REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.2858 OF 2007

Chandana Das (Malakar) … Appellant

Versus

The State of West Bengal & Ors. … Respondents

WITH

CIVIL APPEAL NO.2859 OF 2007

JUDGMENT

R.F. Nariman, J.

1. These appeals have been referred to a Three Judge Bench in view of a disagreement between T.S. Thakur, J. and R. Banumathi, J., reported as **Chandana Das (Malakar) v. State of West Bengal** (2015) 12 SCC 140. The facts that are necessary in order to decide these appeals are set out by Thakur, J. in his judgment as follows:

> "**2.** The appellants, it appears, were appointed as teachers on temporary basis in what is known as Khalsa Girls High

School, Paddapukur Road, Bhowanipore, Calcutta. Their appointment did not, however, meet the approval of the District Inspector of Schools, Calcutta, according to whom any such appointment could be made only on the recommendations of the School Service Commission established under the Rules for Management of Recognised Non-Government Institutions (Aided and Unaided), 1969 (hereinafter referred to as "the Rules").

3. Aggrieved by the order passed by the District Inspector, the appellants approached the High Court of Calcutta in Writ Petitions Nos. 16256 and 16255 of 2003 which were allowed by a learned Single Judge of the High Court by his order dated 29-1-2004 holding that the Institution in which the appellants were appointed being a linguistic minority institution was entitled to select and appoint its teachers. The Single Bench accordingly directed the respondents in the writ petitions to approve the appointment of the appellants as whole-time teachers with effect from 28-7-1999 and release the arrears of salary and other service benefits in their favour with effect from the said date.

4. Aggrieved by the judgment and order of the learned Single Judge, the State of West Bengal, Director of School Education and District Inspector of Schools preferred CANs Nos. 3861 and 3863 of 2004 against the order passed by the Single Bench which appeals were allowed and disposed of by a Division Bench of that Court by a common order dated 23-9-2004 [*State of W.B.* v. *Sukhbindar Kaur*, 2004 SCC OnLine Cal 570 : (2005) 3 CHN 604] . The High Court held that since the Institution in which the appellants were appointed was a recognised aided Institution, the management of the Institution was bound to follow the mandate of Rule 28 of the Rules aforementioned which permitted appointments against a permanent post only if the candidate was recommended for any such appointment by the School Service Commission.

5. The Division Bench further held that the appellants having been appointed beyond the sanctioned staff

strength at the relevant point of time and dehors the Rules could not claim any approval in their favour. The Court noted that the directions issued by the Director of School Education, Government of West Bengal did not permit any appointment without the prior permission of the Director. No such permission had been, in the case at hand, obtained from the Director. More importantly, the Division Bench held that since the Institution had not made any claim to its being a minority institution it was not open to the employee writ petitioners to claim any such status on its behalf. The Division Bench further took the view that once a minority community applies for a special constitution under sub-rule (3) of Rule 8 of the said Rules it represents to the State Government that it was not claiming the status of a minority institution. The Single Bench had, therefore, fallen in error in holding that the Institution where the appellants worked was a minority institution or that the appointment made by such an Institution would not be regulated by Rule 28 of the Rules mentioned above. The present appeals, as noticed above, call in question the correctness of the view taken by the Division Bench of the High Court.

6. The short question that falls for determination is whether Khalsa Girls High School, Poddapukur Road, Calcutta is a minority institution, if so, whether the Institution's right to select and appoint teachers is in any way affected by the provisions of the Rules of Management of Recognised Non-Government Institutions (Aided and Unaided), 1969 framed under the provisions of the West Bengal Board of Secondary Education Act, 1963?

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8. The Institution's case, on the other hand, is that the same was and continues to be a linguistic minority institution from its inception. The affidavit filed on behalf of the Institution traces the history behind the establishment of the Institution for the benefit of Punjabi-speaking Sikhs settled in Calcutta and other parts of West Bengal. The affidavit states that on 19-4-1976 a detailed memorandum

was sent by the Institution to the Secretary, West Bengal Board of Secondary Education asking for approval of the special constitution for the school in terms of Rule 33 of the Rules mentioned above. That prayer was according to the Institution made only because the school was a minority educational institution. The affidavit also relies upon recognition of the minority status of the school by the West Bengal Minority Commission in terms of its Order dated 6-10-1989. The affidavit states that minority status of the Institution continues despite the grant sanctioned by the State which cannot carry conditions that would have the effect of defeating or diluting the right of minority to establish and administer its own Institutions. It was also contended that Rule 33 of the Rules reserves in favour of the State Government the power to frame further rules for certain institutions to which the provisions of Articles 26 and 30 of the Constitution apply. No such rules having been framed a minority can establish and run its institution in accordance with a special constitution that may be sanctioned in its favour. Rule 28 of the Rules relating to the appointment of teachers in minority institutions, therefore, does not apply in the present case."

