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Writ - A No 56673 of 2009

C/M Swami Lila Shah Adarsh Sindhi Inter College & Anr
Vs
State of U P & Ors

Appearance:

For the petitioners : Mr K P Shukla, Advocate

For the respondents : Mr Ashok Kr Pandey, Additional Advocate General, with Dr Y K Srivastava, Standing Counsel

Hon'ble Dilip B Bhosale, Chief Justice
Hon'ble Pankaj Mithal, J
Hon'ble Yashwant Varma, J

(Per Dilip B Bhosale, CJ)

An advertisement published in the newspaper 'Dainik Jagran' dated 25 July 2009, inviting applications for filling up eight posts of LT Grade Assistant Teachers, issued by Swami Lila Shah Adarsh Sindhi Inter College, Charbagh, Shahganj, Agra (for short, 'the institution'), gave rise to the instant writ petition.

The writ petition was initially heard by a learned Single Judge (Hon'ble A.P. Sahi, J), who, vide order dated 29 October 2009, after having noted divergent opinions expressed by a learned Single Judge in **Committee of Management, Sri Kund Kund Jain Inter College, Muzaffarnagar Vs State of U P & Ors, [2006 (3) ESC 1528 (All)]**, and a Division Bench in **N B Lal Vs District Inspector of Schools & Ors, Writ Petition No 9776 of**

1984, **decided on 31 August 1984**, on the one hand and the judgment of a learned Single Judge in **Management Committee of M M Inter College, Chandpur, District Bijnor Vs Deputy Director of Education, III Region, Bareilly & Ors, 1984 (1) UPLBEC 271** as also the judgment of the Supreme Court in **Kolawana Gram Vikas Kendra Vs State of Gujarat & Ors, 2010 (3) AWC 2543 (SC)** on the other, proceeded to refer the matter to the Chief Justice for constitution of a larger Bench, framing three questions for consideration. The reference made by a learned Single Judge was accordingly placed before a Division Bench, consisting of Hon'ble Ashok Bhushan, J (as he then was) and Hon'ble A P Sahi, J. The learned Judges in the Division Bench have written separate concurring orders and framed questions, requesting the Chief Justice for constitution of a larger Bench. In the reference order, both the learned Judges have independently expressed their opinion, based on the judgment of the Supreme Court in **Kolawana Gram Vikas Kendra** (supra). The questions framed by the Division Bench, and which now fall for our consideration, read thus:

> "(1) Whether the law laid down in the case of **N.B. Lal Vs. District Inspector of Schools** (supra) that provisions of Chapter II Regulation 5 providing for filling up 50% post by promotion of Assistant Teacher violates the right of minority institution guaranteed under Article 30 of the Constitution.
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> (2) Whether the institution claiming itself to be a minority institution and acknowledged as such by the State Government is entitled to not to consider the claim of promotion of teachers of the primary section of Intermediate Colleges claiming promotion under the Government Order dated 25.11.2005 whereby 25% quota is reserved in their favour, on the ground that it offends Article 30 of the Constitution of India.

> (3) Whether the provisions relating to promotion in respect of teachers of Intermediate College contained in Chapter II of the Regulations framed under the U.P. Intermediate Education Act, 1921, can be treated to be regulatory in nature, not violative of rights under Article 30 of the Constitution of India."

The questions framed by the Division Bench centered around the applicability of the provisions of Regulation 5 contained in Chapter II of the Regulations framed under the Intermediate Education Act, 1921 (for short, 'the Act 1921') and whether the said provision violated the rights of a minority institution guaranteed by Article 30 of the Constitution. When the matter was heard by the Division Bench, the learned Judge found themselves unable to accept the view taken by the Division Bench in **N B Lal** and, accordingly, opined that the same would require reconsideration. It is in this backdrop that the present Full Bench came to be constituted.

Before we proceed further, it would be relevant and necessary to mention that learned counsel for the parties have jointly requested to correct the terms of reference so far as reference to Regulation 5 and 50% posts mentioned in the first question is concerned and prayed for correcting it as Regulation 7 and 25% posts. Another correction sought was with reference to the date of the Government Order referred to in the second question, which was urged to be read as 25.11.2003 instead of 25.11.2005. Having considered the prayers so made, we modify the first question so as to read therein Regulation 7 instead of Regulation 5 and 25% posts instead of 50% posts and the second question so as to read the date 25.11.2003 instead of 25.11.2005 therein. We must observe that this modification will not change the complexion of the matter nor the opinions expressed by the learned

Judges in the reference order nor would it have any effect on consideration of the questions referred to this Full Bench.

Briefly stated, the facts, which gave rise to the writ petition, are as follows : admittedly, the institution is a recognized institution under the provisions of the Act 1921 and it receives grant-in-aid from the State Government upto the high school level. It is also not in dispute that the institution has been recognized as a minority institution vide Government Order dated 9 June 2004. There were eight vacancies of LT Grade Assistant Teachers in the institution, for which the Committee of Management, vide its letter dated 14 November 2007, requested the District Inspector of Schools, Agra to accord permission to fill up those vacancies. The District Inspector of Schools, in turn, vide his letter dated 21 November 2007, raised certain queries which, the petitioners claim, they had replied. Thereafter, the institution, without awaiting the permission from the District Inspector of Schools, issued an advertisement as aforementioned, on 25 July 2009, inviting applications for the eight vacancies by direct recruitment. The District Inspector of Schools raised an objection on 27 August 2009, informing the institution that, as per the Government Order dated 25 November 2003, LT Grade Assistant Teachers working in the primary section are entitled to be considered for promotion to the extent of 25% posts and, therefore, proceedings initiated by the Committee of Management for direct recruitment are contrary to the said Government Order. The Committee of Management replied to the said letter, stating that the institution, being a minority institution, is empowered to recruit teachers in

the institution and the letter of the District Inspector of Schools asking them to consider LT Grade Assistant Teachers, working in the primary institution, for promotion to the extent of 25 percent promotion quota is violative of their rights conferred under Article 30 of the Constitution of India. In view thereof, the District Inspector of Schools issued the order dated 19 October 2009, impugned in the writ petition, asking the Committee of Management to desist from holding the interviews for appointment on the posts of LT Grade Assistant Teachers which were scheduled to take place on 20 October 2009.

