutions as well as to the minority institutions."

43. The decision in T.M.A. Pai Foundation [T.M.A. Pai Foundation v. State of Karnataka, (2002) 8 SCC 481 : 2 SCEC 1] , rendered by eleven Judges of this Court, thus put the matter beyond any doubt and clarified that the right under Article 30(1) is not absolute or above the law and that conditions concerning the welfare of the students and teachers must apply in order to provide proper

> *academic atmosphere, so long as the conditions did not interfere with the right of the administration or management. What was accepted as correct approach was the test laid down by Khanna, J. in Ahmedabad St. Xavier's College case [Ahmedabad St. Xavier's College Society v. State of Gujarat, (1974) 1 SCC 717: 1 SCEC 125] that a balance be kept between two objectives—one to ensure the standard of excellence of the institution and the other preserving the right of the minorities to establish and administer their educational institutions. The essence of Article 30(1) was also stated — "to ensure equal treatment between the majority and the minority institutions" and that rules and regulations would apply equally to the majority institutions as well as to the minority institutions...*
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> *xxx xxx xxx*
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> *59. In our considered view going by the principles laid down in the decision in T.M.A. Pai Foundation case [T.M.A. Pai Foundation v. State of Karnataka, (2002) 8 SCC 481: 2 SCEC 1], the provisions concerned cannot, therefore, be said to be transgressing the rights of the minority institutions. The selection of the teachers and their nomination by the Commission constituted under the provisions of the Commission Act, 2008 would satisfy the national interest as well as the interest of the minority educational institutions and the said provisions are not violative of the rights of the minority educational institutions."*

35. We would also like to point out two additional paragraphs of the lead judgment in ***T.M.A. Pai Foundation*** vs. ***State of Karnataka***, (2002) 8 SCC 481 that would put a quietus to the issue before us qua grant of aid and the conditions that may be imposed by the State in light of the protection granted to minority institutions under Article 30 of the Constitution of India:

> *"143. This means that the right under Article 30(1) implies that any grant that is given by the State to the minority institution cannot have such conditions attached to it, which will in any way dilute or abridge the rights of the minority institution to establish and administer that institution. The conditions that can normally be permitted to be imposed, on the educational institutions receiving the grant, must be related to the proper utilization of the*

> *grant and fulfilment of the objectives of the grant. Any such secular conditions so laid, such as a proper audit with regard to the utilization of the funds and the manner in which the funds are to be utilized, will be applicable and would not dilute the minority status of the educational institutions. Such conditions would be valid if they are also imposed on other educational institutions receiving the grant.*
>
> *144. It cannot be argued that no conditions can be imposed while giving aid to a minority institution. Whether it is an institution run by the majority or the minority, all conditions that have relevance to the proper utilization of the grant-in-aid by an educational institution can be imposed. All that Article 30(2) states is that on the ground that an institution is under the management of a minority, whether based on religion or language, grant of aid to that educational institution cannot be discriminated against, if other educational institutions are entitled to receive aid. The conditions for grant or non-grant of aid to educational institutions have to be uniformly applied, whether it is a majority-run institution or a minority-run institution…"*

POLICY DECISION: -

36. The challenge before us is the amendment to the Regulation 101. This regulation is in the form of a subordinate legislation. A subordinate legislation can also be in the form of a policy decision. We have already noted that a policy decision has come into force in the year 2010 itself.

37. A policy decision is presumed to be in public interest, and such a decision once made is not amenable to challenge, until and unless there is manifest or extreme arbitrariness, a constitutional court is expected to keep its hands off.

38. A challenge to a regulation stands on a different footing than the one that can be made to an enactment. However, when the regulation is nothing but a reiteration of a policy reinforcing the decision of the Government made earlier,

then the parameters required for testing the validity of an Act are expected to be followed by the Court.

39. An executive power is residue of a legislative one, therefore the exercise of said power i.e., the amendment of the impugned regulation, cannot be challenged on the basis of mere presumption. Once a rule is introduced by way of a policy decision, a demonstration on the existence of manifest, excessive and extreme arbitrariness is needed.