2. The question posed by Thakur, J. in paragraph 6 of the judgment was answered stating:

"**21.** It is unnecessary to multiply decisions on the subject for the legal position is well settled. Linguistic institution and religious are entitled to establish and administer their institutions. Such right of administration includes the right of appointing teachers of its choice but does not denude the State of its power to frame regulations that may prescribe the conditions of eligibility for appointment of such teachers. The regulations can also prescribe measures to ensure that the institution is run efficiently for the right to administer does not include the right to maladministration. While grant-in-aid is not included in the guarantee contained in the Constitution to linguistic and religious minorities for establishing and running their educational institutions, such grant cannot be denied to such institutions only because the institutions are established by linguistic or religious minority. Grant of aid

cannot, however, be made subservient to conditions which deprive the institution of their substantive right of administering such institutions. Suffice it to say that once Respondent 4 Institution is held to be a minority institution entitled to the protection of Articles 26 and 30 of the Constitution of India the right to appoint teachers of its choice who satisfy the conditions of eligibility prescribed for such appointments under the relevant rules is implicit in their rights to administer such institutions. Such rights cannot then be diluted by the State or its functionaries insisting that the appointment should be made only with the approval of the Director or by following the mechanism generally prescribed for institutions that do not enjoy the minority status.

22. The view taken by the Division Bench of the High Court that appointments of the appellants were dehors the Rules inasmuch as they were not made by the School Service Commission hence did not qualify for approval, does not appear to us to be sound. The mechanism provided for making appointments under Rule 28 has no application to minority educational institutions.

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24. Placed in juxtaposition to Rule 33 of the Rules extracted earlier, it is self-evident that while Rule 28 applies generally to other institutions; Rule 33 is more specific in its application to minority educational institutions covered by Article 26 or 30 of the Constitution. In the absence of any rules framed for such minority educational institutions the minority educational institution in the present case was entitled to select and appoint its teachers so long as other conditions for such appointments, namely, availability of substantive vacancies and the eligibility of the candidates for such appointments were duly satisfied.

25. It is not, in the instant case, disputed that the appellants were both duly qualified for appointment as teachers in the subject concerned. It is also not in dispute that they have been serving for a considerable length of

time on a meagre salary which the institution has been paying to them in the absence of the State Government recognising the appointments and releasing grant-in-aid against their posts.

26. The only other question that could possibly arise in the matter of approval of such appointments was the absence of a sanctioned post as on the date the appointments were made. It was contended by the learned counsel for the appellants that vacancies had subsequently arisen against which the appointments of the appellants could be approved and the salary payable to them from the date of such vacancies becoming available released. If that be so, we see no reason why the appointments of the appellants should not be approved with effect from the date of such vacancies becoming available against which such appointments could be regularised. To that extent the relief prayed for by the appellants shall be suitably moulded."

3. Banumathi, J. delivered a separate judgment disagreeing with these conclusions. She agreed with the Division Bench judgment of the Calcutta High Court, which had upset the Single Bench judgment of that Court, and held as follows:

"**34.** The impugned judgment [*State of W.B.* v. *Sukhbindar Kaur*, 2004 SCC OnLine Cal 570 : (2005) 3 CHN 604] of the Division Bench of the Calcutta High Court is as under: (*Sukhbindar Kaur case* [*State of W.B.* v. *Sukhbindar Kaur*, 2004 SCC OnLine Cal 570 : (2005) 3 CHN 604] , SCC OnLine Cal para 4)

"*4*. … In such view of the matter, a Constitution permitted under sub-rule (3) of Rule 8 of the said Rules cannot be in relation to minority community institutions. That has been amply cleared by framing Rule 33 in the Management Rules which specifically deals with institutions entitled to protection of Articles 26 and 30. It authorises the State Government to make special rules for constitution of the Managing

> Committee of such institutions. The moment a minority community applies for a special constitution under sub-rule (3) of Rule 8 of the said Rules it represents to the State Government that it is not claiming the status of minority community at least at the time when such application is made."
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> In my considered view, the above reasoning of the Calcutta High Court is to be affirmed for the reasons indicated by me herein."

4. The main grounds for disagreement were two. In paragraphs 36 to 40, the learned Judge found that in the absence of any order by the competent authority under the West Bengal Board of Secondary Education Act granting minority status to the Respondent No.4 school, the said school cannot claim to be a minority institution for the purpose of Article 30 and is, therefore, bound, being an aided institution, by the 1969 Rules, in particular Rule 28 thereof. The other plank of the decision was contained in paragraphs 43 and 51, stating that the school having accepted the special constitution in terms of Rule 8(3) of the Rules, the school is estopped from contending that it is a minority institution governed by special rules to be framed by the State under Rule 33 of the Rules.

5. Shri Siddharth Bhatnagar, learned Senior Advocate appearing on behalf of the Appellants, has taken us through the impugned High Court judgment as well as the judgments of Thakur,

J. and Banumathi, J. He also read Rules 6, 8(3), 28 and 33 of the Rules together with the request dated 19th April, 1976 of the Khalsa Girls School, stating that it was formed on behalf of the Sikh religious and linguistic minority in the State of West Bengal and to accord it the status of a minority institution. He then relied upon an order dated 7th May, 1982 of the West Bengal Board of Secondary Education, in which, despite approving of a special constitution for future management of the school, was done in deviation of Rule 6 in recognition of the fact that it was a minority institution. He also brought to our notice the fact that since 2008, Rule 32(c) is now substituted as follows:

> "32. **Rules not to apply to certain Institutions**--- Nothing in these rules shall apply to -
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> xxx xxx xxx
>
> (c) the non-Government aided Educational Institution established and administered by a Minority referred to in clause (c) of Section 2 of the West Bengal Minorities' Commission Act, 1996 (West Bengal Act XVI of 1996);
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> xxx xxx xxx
>
> *Explanation :-* For removal of any doubt, it is hereby declared that the State Government may, for the purpose of ensuring quality education, access and equity, on an application made by any non-Government aided Educational Institution referred to in clause (c), make rules under the provisions of the said Act for the composition, powers, functions etc of the Committee of such Institution;"

As a consequence, Rule 33 has been omitted.