It is against this backdrop that the institution preferred the instant writ petition challenging the order dated 19 October 2009 passed by the District Inspector of Schools, Agra and sought a direction in the nature of mandamus commanding the District Inspector of Schools not to interfere in the selection process of LT Grade Assistant Teachers initiated by the Committee of Management.

In the reference order, both the learned Judges have exhaustively considered the relevant provisions of the Regulations and several judgments, including the judgments to which we have already made reference. It would be advantageous to reproduce the relevant portion of the reference order written by Hon'ble Ashok Bhushan, J (as he then was) and so also by Hon'ble A P Sahi, J. While opining that **N B Lal** required reconsideration, Hon'ble Ashok Bhushan, J (as he then was), made the following observations in the referral order:

> "We are of the view that providing 25% posts to be filled up by promotion of primary teachers of the primary

institution is a regulation providing service conditions of the teachers and is a provision providing avenue for promotion to the primary teachers so that they may not stagnate nor they feel frustrated by not getting a career advancement, providing beneficial service conditions to the teachers of the minority institution is with the object of better administration and cannot be said to take away any right of Management. The question as to whether teachers are entitled to be promoted or whether they are fit to be promoted is again in the domain of the Management who is to affect promotion. It cannot be held that the Management has right to make appointment only by direct recruitment on all the posts, permitting the management to make appointment on all the posts by direct recruitment only shall breed discontent in the existing teachers who look forward for such conditions of service which may provide for career advancement so that they may feel contended and give their best to the students.

... ...

In the above case the Division Bench held that Regulation 5 of Chapter II not to be applicable to minority institution only on the ground that the said regulation has not been made specifically applicable to the minority institution.

We have already noted the scheme of the Act, 1921 and the Regulations framed thereunder. There are several provisions in the Regulations which have not been specifically made applicable to the minority institution, but they are applicable to the minority institution. In fact, in the Act, 1921 apart from the provisions providing for constitution of the Selection Committee for minority institution there are no other provisions which have been made specifically applicable to the minority institution.

... ...

The observation of the Division Bench in **N.B. Lal's** case (supra) that Chapter II Regulation 5 has not been specifically made applicable to the minority institution thus needs a reconsideration since there are several provisions in the Regulations which have not been made applicable specifically to a minority institution, but they are applicable for example Regulations 44 to 48.

The Division Bench in **N.B. Lal's** case (supra) has not referred to any other reason for not applying Chapter II Regulation 5. We are of the view that the said Division

> Bench judgment needs reconsideration specially in view of the law laid down by the Apex Court in its several judgments as noted above that Regulations can be enforced against the minority institutions which relate to the conditions of service and which are beneficial to the teachers and promote excellence."

Hon'ble A P Sahi, J, while concurring with the view taken by Ashok Bhushan, J, observed as follows:

> "To make a provision for the promotion of a teacher to a higher grade in the same institution, which is State aided, can be treated to be regulatory without encroaching upon the right of the management to make an appointment of its own choice. The teacher, who is seeking promotion is within the same institution and his appointment as such did not offend Article 30 of the Constitution when he was inducted into the cadres of the institution. The management has a right to promote a teacher provided he is fit and eligible to be promoted. The teacher has a right to be considered but the ultimate authority to appoint is with the management. The management has the right to assess the fitness of a candidate for promotion which means fitness in all respects as indicated in the apex court decision in the case of **Union of India and others Vs. Lt. Gen. Rajendra Singh Kadyan and another reported in (2000) 6 SCC 698.**
>
> ... ...
>
> There is yet another aspect on the constitutional plane that has to be gone into and which is the fundamental question relating to the defence taken by the management of the institution. An employee under the general rules of service jurisprudence has a right to be considered for promotion which has been acknowledged as a fundamental right protected under Article 16 of the Constitution of India. Reference be had to the decision in the case of **Ajit Singh and others Vs. State of Punjab and others reported in (1999) 7 SCC 209, paragraphs 22, 24 to 27**. Promotion is a consideration for occupying a higher post as per rules on the basis of the qualifications so prescribed. The concept of promotion comes into picture only if a person has entered into a cadre strength of the organization. What is promotion has been explained by the apex court in the case of **A.K.**

> **Subraman and others Vs. Union of India and others reported in (1975) 1 SCC 319, paragraph 22**. If the right for consideration of promotion is a fundamental right then it has to be further examined as to whether this individual right in any way trenches upon the social protection guaranteed under Article 30 of the Constitution of India"

In **N B Lal**, the Division Bench was called upon to consider the claim of a teacher for promotion against the quota reserved for in-house candidates in terms of the provisions of Regulation 5. This claim of the petitioner in **N B Lal** came to be turned down by the Division Bench which held that such a restriction could not be read by implication to apply to an institution which stood protected under Article 30 of the Constitution. The second premise upon which the Division Bench in **N B Lal** negatived the claim was that since the provisions of Regulation 5 had not been made applicable to minority institutions, the petitioner therein could not base any claim thereon. It becomes relevant to note that **N B Lal** summarily dismissed the writ petition. The short order by which the Division Bench (and which is unreported) rejected the claim of the petitioner therein is extracted herein below:

> "Having heard learned counsel for the petitioner we find no merit in this petition.
>
> The petition is liable to be dismissed on a short ground. Admittedly the institution of which the petitioner is a teacher is a minority institution. To such an institution the provisions of U.P. Secondary Education Services Commission and Selection Boards Act do not apply. Neither does Regulation 5 of Chapter II of the Regulations framed under the U.P. Intermediate Education Act apply to such an institution as the same has not been made applicable to a minority institution.
>
> Learned counsel for the petitioner submitted that as

> the procedure for selection of teachers even of minority institutions has been laid down under Section 16FF of the Intermediate Education Act, it implies that in regard to the minority institutions also the quota of 40 per cent reserved for promotees contemplated under Regulation-5 aforesaid shall be maintained.
>
> We do not agree with this contention. **To a minority institution which is protected under Article 30 of the Constitution, such a restriction can not be read by implication**. In our opinion, the mere fact that the procedure prescribed for selection is the same or similar to that applicable to other institutions can not automatically bring in Regulation 5 of Chapter II. **This provision not having been specifically applied to minority institutions the petitioner can not base any claim thereon**.
>
> Learned Counsel for the petitioner next contended that the right to promotion under Regulation 5 against the 40 per cent quota was a condition of the petitioner's service and therefore, Regulation 5 should be deemed to be applicable to minority institutions also. **As regulation 5 does not apply to a minority institution, it can not be treated as forming part of the petitioner's conditions of service. A minority institution enjoys complete autonomy in respect of selections and appointments of teachers except to the extent specifically restricted by the Intermediate Education Act. In the scheme of that Act we find nothing which may have taken away the right of a minority institution to fill in the posts of teachers by direct recruitment regardless of the restrictions imposed as regards the quota of promotees contemplated in Regulation 5**.
>
> The petition is accordingly dismissed summarily."
>
> (emphasis supplied)

As is evident from the order penned by the Division Bench in **N.B. Lal**, the claim of the petitioner therein came to be negatived firstly on the premise that the provisions of Regulation 5 operate as a "restriction" on the rights of a minority institution as guaranteed and protected by Article 30 of the Constitution. The second ground upon which the Division Bench rested its decision to summarily dismiss the writ petition was that Regulation 5 had

not been made specifically applicable to minority institutions.

