

A STATE OF BIHAR AND ORS.
v.
PROJECT UCHCHA VIDYA, SIKSHAK SANGH AND ORS.

JANUARY 3, 2006

B [S. B. SINHA AND P.P. NAOLEKAR, JJ.]

Constitution of India, 1950:

C Articles 14, 15(3), 16, 19(1)(g), 19(6) and 309—'Project Schools' in State of Bihar—Establishment, identification and recognition of—State intending to establish at least one Girls High School in each block of educationally backward areas—Some schools established, identified and recognized—These schools were not to be treated as nationalized schools—Claim by teachers of such schools for payment of salaries and regularization of their services—Number of Schools and number of teachers in such schools disputed—Held, education as a part of human development is a human right—Woman and children require special treatment and, therefore, protective discrimination and affirmative action were contemplated in terms of Article 15(3)—State Government would constitute a Committee to consider the claims regarding recognition, actual number of such schools, educational qualification of the teachers as also recruitment of teachers where ad hoc teachers were appointed.

Articles 162, 166 and 300-A:

F Educational institutions—"Takeover" of by State Government—Identification of High Schools as 'Project Schools' in State of Bihar—Recognition of—Such Schools not to be treated as nationalized schools—No statute enacted nor Rules framed laying down the modalities for taking over the properties and management together with teaching and non-teaching staff of such schools—Held, in the instant case word "takeover" has been used loosely—A circular letter issued by an officer of the State Government without fulfilling the mandatory provisions of Articles 162 and 166 cannot be categorized as a decision by the State—Doctrine of 'eminent domain'.

Education/Educational Institutions:

'Recognition' of Schools and 'regularisation' of services of teaching

and non-teaching staff—Directions given to consider the claims regarding recognition to the institutions. A

Administrative Law:

Equitable estoppel—Held, rule of estoppel has no application if by reason of a constitutional provision State's action cannot be supported or State intends to withdraw or modify a policy decision—Legitimate expectation. B

Words and Phrases:

Words 'regularization' and 'take over'—Connotation of in the context of regularization of services of educational institutions. C

With a view to combat illiteracy in comparatively educationally backward areas of State of Bihar, the State Government issued circular No. 1115 dated 27.5.1981 laying down a policy decision that in the remaining years of the sixth Five Year Plan period, i.e. 1981-82 to 1984-85, the State would achieve a target of establishing four High Schools out of which one would be Girls High School in every block. Such schools were to be known as Project Schools. During the years 1981-82, some schools were established. In order to achieve the target a three-man Committee was constituted for identification of the existing schools as Project Schools. Certain schools were recognized in the year 1985. These schools were not to be treated in the category of nationalized schools for management purposes and a formal notification was to be issued declaring control of management of such schools by the Government. D E

During the period between 1992 and 1997 a number of writ petitions were filed in the High Court seeking directions, *inter alia*, for payment of salaries of teaching and non-teaching staff of 300 schools purported to be selected as Project Schools. Ultimately the matter was heard by a Full Bench of the High Court which held that there remained no controversy as regards establishment/selection of 300 project schools, and the number of teachers in each schools would constitute 9. The High Court also made observations regarding age and educational qualification of teaching and non-teaching staff. Present appeals were filed both by the State as also on behalf of the teachers, questioning the judgment of the Full Bench of the High Court. F G

The stand of the State before the High Court as also before the H

- A** Supreme Court was that the three-man Committee was appointed for the purposes of identification of the Schools, which were situated in various blocks, as Project Schools. The controversy between the parties was with regard to questions: whether the schools were to be recognized or the schools alongwith its management had been taken over; whether management of the schools continued to be in the private hands and the
- B** State only intended to pay salaries of teachers whether the properties belonging to the Managing Committees of erstwhile schools vested in the State of Bihar; whether 5 or 9 posts were recognized in the Project Schools.