6. He then took us through Section 2(c) of the West Bengal Minorities' Commission Act, 1996, which states as follows:

> "2. **Definitions** - In this Act, unless the context otherwise requires,-
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> xxx xxx xxx
>
> (c) "Minority", for the purpose of this Act, means a community based on religion such as Muslim, Christian, Sikh, Buddhist, or Zoroastrian (Parsee), and includes -
>
> (i) such other minority as the Central Government may notify under clause (c) of section 2 of the National Commission for Minorities Act, 1992, or .
>
> (ii) such other minority based on language within the purview of article 29 of the Constitution of India (hereinafter referred to as the Constitution) as the State Government may, by notification, specify from time to time;"

On facts, he argued that it was wholly incorrect to hold that the management of the school had given up its right to be a minority institution. He also argued, based on several judgments, that the fundamental right under Article 30 of the Constitution of India cannot be waived. He also took us through various judgments to show that though Respondent No.4 school was an aided institution, Rule 28 qua appointment of teachers would not be applicable to it as it is a minority institution. He also cited judgments before us to show that it was unnecessary to first obtain a declaration from the competent authority that the school is a minority institution as any such declaration would only be a recognition of a pre-existing right,

if the institution was, in fact, set up by the minority community for the minority community.

7. Shri Rana Mukherjee, learned Senior Advocate appearing on behalf of Respondent No.4 school, broadly echoed Shri Bhatnagar's arguments and also took us through the letter dated 19th April, 1976 to show that Respondent No.4 school was set up purely as a linguistic minority school in the State of West Bengal. Hence, he supported the prayer of the teachers that they be regularised against vacancies that have since arisen.

8. Shri Soumya Chakraborty, learned Senior Advocate appearing on behalf of the State, strongly relied upon the judgment of Banumathi, J. and, in addition, argued that Article 350B would make it clear that the institution must first be declared to be a minority institution before it can avail of the fundamental right under Article 30. He added that in any case the medium of instruction was Hindi and, therefore, being the national language, the institution could not be said to cater to the needs of the minority community. He also made a fervent plea to refer the matter to a larger Bench, given the fact that a Division Bench of this Court had in **Shiromani Gurudwara Prabandhak Committee v. Shail Mittal** SLP (C) No. 2755/2008 by an order dated 18th November, 2010 referred a

similar matter to be heard along with other matters by a Constitution Bench.

9. Before embarking on the questions raised in these appeals, it is important to first advert to the West Bengal Board of Secondary Education Act, 1963. It is enough to state that this Act establishes the West Bengal Board of Secondary Education and various Committees and Regional Examination Councils and then lays down their powers. Suffice it to say that it is no part of the powers and duties of the Board or of any authority set up therein to declare that a particular institution is, or is not, a minority institution.

10. It is now necessary to advert to the Management of Recognised Non-Government Institutions (Aided and Unaided) Rules, 1969. Rule 6 is relevant and is set out hereinbelow as follows:

> **"6. Composition of the Committee of an Institution other than that sponsored by the State Government:**
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> The Committee shall consist of the following members:-
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> (i) one founder to be chosen in the manner provided in Rule 6A;
> (ii) one Life Member, if any, to be selected or nominated in the manner laid down in Rule 6A;
> (iii) six guardians of whom two shall be woman in case of a girls school in the case of institutions having classes XI and XII recognized by the West Bengal Council of Higher Secondary Education and/or X-Class High

Schools and three guardians in the case of Junior High Schools, to be elected or nominated, as the case may be, in the manner laid down in sub-rule (2) of Rule 6A;

(iv) one person interested in education (to be co-opted) in the manner laid down in clause (i) of sub-rule (3) of Rule 6A;

Provided that in the case of an institution located within the jurisdiction of a **Panchayet,** one person interested in education shall be the nominee of the **Local Panchayet Samity**. The person so nominated shall be a resident of the locality within the jurisdiction of the said **Panchayet Samity**;

(v) three teaching staff except the Head of an Institution and one non-teaching staff in the case of an institution with Higher Secondary Classes (XI and XII) recognised by the West Bengal Council of Higher Secondary Education and/or a X-Class High School and two members from among the teaching and non-teaching staff in the case of a junior High School, to be elected in the manner prescribed in Clause (i) of sub-rule (4) of Rule 6A;

(vi) one member of the Committee shall be nominated by the Director or by an officer authorised by him in this behalf;

(vii) Head of the Institution (*ex-officio).*

Provided that no person shall be eligible to represent more than one category.

Rule 8(3) is important for our purpose and states as follows:

"8. **Power of Executive Committee to approve and Supersede Committee, to appoint Administrator or Ad-hoc Committee and to grant special constitution**;

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(3) Notwithstanding anything contained in these rules, the Executive Committee shall have the power to approve, on the application of any Institution or class of Institutions, of the *special constitution* of a Committee in favour of such

Institution or class of Institutions and in approving the special constitution of a Committee, the Executive Committee shall pay due regard to the recommendations of the Director, if any. While granting special constitution in favour of an Institution or a class of Institution, the Executive Committee shall ensure that representation of the members of the teaching and the non-teaching staff, guardians and the member nominated by the Director or an officer authorised by him in this behalf, is made according to clause (iii), clause (v) and clause (vi) of Rule 6:

Provided that if the Executive Committee is of the opinion that a school enjoying special constitution has not been functioning properly, the Executive Committee may, after paying due regard to the recommendations of the Director, if any, amend or withdraw such special constitution of a Committee and in that event, the Executive Committee may, by order, appoint an Administrator or an Ad-hoc Committee, as the case may be, to exercise the powers and perform the functions of the Committee for such period as may be specified in the order."