A learned Judge of this Court in **Sri Kund Kund Jain Inter College** (supra), reiterated the view expressed in **N B Lal** (supra).

On the other hand, in **Management Committee of M M Inter College** (supra), a learned Single Judge of this Court, after considering the relevant Regulations providing for a procedure to conduct disciplinary proceedings against a teacher, held that the Regulations are regulatory in nature and do not offend Article 30 of the Constitution. Paragraphs 12 and 13 of the judgment read thus:

> "12. The question remains still whether the Managing Committee can claim to have acted in accordance with law, despite the failure to observe the provision contained in Regulations 35 to 37, referred to above. Despite the order of the appellate authority being ignored, the dismissal of the respondent no.3 from service may not be upheld until it were to be found that the action taken by the Managing Committee was in conformity with the mandatory requirements of law. The provision contained in Regulations 35 to 37 is designed to carry out the requirement of section 16-G (1)/(2) in so far as these Regulations prescribe the conditions and the procedure under which the punishment may be imposed. Faced with this, Sri Zaidi urged that these Regulations be held *ultra vires* Article 39 (1) of the Constitution. This argument has merely to be stated and rejected. The regulatory power of the Legislature has been upheld in relation to the educational institutions established and administered by religious and linguistic minorities. The validity of section 51-A(1) (a) of the Gujarat University Act, 1949, which makes provisions for giving a reasonable opportunity of showing cause against a penalty to be proposed on a member of the staff of an educational institution was held to be valid in the *Ahmadabad St. Xavier's College Society and anothers case* (supra). The provision therein is that no member of the staff (including a teacher) shall be dismissed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of these

charges and until he has been given a reasonable opportunity of making representation on any such penalty proposed to be inflicted on him. The provision thus is in *pari materia* with that contained in Regulations 35, 36 and 37. In paragraph 105 of that case Khanna,J. observed:-

> **Although disciplinary control over the teachers of a minority educational institution would be with the governing council regulations, in my opinion, can be made for ensuring proper conditions of service of the teachers and for securing a fair procedure in the matter of disciplinary action against the teachers. Such provisions which are calculated to safeguard the interest of teachers would result in security of tenure and thus inevitably attract competent persons for the posts of teachers. Such a provision would also eliminate a potential cause of frustration amongst the teachers. Regulations made for this purpose should be considered to be in the interest of minority educational institutions and as such they would not violate Article 30 (1)**.

13. This was affirmed also in the subsequent decisions in *Lily Kurien v. St. Lewina and others* (supra): *Gandhi Faize-e-Am College case* (supra). **The provision contained in Regulations 35 to 37 being regulatory in the character and intended to ensure fairness in procedure incorporating the essential features of natural justice in matters of imposition of punishment may not be regarded as contravening Article 30(1) of the Constitution**. Sri Zaidi argued also that there is no authority provided to revise or sit in appeal over the decision arrived at by the Managing Committee. This cannot be made a basis to contend that this Court does not have the power to interfere in exercise of the jurisdiction under Article 226 of the Constitution where it is found that the Managing Committee has acted illegally and exercised jurisdiction not conferred under the Act."

(emphasis supplied)

Though, the judgment in **M M Inter college** was of a Single Judge, the Division Bench, in the referral order, also noted the judgment of the

Supreme Court in **Kolawana Gram Vikas Kendra** (supra) for making reference to a larger Bench. In **Kolawana Gram Vikas Kendra**, the institution was receiving hundred percent government grant. The question which arose in the said case was whether prior approval of the State Government/competent authority required as per the government circular before appointment of a candidate is an infringement of the right under Article 30 of the Constitution. The circular was upheld, holding that it does not offend the right of a minority under Article 30 of the Constitution. The observations made in paragraph 7 are relevant, and read thus:

> "7. From the reading of aforementioned para 3, it is clear that all that the Government wants to examine is as to whether the proposed appointments were within the framework of the rules considering the workload and the availability of the post in that institution and, *secondly*; whether the selected candidates had the necessary qualifications for the subjects in which the said teachers were appointed. The same applies to the non-teaching staff also."

In view of the observations made by the Supreme Court in **Kolawana Gram Vikas Kendra**, the Division Bench, in the reference order, observed that Regulations can be made and applied to a minority institution receiving grant-in-aid, by the State Government, provided the Regulations do not impinge upon the rights of the minority which are protected under Article 30 of the Constitution. Further, it was observed, the Regulations, which are regulatory in nature and advance the efficient administration by the minority institution, do not interfere with the choice of the management to choose a teacher, either for initial selection or for considering any teacher working in the institution for promotion.