OTHER CONTENTIONS: -

40. Section 9(4) of the Act is certainly of a wider import. The power conferred to the State Government to give effect to the Act is unbridled. It is the very same regulation, based upon which, recruitments have been made by the management. One has to understand the impugned regulation in the context along with the setting. It is only by way of abundant caution, that the amendment has come into force. The existence of the power under Section 9(4) of the Act has been dealt with by this court in ***Ramji Dwivedi's*** case (supra)***:***

> *"12. Sub-section (4) of Section 9 which has been extracted hereinbefore confers power on the State Government without making any reference to the Board to make an order or take such other action consistent with the provisions of the Act as it deems necessary and in particular, may by such order modify or rescind or make any regulation in respect of any matter. It would thus unquestionably transpire that while enacting the Regulations prior sanction of the State Government is necessary and under sub-section (4) of Section 9 the State Government enjoys the power to make, modify or rescind any regulation. Armed with this power the State Government issued an order dated July 7, 1981 stopping all fresh selections and appointments of Principals etc. in*

all non-government-aided schools. Shrinath Intermediate College is a non-government-aided school. The effect of the order conveyed by the radiogram would be to rescind the regulation conferring power on the Committee of Management to make appointment and withdrawing and/or suspending power of appointment of Principal and teachers. The issuance of the order is not in dispute. The argument, in the High Court, was that the State Government had no such power and that even if sub-section (4) is deemed to confer such a power it has to be read in juxtaposition with the power conferred on the State Government by sub-sections (1), (2), (3) preceding sub-section (4) of Section 9. The High Court therefore had to examine the width and ambit of the executive power of the State Government in exercise of which, according to the High Court, the order contained in the radiogram was issued. We need not go that far because in our opinion sub-section (4) specifically confers power on the State Government without making any reference to the Board to make, modify or rescind any regulation as also make such other order consistent with the provisions of the Act. This power of wide amplitude will comprehend the power to stop all appointments for the time being. And the power appears to have been exercised as Government was contemplating taking away the power of private management of non-government-aided schools to make appointment of teachers including Principals. In order to avoid forestalling of governmental action by private managements, the power to make appointments was suspended for the time being. As pointed out earlier, the Regulation confers power on the Committee of Management to make appointment. That Regulation was enacted by the Board with the prior sanction of the State Government. The State Government could be said to have rescinded that Regulation conferring power of appointment or at any rate suspended the power conferred on the Committee of Management to make appointment. The order became effective the moment it is issued. The effect of this order is that the Selection Committee had no right to select the appellant nor the Committee of Management had any power to make the appointment.

14. In view of the finding that sub-section (4) of Section 9 did confer power on the State Government to make, modify or rescind the regulation or make any other order consistent with the provisions of the Act, the second contention of Mr Sanghi is equally bound to fail."

41. Section 9(4) of the Act is to be read in conjunction with Section 16G, as the provisions will have to be read keeping in view all the objects of the enactment. In this connection, we need to point out that if the practice of recruitment, prior to the amendment of the impugned regulation, was done by tracing the power under it, then it is not open to the respondents to contend to the contrary.

42. Regulation 101, prior to the amendment, imposes strict compliance of getting prior approval. We find that except in Civil Appeal No.2753 of 2021, no such approval has been granted. Obviously, it only indicates the real intention of the respondents/management which is to have their own recruitment other than anything else.

43. The Division Bench in considering the view has entered into an arena which was not required to be done. Much labouring was done in interpreting the word "Outsourcing", however, such an exercise ought to have been avoided as it stands outside the scope of judicial review. We have already noted the fact that "Outsourcing" as a matter of policy is being introduced throughout the State. It is one thing to say that it has to be given effect to with caution as recommended by the Seventh Central Pay Commission, and another to strike it down as unconstitutional. "Outsourcing" per se is not prohibited in law. It is clear that a recruitment by way of "Outsourcing" may have its own deficiencies and pit falls, however, a decision to take "Outsourcing" cannot be

declared as ultra vires of the constitution on the basis of mere presumption and assumption. Obviously, we do not know the nature of the scheme and safeguards attached to it.