Disposing of the appeals, the Court

- C** HELD: 1.1. Imparting education is the primary duty of the State. Although establishment of High Schools may not be a constitutional function in the sense that citizens of India above 14 years might not have any fundamental right in relation thereto, but education as a part of human development indisputably is a human right. The framers while
- D** providing for equality clause under the constitutional scheme had in their mind that women and children require special treatment and only in that view of the matter protective discrimination and affirmative action were contemplated in terms of clause (3) of Article 15 of the Constitution of India. [41-A-C]

- E** 1.2. The State of Bihar framed the scheme having constitutional goal in mind. However, the shifting of stand by the State is apparent. Whereas the main scheme framed in the year 1981 postulated establishment of schools by itself and that too in the most backward areas of the then State of Bihar, namely, Chhotanagpur and Santhal Pargana, the facts clearly
- F** show that the main purpose for which the said scheme was formulated had been greatly deviated from. Instead and in place of establishing more and more girls schools in Chhotanagpur and Santhal Pargana regions, more and more schools were sought to be established in other parts of the State as well. Further, whereas emphasis was laid on spreading of education amongst women by establishing at least one Girls High School
- G** in each identified block, for all intent and purport a shift was made towards Boys High Schools. [41-C-D; 43-D]

- H** 1.3. The State in implementation of the scheme failed and/or neglected to adhere to one stand. It although took a categorical stand that Project Schools would not be in the category of nationalized schools or

government schools, but while identifying and selecting private schools for recognition thereof funds were also allotted for construction of buildings. The State Government took different stands at different point of time. It is not clear as to how many schools were constructed by the State itself or how many of them had been constructed with public assistance and/or how many of the schools were identified and proposed to be recognized/taken over. [41-F, H; 42-A]

2.1. So far as taking over of the services of the teaching and non-teaching staff of the Project Schools and claim regarding regularization of their services is concerned, it must be seen that the expression 'regularization' has a definite connotation. Regularization of services must precede a legislative act or, in absence of legislation, rules framed in terms of proviso appended to Article 309 of the Constitution. Besides, in absence of any policy decision of the State regarding taking over of Schools, it cannot be said that services of teaching and non-teaching staff had been taken over whether along with properties of such schools or not, so as to enable the courts to arrive at a definite conclusion that teaching and non-teaching staff for all intent and purport have become employees of the State. [44-B; 44-F]

State of UP v. Neeraj Awasthi, (2005) 10 SCALE 286, relied on.

2.2. It is one thing to say that the Management of the school has been taken over together with the services of the teaching and non-teaching staff and it is another thing to say that the State has recognized the schools and is bound to pay the salary of such teaching and non-teaching staff on the same scale and pay as it has been paying to its own teachers. In case of nationalization of schools, furthermore in terms of the provisions of the statute itself, the educational qualification as also other qualifications for taking over the services of the teachers would be laid down. In absence of any such legislation, it was expected of the State to lay down such criteria in clear terms by way of policy decision or guidelines not only for the purpose of letting the teachers know as to where they stand but also for the purpose of determining as to whether such teachers are available in the schools who are entitled to salaries and other emoluments payable to them by the State. If new schools were established, indisputably teaching and non-teaching staff thereof were required to be appointed through Vidyalaya Sewa Board in conformity with the existing rules as well as Articles 14 and 16 of the Constitution of India. It is, thus, not a case where

A the concept of regularization could have been invoked. [44-G-H; 45-A-B]

2.3. In the matter of schools which were said to have been established by way of public participation, the Circular letter except mentioning that such schools can be established also by public participation did not indicate as to what were the roles to be played by the members of public. Besides, it is evident that a large number of schools were still to be identified or their identity is not known or building was yet to be constructed. A school could not be said to have been taken over where the identity of the land is not known or where no building is in existence. [45-E; 46-A]

3.1. The word 'take over' would mean that the Government had thought of taking over of the properties and assets of the schools together with teaching and non-teaching staff. Take over of schools in the context of the policy decision of the State does not appear to be an expression of an intendment for complete take over of the management of the school. In the former sense take over of such schools would be violative of Article 300-A of the Constitution of India. The right to manage an institution is also a right to property. Article 300-A embodies the 'doctrine of eminent domain' which comprises of two parts, (i) acquisition of property in public interest; and (ii) payment of reasonable compensation therefor. [49-F]

Jilubhai Nanbhai Khachar and Ors. v. State of Gujarat and Anr., (1995) 1 Supp. 596, relied on.

Bishambhar Dayal Chandra Mohan and Ors. etc. v. State of U.P. and Ors. etc., [1982] 1 SCC 39, referred to.