Rule 28(1)(i), which is sought to be applied to Respondent No.4, states as follows:

"28. **Powers of Committee** - (1) In an aided institution the Committee shall, subject to the provisions of any Grant-in-aid Scheme or Pay Revision Scheme or any order or direction or guide-lines issued by the State Government or the Director in connection therewith and in force for the time being, have the power –

(i) to appoint on the recommendation of the West Bengal Regional School Service Commission in respect of the region concerned, teachers on permanent or temporary basis against permanent or temporary vacancies, if and when available, within the sanctioned strength of teachers and on approval by the Director or

any Officer authorized by him, such approval being sought for within a fortnight from the date of decision of the committee in this behalf;"

Rules 32 and 33 are also important and state as follows:

"32. **Rules not to apply to certain Institutions—**Nothing in these rules shall apply to the Institutions maintained and managed by the State Government, the Union Government or the Railway Board or the schools managed under the provisions of the St. Thomas' School Act, 1923, (Bengal Act XII of 1923) or to any other Institution as may be specified by the State Government by order, made in this behalf from time to time.

33. **Power of the State Government to frame further rules for certain Institutions—**Nothing in these rules shall affect the power of the State Government to frame, on the application of any Institution or class of Institution to which the provisions of Article 26 or Article 30 of the Constitution of India may apply, further or other rules for the composition, powers, functions of the Managing Committee or Committees of such Institution or class of Institutions."

11. These Rules have since been amended by a notification dated 29th August, 2008, as has been noticed hereinabove. And Rule 33 has been omitted altogether.

12. A perusal of the Rules, as they stood prior to the 2008 amendment, would show that in case the provisions of Article 30 of the Constitution apply, further or other rules for the composition, powers, functions of the managing committee or committees of such institutions or class of institutions would be framed. It is

admitted, as has been noticed in the judgment of Thakur, J. that no such Rules have been framed under Rule 33.

13. At this juncture, it may be noted that by a letter dated 19th April, 1976, Respondent No.4 wrote to the Secretary, West Bengal Board of Secondary Education asking that it may be declared as a minority community institution and the special constitution for the same may be approved on that basis. What is of importance is what is stated in paragraph 5(a) and 5(b) of the said letter, which is set out hereinbelow:

> "5. The brief History of the said Khalsa High School is as follows:-
>
> (a) In the year 1932 this institution was started in the shape of a Khalsa Primary School by the Sikh Community living in Calcutta to impart education to their children who came from Punjab where they had ample opportunities to learn their mother tongue viz: Punjabi and to impart religious, ethical and moral training in soothing atmosphere.
>
> (b) Earlier to this in the year 1930, the late Reverend Sant Mastan Singh started a small Pathashala at 573, Paddopukur Road, Calcutta, with about twenty children to teach them Punjabi, in Gurumukh Script. In 1932, Baba Harnam Singh Kaunka was made in charge of that School which was becoming popular day by day among the Sikh Community. After some time he opened a new School at 16, Paddapukur Road, Calcutta. By this time the population of the Sikhs was increasing in Calcutta. A large number of Sikh Children were facing serious difficulties in the absence of their own proper School. The urgent need

of opening a School of their own choice came to the forefront and it was unanimously resolved by the Sikhs in a congregation to start a Khalsa Primary School without any loss of time. The social and religious workers left no stone unturned to get a suitable building for this purpose. After intense endeavours the building situated at No. 75, Bakul Begal Road, Calcutta was acquired on rent to start with. Thus, Khalsa Primary School was inaugurated on the 1st November, 1933, by Sardar B.R. Singh, Head of Eastern Railway. He donated a handsome amount to the School on this pious occasion. Baba Harnam Singh Kanuka threw his lot with this venture of the Sikh Community in toto."

14. By a letter dated 7th May, 1982 from the Secretary, West Bengal Board of Secondary Education to the Respondent No.4, a special constitution of the managing committee of the school was set up as follows:

1.	Representative (s) of :-	
	(i) Bara Sikh Sangat	1(one)
	(ii) Sri Guru Singh Sabha	1(one)
	(iii)Gurudwara Sant Kutia	1(one)
2.	Guardians' representative (to be elected)	4
3.	Members of the teaching & non-teaching Staff (to be jointly elected)	4(3+1)
4.	P.I.E. (as per provisions of the amended rules	1
5.	Head of the institution (ex-officio)	1
6.	Departmental Nominee	1
		14

15. It is obvious on a reading of this document that whereas Rule 6 required only one representative of the Sikh community to be on

the Management Board, there are three representatives appointed. Equally, whereas Rule 6 requires that there be six guardian representatives to be elected, only four are provided for by this letter. Thus, it cannot be said that by acceptance of this letter, Respondent No.4 has, in any manner, unequivocally waived its right to be treated as a minority institution. On the contrary, the application dated 19th April, 1976, was to recognise it as a minority institution, and merely because Rule 8(3) of the Rules was purportedly applied, it does not mean that the minority character of the institution was not kept in mind while framing the special constitution for future management of the school. On facts, therefore, it is difficult to appreciate how the Respondent No.4 can be said to have waived its right to be treated as a linguistic minority institution set up by a linguistic minority, namely, the Sikhs in the State of West Bengal.