44. Reliance is made on a decision of this court in the case of ***Catering Cleaners of Southern Railway*** (supra), wherein the Petitioners were "catering cleaners" employed for cleaning in various railway station, and they were not even paid the minimum wages. Their grievance was that they had no security of service, while being paid a paltry sum as wages. The aforesaid decision has no application qua the present regulation, which has got its own laudable object, introduced on the basis of economic criteria apart from efficiency.

45. We are also not dealing with the scheme per se, and therefore, are in dark on the conditions of service. The challenge in the present case is not by the employee, recruited by way of "Outsourcing", and hence, we hold the said decision on which much reliance is sought to be made by the respondents will not be of any help. One cannot simply presume that "Outsourcing" as a method of recruitment would necessarily be adopting contract labour and that there exists an element of unfair trade practice, as sought to be contended by the respondents.

46. Article 14 is positive in nature. Adequate leverage is to be provided to the law maker in making the classification. Article 14 of the Constitution of India does not prohibit discrimination, what is required is a valid discrimination against a

hostile one. We do not wish to multiply the aforesaid principle of law except quoting the following paragraph in ***Manish Kumar*** vs. ***Union of India***, (2021) 5 SCC 1:

> *"249. We see considerable merit in the stand of the Union. This is not a case where there is no intelligible differentia. The law under scrutiny is an economic measure. As laid down by this Court, in dealing with the challenge on the anvil of Article 14, the Court will not adopt a doctrinaire approach. Representatives of the people are expected to operate on democratic principles. The presumption is that they are conscious of every fact, which would go to sustain the constitutionality of the law. A law cannot operate in a vacuum. In the concrete world, when the law is put into motion in practical experiences, bottlenecks that would flow from its application, are best envisaged by the law givers. Solutions to vexed problems made manifest through experience, would indeed require a good deal of experimentation, as long as it passes muster in law. It is no part of a court's function to probe into what it considers to be more wise or a better way to deal with a problem."*

47. The entire issue has to be looked at from different perspective as well. By the policy decision made, the appellants have abolished the post though in an indirect way by providing for "Outsourcing". Now, a court cannot create or sustain the aforesaid post. There is nothing on record to hold that the decision made is extraneous as it is obviously made applicable not only to the aided institutions but also to all government departments as well.

48. Arguments are advanced to the effect that interest of poor and needy is affected by the impugned Regulation. We do not know how the interest of the poor and needy is affected by the impugned Regulation. Admittedly, no challenge has been made to the decision taken in 2010 and 2011 which was to be made

applicable to all the recruitments for Group 'IV' posts in the Government, and not only for the institutions and the persons recruited by them. The entire litigation is triggered only by the institutions.

49. Whenever a *lis* is raised before the Court the grievance along with interest of the party concerned while laying a challenge has to be kept in mind. The aforesaid principle is expected to be kept in mind. More so, while invoking Article 226 of the Constitution of India being extraordinary and discretionary in nature. The aforesaid principle would help the Court to understand the actual reason behind seeking a relief by a party. Keeping the said principle in mind we could only say that the respondents/petitioners, being the institutions endowed with the power of recruitment, do not wish to let go of their hold.

50. The Division Bench has also taken into consideration Section 9 of the Payment of Salary Act, 1971. We may only state that the aforesaid act has got nothing to do with the impugned Regulation. The idea was to create a new set of employees introduced through "Outsourcing". As stated, the impugned Regulation is only reiteration, as the Government Order dated 08.09.2010 and 06.01.2011 by way of policy, takes care of the aforesaid view.

51. The High Court has placed the onus on a wrong premise on the appellants represented by their pleader. When a challenge is made either to a regulation, rule or an Act, it is for the persons who challenged, to satisfy the Court that they cannot be sustained in the eyes of law. Such a challenge has to be

considered within the contours of law. Mere fact that a counsel representing the State is not able to satisfy the Court on the policy challenged would not *ipso facto* lead to a declaration that it is unconstitutional. Having said that, we do believe that such an exercise is also not warranted at the hands of the High Court.