Before we advert to the contentions urged on behalf of the parties, it would be apposite to refer to the relevant provisions in the Act 1921, upon which would rest the answer to the questions referred for consideration. The Act 1921 was enacted for establishment of a Board of High School and Intermediate Education and for regulating and supervising the system of High Schools of Uttar Pradesh. The provisions of the Act 1921 were amended by U P Act No XXVI of 1975. Section 16-FF saves the right of minority institutions guaranteed by Article 30 of the Constitution by providing that notwithstanding anything contained in Sections 16-E and 16-F, which otherwise apply to all other institutions governed by the provisions of the Act 1921, the composition of a Selection Committee, which must be constituted by a minority institution for the selection and appointment of a head of the institution or a teacher in such an institution, would be such as prescribed therein. Sub-section (4) then restricts the scope of interference liable to be made by the Regional Deputy Director of Education or the Inspector, in respect of such a selection by declaring that approval to such selections shall not be withheld, where it is found that the person selected possesses the minimum qualification prescribed and is otherwise eligible. It would be relevant to reproduce Section 16-FF, which reads thus:

> "**16-FF. Savings as to minority institutions.-**(1) Notwithstanding anything in sub-section (4) of Section 16-E, and Section 16-F, the Selection Committee for the appointment of a Head of Institution or a teacher of an institution established and administered by a minority referred to in Clause (1) of Article 30 of the Constitution shall consist of five members (including its Chairman) nominated by the Committee of Management:
>
> Provided that one of the members of the Selection Committee shall -

> (a) in the case of appointment of the Head of an institution, be an expert selected by the Committee of Management from a panel of experts prepared by the Director;
>
> (b) in the case of appointment of a teacher, be the Head of the Institution concerned.
>
> (2) The procedure to be followed by the Selection Committee referred to in sub-section (1) shall be such as may be prescribed.
>
> (3) No person selected under this section shall be appointed, unless-
>
> (a) in the case of the Head of Institution the proposal of appointment has been approved by the Regional Deputy Director of Education; and
>
> (b) in the case of a teacher such proposal has been approved by the Inspector.
>
> (4) The Regional Deputy Registrar of Education or the Inspector, as the case may be, shall not withhold approval for the selection made under this section where the person selected possesses the minimum qualification prescribed and is otherwise eligible.
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> (5) Where the Regional Deputy Director of Education or the Inspector, as the case may be, does not approve of a candidate selected under this section the Committee of Management may, within three weeks from the date of receipt of such disapproval, make a representation to the Director in the case of the Head of Institution, and not to Regional Deputy Director of Education in the case of teacher
>
> (6) Every order passed by the Director or the Regional Deputy Director of Education on a representation under sub-section (5) shall be final."

This Section, as is seen in sub-section (4), uses the expression "person selected possesses the minimum qualification prescribed and is otherwise eligible." The word "prescribed" in the expression has been defined by Section 2(c) of the Act 1921 to mean "prescribed by Regulations."

We would also like to make a reference to the relevant Regulations.

Minimum qualifications for appointment of a Head of the Institution and teachers has been prescribed in Chapter II Regulation 1. Chapter II contains various provisions for appointment of teachers, filling up of temporary vacancies, seniority of teachers, promotion and the procedure for holding selection. Regulation 5 falling under this Chapter provides for a promotional quota for filling up posts of teachers in recognized institutions. It would be relevant to reproduce Regulation 5, which reads thus:

> "5.(1) Every vacancy in the post of teacher in a recognized institution shall, except as otherwise provided in clause (2), be filled by direct recruitment.
>
> (2) (a) Fifty per cent of the total number of the sanctioned posts in lecturer's grade or in the L.T. grade shall be filled by promotion from amongst the teachers working in the institution in the L.T. And the C.T. grades respectively and promotions shall be made subject to availability and eligibility of such teachers for promotion.
>
> (b) If more than fifty per cent of the total number of the sanctioned posts in the lecturer's grade or as the case may be, in the L.T. grade have already been filled by promotion, the persons already promoted shall not be reverted.
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> (c) In computing fifty per cent of the post under clause (a) fraction of less than one half shall be ignored while fraction of one-half or more shall be reckoned as one.
>
> Explanation-(1) The expression "sanctioned post" means any post not being a post created temporarily for a specified period, which is created by an order of the authority competent to create such post and includes a post on which appointment has been made with the approval of the Inspector.
>
> (2) The post held by a teacher who, while working in an institution in a lower grade was appointed to a higher grade in that institution through direct recruitment shall not be deemed to have been filled by promotion.
>
> (3) For purposes of this regulation, teachers duly appointed in any manner prior to the coming into force of the Intermediate Education (Amendment) Act, 1958 (U.P. Act No. XXXV of 1958) shall be deemed to have been

appointed through direct recruitment."

Though, we are not concerned with this Regulation, we have reproduced the same in order to understand the difference between this Regulation and Regulation 7 (2-a) which is relevant for our purpose. Regulation 7 (2-a), which is not available in English, is being reproduced as under in Hindi:

> "(2-क) ऐसे इण्टरमीडिएट कालेज एवं हाईस्कूल जिनसे सम्बद्व प्राइमरी अनुभाग के अध्यापक उत्तर प्रदेश हाईस्कूल तथा इण्टरमीडिएट कालेज (अध्यापकों तथा अन्य कर्मचारियों के वेतन भुगतान) अधिनियम 1971 के प्रावधानों के अन्तर्गत वेतन भुगतान प्राप्त करते हैं, में उपलब्ध प्रशिक्षित स्नातक श्रेणी के कुल पदों के 25 प्रतिशत पदों को प्रबन्ध समिति द्वारा सम्बद्व प्राइमरी अनुभाग में कार्यरत ऐसे अध्यापकों से पदोन्नति द्वारा भरा जायेगा, जिन्होंने प्राइमरी अध्यापक के रूप में पॉच वर्षों की सेवा पूरी कर ली है तथा वह प्रशिक्षित स्नातक हो और ऐसे पदोन्नति की सूचना निरीक्षक को तुरन्त दी जायेगी।"

In the present case, we are concerned with the teachers attached to the primary sections. Regulation 1 relates to teachers in lecturers' grade who were in the LT Grade (to be filled up by promotion) from amongst teachers working in the institution in the LT Grade and the CT Grades respectively, whereas Regulations 7 (2-a) relates to teachers attached to primary sections of a recognized institution. The procedure for selection of the Head of the institution and teachers, insofar as an institution governed by Section 16-FF is concerned, is detailed in Regulation 17. In Chapter III of the Regulations, there are several provisions pertaining to other service conditions of employees which have to be applied to teachers of non-minority institutions as well as minority institutions, although there is no specific reference in the Regulations that they shall or shall not apply to minority institutions, for

example, Regulation 46 which provides that employees shall be allowed the scale of pay sanctioned by the State from time to time. We are not making a detailed reference to each of the Regulations since that may not be relevant for our purpose, but what is necessary to be noticed is that there are several provisions in the Regulations which although not having been specifically made applicable to minority institutions are still otherwise applicable to minority institutions. In fact, in the Act 1921, apart from the provision of providing for the constitution of a Selection Committee for minority institutions, there are no other provisions which have been made applicable to minority institutions.