16. It is important at this juncture to first set out Article 30 of the Constitution of India. Article 30(1) states:

> "30. **Right of minorities to establish and administer educational institutions -**
>
> (1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice."

17. The historical reasons for enacting Article 30(1) have been set out in some detail in the judgment of Shelat, J. and Grover, J. in **Kesavananda Bharati v. State of Kerala** (1973) 4 SCC 225 as follows:

> "**535-A -** It may be recalled that as regards the minorities the Cabinet Mission had recognised in their report to the British Cabinet on May 6, 1946 only three main communities; general, Muslims and Sikhs. General community included all those who were non- Muslims or non-Sikhs. The Mission had recommended an Advisory Committee to be set up by the Constituent Assembly which was to frame the rights of citizens, minorities, tribals and excluded areas. The Cabinet Mission statement had actually provided for the cession of sovereignty to the Indian people subject only to two matters which were: (1) willingness to conclude a treaty with His Majesty's Government to cover matters arising out of transfer of power and (2) adequate provisions for the protection of the minorities. Pursuant to the above and paras 5 and 6 of the Objectives Resolution the Constituent Assembly set up an Advisory Committee on January 24, 1947. The Committee was to consist of representatives of muslims, the depressed classes or the scheduled castes, the Sikhs, Christians, Parsis, Anglo-Indians, tribals and excluded areas besides the Hindus. As a historical fact it is safe to say that at a meeting held on May 11, 1949 a resolution for the abolition of all reservations for minorities other than the scheduled castes found whole hearted support from an overwhelming majority of the members of the Advisory Committee. So far as the scheduled castes were concerned it was felt that their peculiar position would necessitate special reservation for them for a period of ten years. It would not be wrong to say that the separate representation of minorities which had been the feature of the previous Constitutions and which had witnessed so much of communal tension and strife was given up in favour of joint electorates in consideration of the guarantee of fundamental rights and minorities' rights

which it was decided to incorporate into the new Constitution."

(Emphasis supplied)

18. This was further fleshed out in the judgment of Khanna, J. in **Ahmedabad St. Xavier's College Society v. State of Gujarat** (1975) 1 SCR 173 as follows:

> "Before we deal with the contentions advanced before us and the scope and ambit of Article 30 of the Constitution, it may be pertinent to refer to the historical background. India is the second-most populous country of the world. The people inhabiting this vast land profess different religions and speak different languages. Despite the diversity of religion and language, there runs through the fabric of the nation the golden thread of a basic innate unity. It is a mosaic of different religions, languages and cultures. Each of them has made a mark on the Indian polity and India today represents a synthesis of them all. The closing years of the British rule were marked by communal riots and dissensions. There was also a feeling of distrust and the demand was made by a section of the Muslims for a separate homeland. This ultimately resulted in the partition of the country. Those who led the fight for independence in India always laid great stress on communal amity and accord. They wanted the establishment of a secular State wherein people belonging to the different religions should all have a feeling of equality and non-discrimination. Demand had also been made before the partition by sections of people belonging to the minorities for reservation of seats and separate electorates. In order to bring about integration and fusion of the different sections of the population, the framers of the Constitution did away with separate electorates and introduced the system of joint electorates, so that every candidate in an election should have to look for support of all sections of the citizens. Special safeguards were guaranteed for the minorities and they were made a part of the fundamental rights with a view to instil a sense of confidence and security in the minorities.

Those provisions were a kind of a Charter of rights for the minorities so that none might have the feeling that any section of the population consisted of first-class citizens and the others of second-class citizens. The result was that minorities gave up their claims for reservation of seats.

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A liberal, generous and sympathetic approach is reflected in the Constitution in the matter of the preservation of the right of minorities so far as their educational institutions are concerned… The minorities are as much children of the soil as the majority and the approach has been to ensure that nothing should be done as might deprive the minorities of a sense of belonging, of a feeling of security, of a consciousness of equality and of the awareness that the conservation of their religion, culture, language and script as also the protection of their educational institutions is a fundamental right enshrined in the Constitution. The same generous, liberal and sympathetic approach should weigh with the courts in construing Articles 29 and 30 as marked the deliberations of the Constitution-makers in drafting those articles and making them part of the fundamental rights. The safeguarding of the interest of the minorities amongst sections of population is as important as the protection of the interest amongst individuals of persons who are below the age of majority or are otherwise suffering from some kind of infirmity. The Constitution and the laws made by civilised nations, therefore, generally contain provisions for the protection of those interests. It can, indeed, be said to be an index of the level of civilisation and catholicity of a nation as to how far their minorities feel secure and are not subject to any discrimination or suppression."