52. The fact that the Act of 1921 is of a pre-independent origin has been taken note of by us already. The regulations have been introduced in tune with the powers conferred under the Act. The concept of "always speaking" as a principle of interpretation is to be applied for a proper understanding of an old enactment. After all, such a statute having its intended object which certainly includes regulating the functions of aided institutions requires to be interpreted to deal with the past, present and future situations. Therefore, an interpretation which is reasonable, constructive and purposive would serve the purpose. We draw reference to the decision of this Court in the case of ***Dharani Sugars and Chemicals Ltd.*** vs. ***Union of India***, (2019) 5 SCC 480.

53. The counsel appearing for the respondents did place reliance upon few decisions of this Court. Having gone through the said decisions and in the light of our discussion, we do not find any help flowing from them, strengthening the contentions raised by them. Reliance has been made on the decision rendered by this Court in ***Matankara Syrian Catholic College*** vs. ***T. Jose,*** (2007) 1 SCC 386. Having gone through the said judgment, we do not

find that the same has got any application to the case at hand. The said decision deals with the right of the minor institutions to choose the Principal of its choice. We have already held that we are dealing with the case of aided institutions and, therefore, there is no need for any sub-classification by separating them as minority and non-minority institutions. The impugned regulation is sought to be enforced against all the aided institutions. It is also to be noted that this decision was taken into consideration by this Court in ***S.K. Md. Rafique's*** case (supra).

RELIEF: -

54. We have one more issue to be considered before our conclusion. That is, whether the institutions should be held responsible, with respect to the interest of those who were recruited though contrary to the Impugned Regulation or not. These persons are innocent civilians who got embroiled in the legal battle initiated by the management and made to fight as front-line soldiers. It is the management which found these persons suitable to hold the post. Therefore, this court will have to apply the theory of justice and adopt a problem-solving approach. Having appointed persons and found them suitable, while creating a situation which could have been avoided, the managements will have to take up their responsibility. If imparting education is seen to be in public interest, such institutions have duties to their employees as well. Certainly, the appellants cannot be made to continue them by making a contribution towards their salary by way of aid.

55. We may also note that even the Division Bench in its own wisdom has observed that the impugned Regulation can only be applied to the aided institutions alone. This finding has not been challenged seriously before us. We are conscious of the legal position governing equity when pitted against law. Though both can travel in the same channel, their waters do not mix very often.

56. Having found that the appellants are justified in passing the relevant Government Order followed by the impugned Regulation, we do not wish to impose any further liability on them. On the contrary, we do feel that institutions should be held responsible for the judicial adventurism undertaken.

57. However, we would also like to observe that the appellants will have to seriously consider paragraph 3.72 and 3.83 of the Seventh Central Pay Commission. We expect the appellants to create an adequate mechanism to see to it that the persons employed by the process of "Outsourcing" are not exploited in any manner.

58. Accordingly, we have no difficulty in setting aside the judgment of the Division Bench dated 19.11.2018 and the consequential orders passed while upholding the impugned Regulation. The appeals are allowed with the following directions:

(i) The respondents/writ petitioners in Civil Appeal No 2753 of 2021 are directed to be confirmed by granting adequate approval as Class "IV" employees, having given prior approval.

(ii) The respondents/writ petitioners and similarly placed persons who are recruited by the institutions including the respondents shall be continued with the same scale of pay as if they are recruited prior to 08.09.2010 for which the entire disbursement will have to be made by the institutions alone.

(iii) The appellants shall undertake the necessary exercise to see to it that there is a mechanism available for the proper implementation of "Outsourcing" with specific reference to the conditions of service of those who are employed while taking note of the recommendations made in the Seventh Central Pay Commission.

59. The impleadment /intervention applications are allowed accordingly.

60. There shall be no order as to costs.

……J.
(SANJAY KISHAN KAUL)

……J.
(M.M. SUNDRESH)

New Delhi
September 27, 2021