3.2. Establishment and management of an educational institution is a part of fundamental right being a right of occupation as envisaged under Article 19(1)(g) of the Constitution. A citizen cannot be deprived of the said right except in accordance with law. The requirement of law for the purpose of clause (6) of Article 19 can by no stretch of imagination be achieved by issuing a circular or a policy decision in terms of Article 162 of the Constitution or otherwise. Such a law, it is trite, must be one enacted by legislature. [50-H; 51-A-B]

T.M.A. Pai Foundation and Ors. v. State of Karnataka, [2002] 8 SCC 481 and *State of Madhya Pradesh and Anr. v. Thakur Bharat Singh*, AIR (1967) SC 1170 [1967] 2 SCR 454, relied on.

H

Rai Sahib Ram Jawaya Kapur and Ors. v. The State of Punjab, [1955] 2 SCR 225, referred to. A

3.3. Letter written by an authority to the private persons cannot give rise to a legitimate expectation. In the instant case, the word 'take over' has been used loosely. It is well settled that a circular letter issued by an officer of the State without fulfilling the mandatory provisions of Articles 162 and 166 of the Constitution cannot be categorized as a decision by the State. [52-C-D] B

Sri Dwarka Nath Tewari and Ors. v. State of Bihar and Ors., AIR (1959) SC 249 and *Union of India and Ors. v. M/s Graphic Industries Co. & Ors.*, JT (1994) 5 SC 237, relied on. C

3.4. If the circular letter does not satisfy the requirement of Article 162 of the Constitution the question of a valid take over in the sense that the properties and/or management thereof would vest in the State of Bihar, does not arise. Furthermore, the District Education Officer is not empowered to issue a notification formally taking over of management and control and vesting the same into the State Government. In any event, if teachers were required to be appointed in the manner laid down therein, the management of the school could not have been taken over together with the teaching and non-teaching staff who had already been working therein. [52-E-F] D E

4. As regards the number of Schools, various documents as also the affidavits filed on behalf of the State in no uncertain terms show that besides the schools which were established by the State and are being run by it, there are various other schools over which there was a dispute about their identification. The number of the schools mentioned by either side may not be entirely correct but the fact remains that before the Cabinet also, a representation was made by the authorities of the State themselves that 300 schools are in place. It is only on that basis the Cabinet sanctioned 1200 more posts. [46-C-E] F

5. So far as number of teachers in Project School is concerned, whereas in respect of the schools established by the State 9 posts were sanctioned, for the schools which were selected for recognition / taken over through the agency of the three-man committee, only 5 posts were sanctioned. The State is no doubt entitled to lay down qualification or sanction the requisite number of posts. The State is also entitled to fix the G H

A age limit of such teachers. The Cabinet itself realized that like any school run by the Government, it is necessary to have at least 9 teachers even in the project schools. The strength of the teachers for such schools has not only been sanctioned, sanction therefor was given with retrospective effect and retroactive operation. Necessary funds were allocated for the said purpose. Therefore, the finding of the High Court that the State was bound to recognize at least 9 teachers in each school does not require elaborate consideration as the State Government has now sanctioned 4 additional posts with retrospective effect. [47-B-E; G-H; 48-C]

C 6. As regard minimum age of the teaching and non-teaching staff, indisputably the same should be 18 years. [55-B]

D 7. So far as educational qualification of the teaching staff is concerned, having regard to the fact that the limited number of teachers were to be appointed with a view to accomplish a constitutional goal of spreading literacy in the villages, particularly amongst the girls, the standard adopted in Zila Schools or Government Schools constituted in urban areas may not be insisted upon, as was observed by the High Court; but keeping in view the fact that it is essentially a Government function, the question as to whether some teachers having B.T. training or training in Physical Education would be allowed to continue in the said Project Schools or not is left to the State, wherefor a decision in accordance with law may be taken. [55-C]

F 8.1. Even if there is no dispute as regards number of schools, in view of the stand taken by the State and particularly in view of the fact that it appears from the records that recognition of the school, if any, had wrongly been granted to some schools where buildings were also not completed or the process of selection was also not over, it may be necessary for the State to have a further look in the matter, and the question as to how many schools fulfill the criteria must be considered afresh. It is furthermore necessary to scrutinize as to whether the teaching and non-teaching staff appointed for the said purpose fulfill the criteria in terms of the policy decision of the State or not. Their qualifications laid down under other relevant statutes for the purpose of obtaining permission must also be scrutinized. [52-G-H; 53-A]