(Emphasis supplied)

19. This was reiterated in the concurring judgment of Quadri, J. in **T.M.A. Pai Foundation v. State of Karnataka** (2002) 8 SCC 481 as follows:

"**301.** …The founding fathers of the Constitution were alive to the ground realities and the existing inequalities in various sections of the society for historical or other reasons and provided for protective discrimination in the Constitution with regard to women, children, socially and educationally backward classes of citizens, Scheduled Castes and Scheduled Tribes by enabling the State to make special provision for them by way of reservation as is evident from clauses (3) and (4) of Article 15 and clauses (4) and (4-A) of Article 16 of the Constitution. The apprehensions of religious minorities and their demand for separate electorates, were settled by providing freedom of conscience and free profession, practise and propagation of religion for all the citizens under Articles 25, 26 and 28 which take care of the religious rights of minorities equally; by special provisions their right to conserve a distinct language, script or culture is guaranteed as a fundamental right in Article 29; further, all minorities, whether based on religion or language, are conferred an additional fundamental right to establish and administer educational institutions of their choice as enshrined in Article 30 of the Constitution. The right under Article 30(1) is regarded so sacrosanct by Parliament in its constituent capacity that when by operation of the law of the land — Land Acquisition Act — compensation awarded for acquisition of a minority educational institution was to result in restricting or abrogating the right guaranteed under clause (1) of Article 30, it by the Constitution (Forty-fourth) Amendment Act inserted clause (1-A) in Article 30. It provides that Parliament in the case of a Central legislation or a State Legislature in the case of State legislation shall make a specific law to ensure that the amount payable to the minority educational institutions for the acquisition of their property will not be such as will in any manner impair their functioning. A Constitution Bench of this Court in interpreting clause (1-A) of Article 30 in Society of St. Joseph's College v. Union of India [(2002) 1 SCC 273] observed thus: (SCC p. 278, para 7)

> "7. Plainly, Parliament in its constituent capacity apprehended that minority educational institutions could be compelled to close down or curtail their

> activities by the expedient of acquiring their property and paying them inadequate amounts in exchange. To obviate the violation of the right conferred by Article 30 in this manner, Parliament introduced the safeguard provision in the Constitution, first in Article 31 and then in Article 30."

20. The Nine Judge Bench in **St. Xavier's** (supra), by a majority of 7:2, held that Section 33-A(1)(b) of the Gujarat University Act, 1949 as amended by the Gujarat University (Amendment) Act, 1972, would not apply to minority institutions. Section 33-A(1)(b) of the said Act is set out as follows:

> "33-A. (1) Every college (other than a Government college or a college maintained by the Government) affiliated before the commencement of the Gujarat University (Amendment) Act, 1972 (hereinafter in this section referred to as 'such commencement')—
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> xxx xxx xxx
>
> (*b*) that for recruitment of the Principal and members of the teaching staff of a college there is a selection committee of the college which shall include—
> (1) in the case of recruitment of the Principal, a representative of the University nominated by the Vice-Chancellor, and
> (2) in the case of recruitment of a member of the teaching staff of the college, a representative of the University nominated by the Vice-Chancellor and the Head of the Department, if any, concerned with the subject to be taught by such member."

21. Ray, C.J. adverted to the aforesaid provision and stated that at the core of the fundamental right of Article 30 is the right to administer which includes the right of the minority institutions to

choose its teachers (see pages 194 and 196). Having held this, the learned Chief Justice set out the argument of the Intervenors thus:

> "The provisions contained in Section 33-A(1)(*b*) of the Act were not challenged by the petitioners. The interveners challenged those provisions. The settled practice of this Court is that an intervener is not to raise contentions which are not urged by the petitioners. In view of the fact that notices were given to minority institutions to appear and those institutions appeared and made their submissions a special consideration arises here for expressing the views on Section 33-A(1)(*b*) of the Act. The provisions contained in Section 33-A(1)(*b*) of the Act are that for the recruitment of the Principal and the members of the teaching staff of a college there is a selection committee of the college which shall consist, in the case of the recruitment of a Principal, of a representative of the university nominated by the Vice-Chancellor and, in the case of recruitment of a member of the teaching staff of the college, of a representative of the university nominated by the Vice-Chancellor and the Head of the Department if any for subjects taught by such persons. The contention of the interveners with regard to these provisions is that there is no indication and guidance in the Act as to what types of persons could be nominated as the representative. It was suggested that such matters should not be left to unlimited power as to choice. The provisions contained in Section 33-A(1)(*b*) cannot therefore apply to minority institutions."

This argument was accepted stating that the said Section cannot, therefore, be applied to minority institutions as it would otherwise violate the fundamental right contained in Article 30(1).

22. This view was concurred in by Khanna, J. as follows:

> "Another conclusion which follows from what has been discussed above is that a law which interferes with a minority's choice of qualified teachers or its disciplinary control over teachers and other members of the staff of

> the institution is void as being violative of Article 30(1). It is, of course, permissible for the State and its educational authorities to prescribe the qualifications of teachers, but once the teachers possessing the requisite qualifications are selected by the minorities for their educational institutions, the State would have no right to veto the selection of those teachers. The selection and appointment of teachers for an educational institution is one of the essential ingredients of the right to manage an educational institution and the minorities can plainly be not denied such right of selection and appointment without infringing Article 30(1). In the case of *Rev. Father W. Proost* this Court while dealing with Section 48-A of the Bihar Universities Act observed that the said provision completely took away the autonomy of the governing body of the college and virtually vested the control of the college in the University Service Commission. The petitioners in that case were, therefore, held entitled to the protection of Article 30(1) of the Constitution. The provisions of that section have been referred to earlier. According to the section, subject to the approval of University appointment, dismissals, removals, termination of service or reduction in rank of teachers of an affiliated college not belonging to the State Government would have to be made by the governing body of the college on the recommendation of the University Service Commission. The section further provided that the said Commission would be consulted by the governing body of a college in all disciplinary matters affecting teachers of the college and no action would be taken against or any punishment imposed upon a teacher of a college otherwise than in conformity with the findings of the Commission."