Sri K P Shukla, learned counsel, who has led the arguments on behalf of the petitioner-minority institutions, has contended that the right of a minority institution to establish an educational college and to administer the same without any interference of the educational authorities is a right which stands guaranteed, recognised and protected by Article 30 of the Constitution. According to Sri Shukla, the rights of minority institutions stand protected and placed on a separate pedestal by the Act 1921 itself. This, in his submission, is evident from the express saving of rights of minority institutions by Section 16-FF. According to Sri Shukla, the right to administer an educational institution when conferred upon a minority, is unbridled and cannot be fettered by any interference or direction of authorities constituted under the Act 1921. Upon being asked to elaborate upon the aforesaid submissions, Sri Shukla, in the course of the hearing, conceded that Regulation 7 (2-a) perhaps cannot be characterised as directly

interfering with the rights of the management of a minority institution to administer an educational institution. Sri Shukla, however, placed a caveat to the above submission by stating that while conceding and recognising the applicability of Regulation 7(2-a), the State authorities cannot interfere with the decision of the management of a minority institution to select and promote a particular person. Sri Shukla submitted that although Regulation 7(2-a) in principle may apply to teachers of a minority institution, the same however cannot lead to a situation where the educational authorities interfere with the actual selection or appointment of a candidate by the management subject to other Rules and Regulations being adhered to.

Insofar as the State-respondents are concerned, Dr Y K Srivastava has supported the view taken by the two learned Judges who have made the present reference and submits that Regulation 7(2-a) in no manner infringes or impinges upon the rights of a minority institution guaranteed by Article 30 of the Constitution.

As noticed herein above, the order of the Division Bench in **N B Lal** primarily proceeded on the premise that the provisions of **Regulation 5** restrict the rights of a minority institution protected by Article 30 of the Constitution. As we read Regulations 5 and 7(2-a), we fail to notice or appreciate any facet of the said Regulations which may be said to operate as a "restriction" on the power of the management of a minority institution to administer. Both Regulations only provide for the reservation or earmarking of a particular percentage of seats for in-house candidates who seek promotion in the Lecturers Grade or in the L T Grade. It only provides for

the percentage of the total number of sanctioned posts in the Lecturers Grade or in the L T Grade that may be filled from amongst teachers working in the institution in the L T and C T Grades respectively. Regulation 7 (2-a) makes identical provision in respect of teachers who are working in the attached primary section of a recognised institution. A close and careful reading of both the Regulations clearly evidences the making of a provision for existing teachers to participate in a selection process for further promotion. Both the Regulations at best create and put in place promotional avenues for the existing teachers and staff of a recognised institution. They are, therefore, strictly speaking not restrictions on the right to administer an institution. They are an ameliorative measure placed on the statute to obviate discontentment and stagnation amongst the existing employees of the educational institution. They do not fetter or control the right to administer or control the affairs of a minority institution as may be claimed under Article 30. In our considered view, the Division Bench in **N B Lal** clearly erred in holding that these Regulations operated as a restriction on the rights of the management to administer and manage a minority institution.

Article 30 (1) of the Constitution deals with religious minorities and linguistic minorities. The opening words of Article 30 (1) make it clear that religious and linguistic minorities have been put at par, insofar as that Article is concerned. The Supreme Court in **T M A Pai Foundation & Ors Vs State of Karnataka & Ors, (2002) 8 SCC 481**, has exhaustively considered and dealt with Article 30. Several questions were formulated and

addressed by the Supreme Court in the said judgment. In the present case, we are concerned with Question 5 (c) : whether the statutory provisions which regulate the facets of administration like control over educational agencies, control over governing bodies, conditions of affiliation including recognition/withdrawal thereof, and appointment of staff, employees, teachers and principals including their service conditions and regulation of fees etc. would interfere with the right of administration of minorities? After dealing with Article 30 exhaustively, the Supreme Court observed in paragraph 450 of the judgment (majority view):

> "So far as the statutory provisions regulating the facets of administration are concerned, in case of an unaided minority educational institution, the regulatory measure of control should be minimal and the conditions of recognition as well as conditions of affiliation to a university or board have to be complied with, but in the matter of day-to-day management, like appointment of staff, teaching and non-teaching and administrative control over them, the management should have the freedom and there should not be any external controlling agency. **However, a rational procedure for selection of teaching staff and for taking disciplinary action has to be evolved by the management itself**. For redressing the grievances of such employees who are subjected to punishment or termination from service, a mechanism will have to be evolved and in our opinion, appropriate tribunals could be constituted, and till then, such tribunal could be presided over by a judicial officer of the rank of District Judge. The State or other controlling authorities, however, can always prescribe the minimum qualifications, salaries, experience and other conditions bearing on the merit of an individual for being appointed as a teacher of an educational institution.
>
> **Regulations can be framed governing service conditions for teaching and other staff for whom aid is provided by the State without interfering with the overall administrative control of the management over the staff, government/university representative can be associated with the Selection Committee and the guidelines for selection can be laid down**. In regard to

> unaided minority educational institutions such regulations, which will ensure a check over unfair practices and general welfare of teachers could be framed.
>
> There could be appropriate mechanism to ensure that no capitation fee is charged and profiteering is not resorted to.
>
> The extent of regulations will not be the same for aided and unaided institutions."
>
> (emphasis supplied)

The Supreme Court has, thus, made it clear that a rational procedure for selection of teaching staff and for taking disciplinary action has to be evolved by the management itself, and that the regulatory measure of control should be minimal. It further observed that regulations can be framed governing service conditions for teaching and other staff for whom aid is provided by the State without interfering with the over all administrative control of the management over the staff. Even in regard to unaided minority institutions, such regulations, which will ensure a check over unfair practices and protect the general welfare of teachers could be framed. The emphasis is to ensure a check over 'unfair practices' and 'general welfare of teachers' by framing regulations, more particularly if the management has not evolved a rational procedure for selection of teaching staff. In paragraph 136 of the judgment, the Supreme Court also observed that the right to administer does not include the right to maladminister. Right to administer is not absolute but it must be subject to reasonable regulations for the benefit of the institution as a vehicle of education, consistent with the national interest. General laws of the land applicable to all persons have been held to be applicable to minority institutions also – for example, laws

relating to taxation, sanitation, social welfare, economic regulation, public order and morality.