H 8.2. It can not be said that the principle of equitable estoppel would apply against the State of Bihar. It is now well known, the rule of estoppel

has no application where contention as regard constitutional provision or a statute is raised. The right of the State to raise a question as regards its actions being invalid under the constitutional scheme of India is now well recognized. If by reason of a constitutional provision, its action cannot be supported or the State intends to withdraw or modify a policy decision, no exception thereto can be taken. [53-B-C]

8.3. It is, however, one thing to say that such an action is required to be judged having regard to the fundamental rights of a citizen but it is another thing to say that by applying the rule of estoppel, the State would not permitted to raise the said question at all. So far as the impugned circular dated 18.02.1989 is concerned, the State has, a right to support the validity thereof in terms of the constitutional framework. [53-D]

8.4. It is not clear whether all correct facts have been placed before the Cabinet or not particularly in view of the fact that many of the schools which were established in Chhotanagpur and Santhal Pargana are now in the State of Jharkhand; and whether apart from the schools which had been identified by the three-man committee and admittedly recognized by the State, any final decision had been taken as regard recognition or otherwise of the remaining schools by the appropriate authority. Therefore, a committee should be constituted for the said purpose. The Chief Secretary of the State of Bihar is, therefore, requested to constitute a committee comprising of two officers and one Educationist of repute and/or a retired Judicial officer. In the event a Judicial Officers is appointed as a member of the committee, he would be the chairman thereof. Remuneration of the Judicial Officer and/or the Educationist shall be determined by mutual agreement. In the event it is found that teachers have been appointed on *ad hoc* basis, the Vidyalay Sewa Board shall be directed to make regular recruitment strictly in accordance with law.

[53-E-H; 54-A, B]

8.5. The Committee shall also deal with all such individual cases of the Appellants, as has been directed in para 35 of the judgment of the High Court. All the educational institutions claiming recognition or having any other claims would file their representations together with all supporting documents within three weeks from date. In their applications, the institutions must also give details of the students admitted in each class year-wise. [54-D]

8.6. The Chief Secretary would place the said report together with

A His comments thereupon before the appropriate authority in terms of the Rules of Executive Business and it is expected that the said authority of the Government of Bihar shall take appropriate decision. [54-G-H]

B 8.7. The State Government may take suitable action against those who may be found responsible for commission of irregularities and/or illegalities in the process of implementation of the Government scheme in accordance with law. [55-A]

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 6626-6675 of 2001.

C From the Judgment and Order dated 7.12.1999 of the High Court of Patna in C.W.J.C. Nos. 4783/96, 10397/92, 1224/94, 1772/93, 1604, 1223, 1704/94, 5585 of 1993, 1551, 1430/94, 5116, 4145, 8492, 8499, 8858, 8498, 8720, 11924, 6293, 6777, 6164, 6817, 7239/93, 12326/92, 2752, 2371/94, 8741, 5586, 4427, 12930, 3847/93, 2725, 3064, 1705, 1549, 2676/94 and L.P.A. 1092/1995.

D

WITH

Civil Appeal Nos. 6676-6681 of 2001.

E Rakesh Dwivedi, Sunil Kumar, P.S. Mishra, Ravinder Srivastava B.B. Singh, Mrs. Sunita R. Singh, Shrish Kumar Misra V.P. Singh, Irshad Ahmad, Anita Kanungo, Santosh Kumar, Vijay Kr. Pandey, Chandra Kant Nayak, Rakesh K. Sharma, Ashok Mathur, Arup Banerjee, Deba Prasad Mukherjee, D.N. Goburdhan, Ms. Pinky Anand, Ms. Geeta Luthra, Mrs. Kirti Sinha, Ugra Shankar Prasad, Ram Sagar Singh, Kunal Verma, Tathagat Harsh Vardhan, Upendra Mishra, Dhruv Kr. Jha, Amitesh Chandra Mishra, Himanshu Shekhar, Ambhoj Kumar Sinha, Himanshu Munshi and Kamendra Mishra for the appearing parties.