Likewise, Jagan Mohan Reddy, J. also held Section 33-A(1)(b) inapplicable to minority institutions. The concurring judgment of Mathew, J. and Chandrachud, J. agreed with the learned Chief Justice that the aforesaid provision could not possibly apply to a minority institution as follows:

> "It is upon the principal and teachers of a college that the tone and temper of an educational institution depend. On them would depend its reputation, the maintenance of discipline and its efficiency in teaching. The right to choose the principal and to have the teaching conducted by teachers appointed by the management after an overall assessment of their outlook and philosophy is perhaps the most important facet of the right to administer an educational institution. We can perceive no reason why a representative of the University nominated by the Vice-Chancellor should be on the Selection Committee for recruiting the Principal or for the insistence of head of the department besides the representative of the University being on the Selection Committee for recruiting the members of the teaching staff. So long as the persons chosen have the qualifications prescribed by the University, the choice must be left to the management. That is part of the fundamental right of the minorities to administer the educational institution established by them."

23. A reading of the aforesaid judgment would leave no manner of doubt that if Respondent No.4 is a minority institution, Rule 28 of the Rules for Management of Recognized Non-Government Institutions (Aided and Unaided) 1969, cannot possibly apply as there would be a serious infraction of the right of Respondent No.4 to administer the institution with teachers of its choice.

24. We now go to the question as to whether it is necessary that there be a declaration as to status of the minority institutions by the competent authority under the West Bengal Board of Secondary Education Act, 1963 before it can claim the status of being a minority institution. We have already noticed that the competent

authorities set up by the aforesaid Act do not give any power to recognise a minority institution. For this reason, it is difficult to agree with the conclusion stated in paragraph 40 of judgment of Banumathi, J. Further, the letter dated 19th April, 1976 would show that Respondent No.4 was started as a primary school by the Sikh community living in Kolkata to impart education to their children who came from Punjab, so that they may learn their mother tongue and religion, ethics etc. As a matter of fact, this aspect of the matter is no longer *res integra*.

25. In **N. Ammad v. Emjay High School** (1998) 6 SCC 674, this Court held:

> **"12.** Counsel for both sides conceded that there is no provision in the Act which enables the Government to declare a school as a minority school. If so, a school which is otherwise a minority school would continue to be so whether the Government declared it as such or not. Declaration by the Government is at best only a recognition of an existing fact. Article 30(1) of the Constitution reads thus:
>
> > "30. (1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice."
>
> **13.** When the Government declared the School as a minority school it has recognised a factual position that the School was established and is being administered by a minority community. The declaration is only an open acceptance of a legal character which should necessarily have existed antecedent to such declaration. Therefore, we are unable to agree with the contention that the School

can claim protection only after the Government declared it as a minority school on 2-8-1994."

This statement of the law was then followed by **Corporate Educational Agency v. James Mathew** (2017) 15 SCC 595 as follows:

"**7.** As far as the validity of the declaration of minority status is concerned, this Court in *N. Ammad* v. *Emjay High School* [*N. Ammad* v. *Emjay High School*, (1998) 6 SCC 674 : 1 SCEC 732] has held that the certificate of the declaration of minority status is only a declaration of an existing status. Therefore, there is no question of availability of the status only from the date of declaration. What is declared is a status which was already in existence.

xxx xxx xxx

10. Chapter IV deals with functions and powers of the Commission. Under Section 11(*f*), the Commission has been vested with the power rather the mandate to decide all questions relating to the status of any institution as a minority educational institution and declare its status as such. Section 11 of the Act is quoted hereunder:

"**11.** ***Functions of Commission***.—Notwithstanding anything contained in any other law for the time being in force, the Commission shall—

(*a*) advise the Central Government or any State Government on any question relating to the education of minorities that may be referred to it;

(*b*) enquire, suo motu, or on a petition presented to it by any minority educational institution, or any person on its behalf into complaints regarding deprivation or violation of rights of minorities to establish and administer educational institutions of their choice and any dispute relating to

affiliation to a University and report its finding to the appropriate Government for its implementation;

(*c*) intervene in any proceeding involving any deprivation or violation of the educational rights of the minorities before a court with the leave of such court;

(*d*) review the safeguards provided by or under the Constitution, or any law for the time being in force, for the protection of educational rights of the minorities and recommend measures for their effective implementation;

(*e*) specify measures to promote and preserve the minority status and character of institutions of their choice established by minorities;

(*f*) *decide all questions relating to the status of any institution as a minority educational institution and declare its status as such;*

(*g*) make recommendations to the appropriate Government for the effective implementation of programmes and schemes relating to the minority educational institutions; and

(*h*) do such other acts and things as may be necessary, incidental or conducive to the attainment of all or any of the objects of the Commission."

(emphasis supplied)

11. Therefore, after the introduction of the National Commission for Minority Educational Institutions Act, 2004, it is also within the jurisdiction and mandate of the National Commission to issue the certificate regarding the status of a minority educational institution. Once the Commission thus issues a certificate, it is a declaration of an existing status."