Another Constitution Bench of the Supreme Court proceeded to consider the scope and ambit of the protection conferred by Article 30 in **Islamic Academy of Education & Anr Vs State of Karnataka & Ors**, **(2003) 6 SCC 697**, and observed as follows:

> "**122. Article 30(1) of the Constitution does not confer an absolute right. The exercise of such right is subject to permissible State regulations with an eye on preventing maladministration. Broadly stated, there are "permissible regulations" and "impermissible regulations**".
>
> **123.** Some of the permissible regulations/restrictions governing enjoyment of Article 30(1) of the Constitution are:
>
> *(i)* Guidelines for the efficiency and excellence of educational standards (see *Sidhajbhai v. State of Gujarat*[1]*, State of Kerala v. Mother Provincial*[2]*,* and *All Saints High School v. Government of A.P.*[3]).
>
> (ii) Regulations ensuring the security of the services of the teachers or other employees (see *Kerala Education Bill, 1957, Re*[4] and *All Saints High School v. Government of A.P.* (supra).
>
> (iii) Introduction of an outside authority or controlling voice in the matter of service conditions of employees (see *All Saints High School v. Government of A.P. (supra).*
>
> (iv) **Framing Rules and Regulations governing the conditions of service of teachers and employees and their pay and allowances (see State of Kerala v. Mother Provincial (supra) and All Saints High School v. Government of A.P. (supra).**
>
> (v) Appointing a high official with authority and guidance to oversee, that Rules regarding

1 (1963) 3 SCR 837 : AIR 1963 SC 540
2 (1970) 2 SCC 417
3 (1980) 2 SCC 478
4 AIR 1958 SC 956 : 1959 SCR 995

> conditions of service are not violated, but, however such an authority should not be given blanket, uncanalised and arbitrary powers (see All Saints High School v. Government of A.P. (supra).
>
> (vi) Prescribing courses of study or syllabi or the nature of books (see State of Kerala v. Mother Provincial (supra) and All Saints High School v. Government of A.P (supra).
>
> (vii) Regulation in the interest of efficiency of instruction, discipline, health sanitation, morality, public order and the like (see Sidhajbahi v. State of Gujarat (supra)]"
>
> (emphasis supplied)

Another Constitution Bench (nine Judge) in **The Ahmedabad St Xavier's College Society & Anr Vs State of Gujarat & Anr, (1974) 1 SCC 717**, had an occasion to consider the ambit and scope of Article 30 of the Constitution. It is useful to quote paragraph 30 of the said judgment where the Supreme Court held that in the right of administration, checks and balances in the shape of regulatory measures are required to ensure the appointment of good teachers and their conditions of service. It was held that the right to administer is to be tempered with regulatory measures to facilitate smooth administration. Following was laid down in paragraph 30:

> "30. Educational institutions are temples of learning. The virtues of human intelligence are mastered and harmonized by education. Where there is complete harmony between the teacher and the taught, where the teacher imparts and the student receives, where there is complete dedication of the teacher and the taught in learning, where there is discipline between the teacher and the taught, where both are worshipers of learning, no discord or challenge will arise. An educational institution runs smoothly when the teacher and the taught are engaged in the common ideal of pursuit of knowledge. It is, therefore, manifest that the appointment of teachers is an important part in educational institutions. The qualifications and the character of the teachers are really

> important. The minority institutions have the right to administer institutions. This right implies the obligation and duty of the minority institutions to render the very best to the students. **In the right of administration, checks and balances in the shape of regulatory measures are required to ensure the appointment of good teachers and their conditions of service. The right to administer is to be tempered with regulatory measures to facilitate smooth administration**. The best administration will reveal no trace or colour of minority. A minority institution should shine in exemplary eclecticism in the administration of the institution. The best compliment that can be paid to a minority institution is that it does not rest on or proclaim its minority character."
>
> (emphasis supplied)

In **Brahmo Samaj Education Society & Ors Vs State of West Bengal & Ors, AIR 2004 SC 3358**, the Supreme Court in paragraph 7 thereof, observed thus:

> "7. But that control cannot extend to the day-to-day administration of the institution. It is categorically stated in T M A Pai (cited supra at page 551, paragraph 72) that the State can regulate the method of selection and appointment of teachers after prescribing requisite qualification for the same. Independence for the selection of teachers among the qualified candidates is fundamental to the maintenance of the academic and administrative autonomy of an aided institution. The State can very well provide the basic qualification for teachers. Under the University Grants Commission Act, 1956, the University Grants Commission (UGC) has laid down qualifications to a teaching post in a University by passing Regulations. As per this Regulations UGC conducts National Educational Testing (NET) for determining teaching eligibility of candidates. UGC has also authorized accredited States to conduct State Level Eligibility Test (SLET). Only a person who has qualified NET or SLET will be eligible for appointment as a teacher in an aided institution. This is the required basic qualification of a teacher. **Petitioner's right to administer includes the right to appoint teachers of its choice among the NET/SLET qualified candidates**."
>
> (emphasis supplied)

In **Secy, Malankara Syrian Catholic College Vs T Jose & Ors**, **(2007) 1 SCC 386**, the Supreme Court made the following observations:

> "**19.** The general principles relating to establishment and administration of educational institution by minorities may be summarised thus:
>
> (i) The right of minorities to establish and administer educational institutions of their choice comprises the following rights:
>
> a) to choose its governing body in whom the founders of the institution have faith and confidence to conduct and manage the affairs of the institution;
>
> b) to appoint teaching staff (teachers/lecturers and Head-masters/Principals) as also non-teaching staff, and to take action if there is dereliction of duty on the part of any of its employees;
>
> c) to admit eligible students of their choice and to set up a reasonable fee structure;
>
> d) to use its properties and assets for the benefit of the institution;
>
> (ii) The right conferred on minorities under Article 30 is only to ensure equality with the majority and not intended to place the minorities in a more advantageous position vis-a-vis the majority. There is no reverse discrimination in favour of minorities. The general laws of the land relating to national interest, national security, social welfare, public order, morality, health, sanitation, taxation etc. applicable to all, will equally apply to minority institutions also.
>
> (iii) **The right to establish and administer educational institutions is not absolute.** Nor does it include the right to maladminister. There can be regulatory measures for ensuring educational character and standards and maintaining academic excellence. There can be checks on administration as are necessary to ensure that the administration is efficient and sound, so as to serve the academic needs of the institution. **Regulations made by the State concerning generally the welfare of students and teachers, regulations laying down eligibility criteria and qualifications for appointment, as also**

conditions of service of employees (both teaching and non-teaching), regulations to prevent exploitation or oppression of employees, and regulations prescribing syllabus and curriculum of study fall under this category. Such regulations do not in any manner interfere with the right under Article 30 (1).