F

The Judgment of the Court was delivered by

G

S.B. SINHA, J. These Appeals involving common questions of law and fact were taken up for hearing together and are being disposed of by this common judgment. *

Introduction :

H

Imparting of education is a sovereign function of the State. Article 21A

of the Constitution of India envisages that children of age group 6 to 14 have a fundamental right of education. Clause 3 of Article 15 of the Constitution envisages special protection and affirmative action for women and children. A

Policy Decision :

Presumably, keeping in view the aforementioned constitutional scheme, a policy decision was adopted by the State to establish Project Schools. The State of Bihar is comparatively considered to be educationally backward. With a view to combat the said problem the State issued a Circular bearing No.1115 dated 27.5.1981 laying down a policy decision therein that in the remaining four years of sixth Five Year Plan period, i.e., from 1981-1982 to 1984-1985 the State should achieve the target of establishment of at least four High Schools, out of which one may be Girls High School in every block. B
C

The Circular letter states that according to the information received there are many blocks where less than four schools are functioning. Out of 587 blocks of the State 435 blocks were identified where even a single Girls High School was not recognized. The proposed numbers of schools which were to be opened are as under : D

1981-82	150	
1982-83	200	
1983-84	200	
1984-85	100	
Total	650	E

The districts of Santhal Pargana and Chhotanagpur which were thence part of the State of Bihar and now part of the State of Jharkhand were to be given priority as the said areas in educational spheres were found to be comparatively more backward. In seven districts of the said areas, the Government proposed to establish 299 new High Schools in 1981-82 in each block of the said area. As it was found difficult to attain the target of establishment of minimum four High Schools, it was observed that even if four High Schools are established, the students for so many schools may not be found. In the said areas, therefore two High Schools were proposed to be definitely established in the following terms: F
G

“1. Santhal Pargana 15 H

A	2.	Ranchi	9
	3.	Palamu	9
	4.	Hazaribagh	13
	5.	Giridih	4
B	6.	Dhanbad	2
	7.	Singhbhum	13
		Total	65"

It was further laid down therein that :

C “4. It is expected from the District Education Officer posted in Chhotanagpur and Santhal Pargana area that they will prepare the list of such blocks of their District immediately where there are less than 2 (Two) High Schools and will make such arrangement that in the present financial year i.e. 1981-82 in their district at least two High Schools may be established. At the time of preparing proposal for establishment of new High Schools priority will be given to those High Schools which are granted permission for establishment proposed High Schools and efforts will be made that getting all the conditions regarding recognition completed from those High Schools, which are accorded permission for establishment proposed High Schools only they should be granted recognition. By doing so at least establishment of two High Schools could be obtained without delay. On one hand where the High Schools are accorded permission for establishment proposed High Schools will get recognition on the other hand the local resources like land, building etc. could also properly be used and the Government would get a big amount as subscription. If in any block then may not be schools which fine granted permission for establishment proposed High School, then it is expected from the District Education Officer that looking to the population distance etc. he will propose for establishment of High School at such places where the Government land is easily available so that the expenses to be incurred on purchase of land could be saved. Efforts will be made to obtain the land and building through local efforts.

G 5. The State Government has also taken a decision that in the year 1981-82 in 7 Districts of Chhotanagpur and Santhal Pargana area in those blocks one Girls High School may be established where already at least 3 boys High Schools are functioning. By doing so target of

H

establishing of at least 4 High Schools in these blocks will be achieved in which there would be at least one Girls High School. For obtaining this target in the area District-wise Girls High Schools will have to be established in following numbers:-

Name of District Number of newly established Girls High School:

1.	Santhal Pargana	8
2.	Ranchi	8
3.	Palamu	Nil
4.	Hazaribagh	5
5.	Giridih	2
6.	Dhanbad	1
7.	Singhbhum	5
	Total =	29"

The District Education Officers were directed to take action for establishment of Girls High Schools. Further decision has been taken by the State that in Santhal Pargana and Chhotanagpur areas, 14 other High Schools may also be established. In such blocks where at least two High Schools are already functioning and where the local officer thinks it necessary to establish new schools on the basis of population, area of the block such High Schools were to be Boys High Schools in the following terms:

1.	Santhal Pargana	4
2.	Ranchi	3
3.	Palamu	2
4.	Hazaribagh	1
5.	Giridih	1
6.	Dhanbad	1
7.	Singhbhum	1
	Total =	14

Para 8 of the said Circular letter states that in the year 1981-82, 108 High Schools in Santhal Pargana and Chhotanagpur areas could be established, out of which 79 High Schools were for the boys and 29 High Schools were for the girls.