26. We have held that it cannot be said that Respondent No.4 is, in any manner, estopped from claiming its minority status on the facts of this case. Quite apart from this, it is settled law that the

fundamental right under Article 30 cannot be waived (See **St. Xavier's** (supra) at pages 260 to 262 per Mathew, J.; **Olga Tellis v. Bombay Municipal Corporation,** (1985) 3 SCC 545 and 569 to 571.) In the recent judgment in **K.S. Puttaswamy v. Union of India** (2017) 10 SCC 1, Chandrachud, J. has echoed this sentiment as follows:

> "**126.** In Behram Khurshid Pesikaka v. State of Bombay (1955) 1 SCR 13: AIR 1955 SC 123 : 1955 Cri LJ 215, Mahajan, C.J. speaking for the Constitution Bench, noted the link between the constitutional vision contained in the Preamble and the position of the fundamental rights as a means to facilitate its fulfilment. Through Part III embodies fundamental rights, this was construed to be a part of the wider notion of securing the vision of justice of the Founding Fathers and, as a matter of doctrine, the rights guaranteed were held not to be capable of being waived. Mahajan C.J., observed (AIR p. 146, para 52 : SCR pp. 653-54)
>
> > "52. …We think that the rights described as fundamental rights are a necessary consequence of the declaration in the Preamble that the people of India have solemnly resolved to constitute India into a sovereign democratic republic and to secure to all its citizens justice, social, economic and political; liberty of thought, expression, belief, faith and worship; equality of status and of opportunity.
> >
> > These fundamental rights have not been put in the Constitution merely for individual benefit, though ultimately they come into operation in considering individual rights. They have been put there as a matter of public policy and the doctrine of waiver can have no application to provisions of law which have been enacted as a matter of constitutional policy" "

27. This being the law laid down by this Court, it is clear that both the reasons given by Banumathi, J. cannot be said to be correct, as per the law laid down by this Court.

28. Shri Chakraborty, learned Senior Advocate appearing on behalf of the State, raised an argument based on Article 350B. The said Article reads as follows:

> "**350B. Special Officer for Linguistic Minorities**
>
> (1) There shall be a Special Officer for linguistic minorities to be appointed by the President.
>
> (2) It shall be the duty of the Special Officer to investigate all matters relating to the safeguards provided for linguistic minorities under this Constitution and report to the President upon those matters at such intervals as the President may direct, and the President shall cause all such reports to be laid before each House of Parliament, and sent to the Governments of the States concerned."

29. This Article only sets up a Special Officer for linguistic minorities, to be appointed by the President, whose duty it is to investigate matters relating to safeguards provided for linguistic minorities and send reports to the President of India, which reports the President shall cause to be laid before each House of Parliament, and send to the Governments of the States concerned. Even a cursory reading of this Article cannot possibly lead to the conclusion that absent a report by the Special Officer, no linguistic

minority can claim protection as such under Article 30(1) of the Constitution.

30. In point of fact, in **D.A.V. College v. State of Punjab** (1971) Supp. SCR 688, this Court held that where the challenge is to a State law, linguistic minority status would have to be determined State-wise (see page 696). This view has been reiterated by the Eleven Judge Bench in **T.M.A. Pai Foundation** (supra) (see pages 552, 553 and 587).

31. There can be no doubt that qua the State of West Bengal, Sikhs are a linguistic minority vis-à-vis their language, namely, Punjabi, as against the majority language of the State, which is Bengali. The argument of the learned counsel appearing on behalf of the State that the school is, in fact, teaching in the Hindi medium is neither here nor there. What is important is that the fundamental right under Article 30 refers to the "establishment" of the school as a linguistic minority institution which we have seen is very clearly the case, given paragraphs 5(a) and 5(b) of letter dated 19th April, 1976. Therefore, the medium of instruction, whether it be Hindi, English, Bengali or some other language would be wholly irrelevant to discover as to whether the said school was founded by a linguistic minority for the purpose of imparting education to

members of its community. This argument also, therefore, must be rejected.

32. Seeing the writing on the wall, the learned Senior Advocate appearing for the State made a fervent plea that we should refer this matter to the Constitution Bench, following the order in **Shiromani Gurudwara Prabandhak Committee** (supra) dated 18th November, 2010.

33. This matter arose out of a judgment of the High Court of Punjab and Haryana dated 17th December, 2007, as per which two notifications were issued under the Punjab Private Health Sciences Educational Institutions (Regulation of Admission, Fixation of Fee and Making of Reservation) Act, 2006, by which the aforesaid Sikh institutions were declared to be minority institutions within the State of Punjab. The High Court had held, following this Court's judgment in **Bal Patil v. Union of India** (2005) 6 SCC 690, that the Sikhs were, in fact, population-wise the majority community in the State of Punjab, as a result of which the two notifications were struck down as being violative of Article 14 of the Constitution of India. It is in this backdrop that, by an order dated 18th November, 2010, a Division Bench of this Court referred this matter to be heard along with other matters by a Constitution Bench. The other matter

concerned **Brahmo Samaj Education Society v. State of West Bengal**, (2004) 6 SC 224, in which a review petition was allowed and directed to be heard by a Constitution Bench. In the aforesaid case, the challenge that was raised was grounded on Article 19(1)(g) of the Constitution of India and was not directly related to Article 30 of the Constitution of India. Obviously, this reference order is on different facts and would not avail the respondent State in the present case.

34. As a result, we are of the view that the judgment of Thakur, J. is correct in law. Consequently, the judgment and order of the learned Single Judge of the Calcutta High Court is correct, and that of the Division Bench of the Calcutta High Court is set aside. The appeals are, accordingly, allowed with no order as to costs.

……J.
(R.F. Nariman)

……J.
(R. Subhash Reddy)

……J.
(Surya Kant)

New Delhi
September 25, 2019.