(iv) Subject to the eligibility conditions/qualifications prescribed by the State being met, the unaided minority educational institutions will have the freedom to appoint teachers/lecturers by adopting any rational procedure of selection.

(v) Extension of aid by the State, does not alter the nature and character of the minority educational institution. Conditions can be imposed by the State to ensure proper utilization of the aid, without however diluting or abridging the right under Article 30 (1).

21. We may also recapitulate the extent of regulation by the State, permissible in respect of employees of minority educational institutions receiving aid from the State, as clarified and crystalised in T.M.A. Pai. The State can prescribe:

(i) the minimum qualifications, experience and other criteria bearing on merit, for making appointments,

(ii) **the service conditions of employees without interfering with the overall administrative control by the management over the staff**,

(iii) a mechanism for redressal of the grievances of the employees,

(iv) the conditions for the proper utilisation of the aid by the educational institutions, without abridging or diluting the right to establish and administer educational institutions.

In other words, all laws made by the State to regulate the administration of educational institutions and grant of aid will apply to minority educational institutions also. But if any such regulations interfere with the overall administrative control by the management over the staff, or abridges/dilutes, in any other manner, the right to establish and administer educational institutions, such regulations, to

that extent, will be inapplicable to minority institutions."

(emphasis supplied)

In **Sindhi Education Society & Anr Vs Chief Secretary, Government of NCT of Delhi & Ors, (2010) 8 SCC 49**, the Supreme Court observed that Regulations could relate to the laying down of guidelines for the efficiency and excellence of educational institutions, ensuring the security of service of teachers or other employees. The relevant observations find place in paragraphs 94, 97 and 111 of this judgment, which read thus:

> "**94. It is also equally true that the right to administer does not amount to the right to maladminister and the right is not free from regulations. The regulatory measures are necessary for ensuring orderly, efficient and sound administration. The regulatory measures can be laid down by the State in the administration of minority institutions**. The right of the State is to be exercised primarily to prevent maladministration and such regulations are permissible regulations. **These regulations could relate to guidelines for the efficiency and excellence of educational standards, ensuring the security of the services of the teachers or other employees, framing rules and regulations governing the conditions of service of teachers and employees and their pay and allowances and prescribing course of study or syllabi of the nature of books etc**. Some of the impermissible regulations are refusal to affiliation without sufficient reasons, such conditions as would completely destroy the autonomous status of the educational institution, by introduction of outside authority either directly or through its nominees in the governing body or the managing committee of a minority institution to conduct its affairs, etc. These have been illustrated by this Court in State of Kerala v. Very Rev. Mother Provincial [(1970) 2 SCC 417], All Saints High School v. Govt. of A.P. [(1980) 2 SCC 478] and T.M.A. Pai's case (supra).
>
> **97.** It is not necessary for us to examine the extent

of power to make regulations, which can be enforced against linguistic minority institutions, as we have already discussed the same in the earlier part of the judgment. No doubt, right conferred on minorities under Article 30 is only to ensure equality with the majority but, at the same time, what protection is available to them and what right is granted to them under Article 30 of the Constitution cannot be diluted or impaired on the pretext of framing of regulations in exercise of its statutory powers by the State. **The permissible regulations, as afore-indicated, can always be framed and where there is a maladministration or even where a minority linguistic or religious school is being run against the public or national interest, appropriate steps can be taken by the authorities including closure but in accordance with law. The minimum qualifications, experience, other criteria for making appointments etc. are the matters which will fall squarely within the power of the State to frame regulations but power to veto or command that a particular person or class of persons ought to be appointed to the school failing which the grant-in-aid will be withdrawn, will apparently be a subject which would be arbitrary and unenforceable**.

111. A linguistic minority has constitution and character of its own. A provision of law or a circular, which would be enforced against the general class, may not be enforceable with the same rigours against the minority institution, particularly where it relates to establishment and management of the school. It has been held that founders of the minority institution have faith and confidence in their own committee or body consisting of the persons selected by them. Thus, they could choose their managing committee as well as they have a right to choose its teachers. Minority institutions have some kind of autonomy in their administration. This would entail the right to administer effectively and to manage and conduct the affairs of the institution. There is a fine distinction between a restriction on the right of administration and a regulation prescribing the manner of administration. What should be prevented is the maladministration. Just as regulatory measures are necessary for maintaining the educational character and content of the minority institutions, similarly, regulatory measures are necessary for ensuring orderly, efficient and sound administration."

(emphasis supplied)

It is clear from this judgment that the regulatory measures are necessary for ensuring orderly, efficient and sound administration and so also security of the services of the teachers and other employees. The regulations, laying down eligibility criteria and qualification for selection and appointment, in our opinion, would also include include laying down criteria and procedure for considering teaching and non-teaching staff in minority institutions for promotion, leaving it open to the management to consider and select/appoint the teachers on promotion.

From the principles as enunciated by the Supreme Court in the judgments referred to above, it is apparent that the rights guaranteed and protected by Article 30 are not intended to be viewed in absolute or inviolable terms. Regulations that may be framed for the purposes of ensuring the quality of education which is imparted in such institutions when permitted to operate and apply, would not impinge upon the rights of minorities conferred by Article 30 of the Constitution. The quality of education and the preservation of minimum standards thereof is directly dependant upon the quality of teachers and it is in this view that Regulations laying down the eligibility criteria, qualifications for appointment as also conditions of service have been held to be applicable even to a minority institution. Such Regulations operate not just for the welfare of the students but also in order to ensure that the attached staff in such minority institutions are not placed in a disadvantageous position or rendered vulnerable to exploitation or oppression. Statutory provisions of this character are regulatory in nature and enable the efficient administration of an educational

institution including one which may have been established and is administered by a minority. These Regulations would clearly fall in the category of **"permissible regulations"** as culled out in **Islamic Academy of Education**. It becomes relevant to note that both Regulations 5 and 7(2-a) do not mandate or force the management of a minority institution to appoint a particular person. The freedom to select a particular person which stands conferred in the management is not fettered or trampled upon. All that these Regulations do is to make provision for promotional avenues for the existing staff and teachers of such minority institutions. These Regulations cannot by any stretch be read as subsuming or taking away the right of the management to select and appoint. These Regulations are primarily put in place in order to avoid stagnation and discontent amongst the existing staff. In our considered view, these Regulations do not, in any manner, interfere with the rights of minorities to establish and administer institutions. To the contrary, if it were held that these Regulations would not apply to minority institutions, it may lead to a situation where the management of such institutions exploits and oppresses its employees. This would clearly be contrary to the principles enunciated by the Supreme Court.