Further, a policy decision which was taken in relation to the areas

A falling outside Santhal Pargana and Chhotanagpur, it was directed:-

“Outside Chhotnagpur and Santhal Pargana in other areas of the State even now there are some such blocks where there is not even a single High School or the number of schools is less than 2 in each block. Therefore the State Government has also taken a decision that in the year 1981-82 in other area of the State, the following number of High Schools will be established district-wise:

	Number of District	Number of Boys Schools to be newly established
C	1. Rohtas	2
	2. Bhagalpur	1
	3. Purnia	2
	4. Saharsa	1
D	5. W. Champaran	2
	6. East Champaran	1
	Total =	9"

E 33 Girls High Schools were also proposed to be established in areas other than Santhal Pargana and Chhotanagpur where at least Boys High Schools are functioning. It was directed that the target of the establishment of 150 High Schools was definitely to be achieved by the end of the year 1981-82. By a Circular letter dated 3.9.1981 a decision was taken to establish 150 schools in the year 1981-82 whereby the District Education Officers were directed to select the place with the sanction of the Regional Director of Education and obtain approval of the Government.

F Yet again in another Circular dated 21.2.1982, the mode and manner of appointment as also the requisite qualification for recognition/regularization of services of teachers of the Project Schools were laid down wherefor Rs. 1.5 crores was earmarked for construction of building etc.

G It is not in dispute that during 1981-82, 150 schools were established. According to the State, the number of such schools which were established in the first level situate in different districts of the State were as under:

	Darbhanga	-	8
H	Madhubani	-	10

Samastipur	-	4	A
Begusarai	-	2	
Khagaria	-	1	
Sitamarhi	-	1	
East Champaran-		2	
West Champaran-		3	B
Gopalganj	-	3	
Saran	-	4	
Muzaffarpur	-	3	
Purnia	-	3	C
Bhagalpur	-	4	
Lohardagga	-	2	
Gumla	-	1	
Nalanda	-	1	D
Munger	-	1	
Bhojpur	-	2	
Santhal Pargana	-	2	
Palamau	-	4	
Nawada	-	2	E
Gaya	-	4	
Aurangabad	-	1	
Giridih	-	1	
Singhbhum	-	1	F
Patna	-	1	
Begusarai	-	3	

Implementation of the Scheme :

It also is not in dispute that a three-man committee constituted for the purpose of identification of the existing schools identified 57 schools. Schools so identified were recognized and the appointments of teachers were made by the Vidyalaya Sewa Board in terms of the aforementioned letter dated 23.2.1985, the relevant clauses whereof are as under:

“(a) The first preference would be provided in the establishment of

- A schools to the Block head quarters.
- (b) If there is no Girls School in block then the committee would decide where it would be appropriate to establish schools.
- (c) Where more than one such schools have been established at the block Headquarter or away then the selection of one school would be made from amongst them on the basis of the date of permission given by the State Government for establishment of such schools and superiority (sic) of physical resources of the school.
- B (d) Where a school established by public initiative is taken under the project then the teachers therein would be appointed by the Vidyalaya Sewa Board.”
- C

D On or about 4.2.1989, a circular was issued for appointment of a competent and qualified working teaching and non-teaching staff of such schools. Those schools were not to be treated in the category of nationalized schools for management purposes and a formal notification was to be issued declaring control of management of such schools by the Government. In private schools teachers were to be appointed by Vidyalaya Sewa Board. There appears to be some dispute as a three-man Committee selected and recommended for bringing them within the Project Schools. Whereas, according to the State 57 schools were recommended, the respondents contend that in fact 225 of such schools were recommended. The contention of the State is that 75 schools selected by the Government directly and 57 schools recommended by the Committee were all private schools and had not been established with Government funds.

E

F It is also not in dispute that despite the fact such schools stood recognized in the year 1985; qualifications for teachers and strength thereof was prescribed by a Government letter dated 04.02.1989, the relevant clauses whereof are as under :

- G “(i) Such persons will be appointed as teachers in Government Service who fulfill the following qualification the schools should have been opened with public co-operation and should have been selected by three men committee as prescribed in department letter No.142 dated 23.2.1985 and which should have obtained the permission of establishment from the Madhyamik Shiksha Karalaya and whose students should have been registered and set up from the school itself for the examination conducted by Bihar
- H

School Examination Board and the result of such student appearing for the Bihar Secondary Examination should have been published in the name of school itself who should be appointed in the sanctioned strength by the Managing Committee and possess the requisite qualification and competitive for appointment and should possess utility certificate for the subject in the Girl High school for that very subject and have got the concurrence of Vidyalaya Sewa Board. A B

(ii) In the aforesaid category of the schools the appointment of the teachers will be made on the basis of the seniority, qualification and utility against the five sanctioned posts in the light of the standard strength as mentioned in para (iii) C

(iii) The standard strength of teachers in such schools will be like that made under the Govt. Circular No. 705 dated 12.10.1982 and circular No.1027 dated 2.11.1985.

(a) Language Group-3 (Hindi-1, English-1 and Sanskrit -1) D

(b) Humanity Group-3 (Home Science, Geography, Civics, Economics and three in the light of seniority, qualification and utility).

(c) Science Group-2 (Math-1, Biology-Chemistry-1) E

(d) Other teachers-1 (Minority language, Music, Fine Arts, Commerce, Only one in the light of seniority, qualification and utility)."

For the purpose of appointments of such teachers, a screening committee consisting of the persons named therein was constituted. The age of such trained graduate teachers was to be 31 years while those with M.Ed. degree holders were to have the age limit of 32 years. Clause (3) of the said circular which was basically the subject-matter of the writ petitions before the High Court reads as under : F G

"3. The services of only such teachers will be considered for recognition who are currently working and who are appointed by the managing committee prior to the date of permission of establishment or selection by Head quarter or the date of election by the Competent committee at district level." H

A 5 sanctioned posts for the said schools were prescribed. According to the State in terms of the said 1989 circular letter, 56 schools having been recognized, salary was being paid to the teachers thereof. However, out of the said 56 schools, 4 schools are said to be now in the State of Jharkhand.

B **Writ Proceedings :**

Teaching and non-teaching staff of several schools filed a large number of writ petitions before the Patna High Court during the period between 1992 and 1997, *inter alia*, contending that said circular letter dated 04.02.1989 is arbitrary and discriminatory. In the said writ petitions, directions were sought for payment of salaries to the teaching and non teaching staff of 300 schools, purported to have been selected in terms of the Government letter dated 12.02.1985 and 23.02.1985. Different orders were passed in the said writ petitions, some of which were conflicting with others.. The matter ultimately reached this Court. This Court by an order dated 23.07.1997 passed in Civil Appeal No.10245 of 1996 and connected matters, having regard to such conflicting decisions, opined that the matter should be resolved by a Full Bench of the Patna High Court.

Findings of the High Court :

E A Full Bench of the Patna High Court was, pursuant to the said direction, constituted and by reason of the impugned judgment dated 07.12.1999, it was held :

(i) Establishment/take over of the schools in question was continuous process under the scheme framed in terms of the Government letter dated 27.05.1981 and it constituted a single transaction so as to avoid any discrimination amongst the students of one area with that of another area.

(ii) The provisions governing the recognition/regularization of the services of the teachers and payment of their salaries in respect of Project Schools of 1981-82 would also apply to the schools selected during 1984-85.

(iii) In view of the unambiguous stand of the State before the High Court, the process of selection was completed in the year 1986 and there remains no controversy as regard establishment or selection of 300 Project Schools during the year 1984-85.