While answering the questions referred for our consideration we cannot lose sight of the fact that the right to be considered for promotion is in fact a fundamental right traceable to Article 16 of the Constitution and that any provision which takes away the right of consideration would be invalid. In **S B Bhattacharjee Vs S D Majumdar**, **(2007) 10 SCC 513**, it was observed as under:

> "13. Although a person has no fundamental right of promotion in terms of Article 16 of the Constitution of India, he has a fundamental right to be considered therefor. An effective and meaningful consideration is postulated thereby. The terms and conditions of service of an employee including his right to be considered for promotion indisputably are governed by the rules framed under the proviso appended to Article 309 of the Constitution of India."

In **Panchraj Tiwari Vs Madhya Pradesh State Electricity Board & Ors, (2014) 5 SCC 101**, the Supreme Court held thus:

> "**14.** Chances of promotion are not conditions of service, but negation of even the chance of promotion certainly amounts to variation in the conditions of service attracting infraction of Articles 14 and 16 of the Constitution of India. No employee has a right to particular position in the seniority list but all employees have a right to seniority since the same forms the basis of promotion."

It would here be apposite to note the acceptance and application of the theory of "proportionality" which bids us to strike a balance between constitutional rights and the public interest. It was in a not altogether different and distinct backdrop when the Constitution Bench of the Supreme Court in **Modern Dental College and Research Centre & Ors Vs State of Madhya Pradesh & Ors**, **(2016) 7 SCC 353**, observed:

> "**62.** It is now almost accepted that there are no absolute constitutional rights [Though, debate on this vexed issue still continues and some constitutional experts claim that there are certain rights, albeit very few, which can still be treated as "absolute". Examples given are : (a) Right to human dignity which is inviolable, (b) Right not to be subjected to torture or to inhuman or degrading treatment or punishment. Even in respect of such rights, there is a thinking that in larger public interest, the extent of their protection can be diminished. However, so far such attempts of the States have been thwarted by the judiciary.] and all such rights

are related. As per the analysis of Aharon Barak [Aharon Barak, Proportionality : Constitutional Rights and Their Limitation (Cambridge University Press 2012)], two key elements in developing the modern constitutional theory of recognising positive constitutional rights along with its limitations are the notions of democracy and the rule of law. Thus, the requirement of proportional limitations of constitutional rights by a sub-constitutional law i.e. the statute, is derived from an interpretation of the notion of democracy itself. Insofar as the Indian Constitution is concerned, democracy is treated as the basic feature of the Constitution and is specifically accorded a constitutional status that is recognised in the Preamble of the Constitution itself. It is also unerringly accepted that this notion of democracy includes human rights which is the cornerstone of Indian democracy. Once we accept the aforesaid theory (and there cannot be any denial thereof), as a fortiori, it has also to be accepted that democracy is based on a balance between constitutional rights and the public interests. In fact, such a provision in Article 19 itself on the one hand guarantees some certain freedoms in clause (1) of Article 19 and at the same time empowers the State to impose reasonable restrictions on those freedoms in public interest. This notion accepts the modern constitutional theory that the constitutional rights are related. This relativity means that a constitutional licence to limit those rights is granted where such a limitation will be justified to protect public interest or the rights of others. This phenomenon—of both the right and its limitation in the Constitution—exemplifies the inherent tension between democracy's two fundamental elements. On the one hand is the right's element, which constitutes a fundamental component of substantive democracy; on the other hand is the people element, limiting those very rights through their representatives. These two constitute a fundamental component of the notion of democracy, though this time in its formal aspect. How can this tension be resolved? The answer is that this tension is not resolved by eliminating the "*losing*" facet from the Constitution. Rather, the tension is resolved by way of a proper balancing of the competing principles. This is one of the expressions of the multi-faceted nature of democracy. Indeed, the inherent tension between democracy's different facets is a "*constructive tension*". It enables each facet to develop while harmoniously coexisting with the others. The best way to achieve this peaceful coexistence is through

> balancing between the competing interests. Such balancing enables each facet to develop alongside the other facets, not in their place. This tension between the two fundamental aspects—rights on the one hand and its limitation on the other hand—is to be resolved by balancing the two so that they harmoniously coexist with each other. This balancing is to be done keeping in mind the relative social values of each competitive aspects when considered in proper context."

The view that we take clearly balances and preserves the competing rights of existing teachers guaranteed by Article 16 as well as the rights of the minority as guaranteed by Article 30.

The second premise upon which **N B Lal** is based is that these Regulations have not been made applicable to minority institutions specifically. Hon'ble Ashok Bhushan, J (as he then was), in his referral order has, in detail, referred to the various regulations which have been held to be applicable to minority institutions even though they may not have been specifically so worded in the statute. In our considered view, the view so taken is correct and merits affirmation. More fundamentally, we note that no provision of the Regulations exclude the applicability of Regulations 5 and 7(2-a). The Regulations themselves do not hold out to be inapplicable to minority institutions. The Division Bench in **N B Lal** was, therefore, in our opinion, clearly incorrect in proceeding on this premise.

In view of the aforesaid, we answer Questions 1, 2 and 3 in the negative and hold that Regulation 7(2-a) as falling in Chapter II of the Regulations framed under the Intermediate Education Act, 1921 do not violate the rights of minority institutions guaranteed by Article 30 of the

Constitution. The Regulation is clearly permissive and cannot be said to be violative of rights conferred on such institutions by Article 30 of the Constitution. A minority institution would not be entitled to negative the claim of consideration for promotion of teachers of the primary section of recognised institutions in terms of the Regulation aforementioned, read with the provisions of the Government Order dated 25 November 2003.

This petition alongwith connected matters shall now be placed before the appropriate Benches for disposal in light of our judgment.

January 25, 2017
AHA

(Dilip B Bhosale, CJ)

(Pankaj Mithal, J)

(Yashwant Varma, J)