H

(iv) The question as regard recognition and regularization of the services of the teaching and non-teaching staff of the Project Schools which were selected in the year 1984-85 was categorized as under :

- (a) Sanctioned strength of the teachers in the schools;
- (b) minimum qualification on the date of the appointment;
- (c) over age and under age on the date of appointment;
- (d) degree equivalence;
- (e) the question with respect to the circular holding the field for recognition/regularization of the service conditions of teaching and non teaching staff of all the schools for the year 1984-85;

It was *inter alia* held : In view of the ambiguity and contradictions contained in clauses (ii) and (iii) of letter No.142 dated 04.02.1989, the staffing pattern of the teachers would constitute 9 posts including the Head Master/Head Mistress as prescribed in the Government Circular No.705 dated 12.10.1982; (ii) In absence of any policy decision of the Government fixing the cut off date for the purpose of possessing minimum qualification, it would not be proper for the State to refuse recognition/regularization of the services of the teachers on the ground that at the time of their appointments by the Managing Committee of the respective schools, they were not trained graduates; (iii) The qualifying age for teachers of Project Schools of general category would be 31 years on the date of their appointment by respective Managing Committee of the schools; having regard to the fact that the teachers had continuously been working in the schools for more than 17 years, they were entitled for regularization/recognition of their services within the staffing pattern; (iv) The minimum qualifying age for appointment was 18 years; (v) The qualification of possessing a certificate of B.T. is not at par with B.Ed., since any person having passed matriculation examination may appear at the B.T. examination conducted by the Secondary School Examination Board and can get a certificate, whereas a person is not entitled to get a degree of B.Ed. unless he or she is a graduate. It will, however, be open to the authorities of the State Government to consider as to whether B.T. certificate can be equated with that of B.Ed. qualification or qualification of diploma in education.; (vi) The provisions of Circulate letter No.142 dated 04.02.1989 cannot be applied retrospectively, as the State is not empowered to alter or modify any circular with retrospective effect to the prejudice of the rights of the Government servants; (vii) The provisions governing recognition/

A regularization of the services of the teachers and payment of their salaries in respect of Project Schools of 1981-82 would also apply to the case of schools selected during 1984-85.

B The Full Bench, however, was of the opinion that as it was constituted to examine the broad proposition regarding the scope and applicability of different circulars issued by the State in the matter relating to implementation of the scheme in question and the service conditions of the teaching and non-teaching staff qua their eligibility, qualification, suitability etc., for the purpose of regularization/recognition of the service in the Project Schools, individual cases have to be examined by the authorities of the State in terms of its findings, stating :

C
D "...Individual cases of the petitioners of course, shall be examined by the respondent authorities in terms of the findings of this Full Bench in these cases, as we have not been posted with the facts in detail by the respective parties. In some of the cases State has not been filed counter affidavit perhaps under the impression that once this Court decided the principle then the authority concerned would examine individual cases and dispose it of in the light of the said principle."

It was further directed :

E "36. Accordingly, in the light of the findings recorded above, all the writ applications are disposed of with a direction to the respondent authorities to examine the claim of the petitioners for recognition/absorption of their services in the respective schools. Since these matters continued to remain pending for a long time, final implementation of the directions of this Full Bench should be made within a period of four months from the date of receipt/production of a copy of this judgment before the competent authority. However, in the facts and circumstances of these cases, there shall be no order as to costs."

G Appeals before this Court :

H Civil Appeal Nos.6625-6675 of 2001 were filed by the State of Bihar questioning the correctness of the said judgment, whereas Civil Appeal Nos. 6681 & 6676-78 of 2001 and Civil Appeal Nos.6679-80 of 2001 were filed, *inter alia*, questioning those parts of the judgment which were in favour of

the State.

A

Subsequent events :

Before advertng to the questions raised in these appeals, we would, however, notice subsequent events which are relevant for the purpose of decision in the instant case.

B

After the State of Bihar filed these special leave petitions, the question as regard implementation of the impugned judgment came up for consideration before the Cabinet. On or about 25.01.2000, the Cabinet took a decision to create 4 additional posts of Assistant Teachers in the said 300 schools, totaling 1200 teachers which were purported to have been selected/taken over in the year 1984-85. It sanctioned annual expenditure of Rs.11,26,80,000/- for payment of salaries of teachers against the 9 sanctioned posts of 300 Project Schools.

C

On or about 20.11.2000, the State of Bihar has been bifurcated in two States i.e. the State of Bihar and the State of Jharkhand. According to the Respondents, out of 300 Project Girls High Schools selected/taken over in the financial year 1984-85, 211 fell within the jurisdiction of the State of Bihar and 89 had gone within the jurisdiction of the State of Jharkhand.

D

By a letter 04.08.2003, the State sought to recognize 151 out of 211 Project Girls High Schools falling under the jurisdiction of the State of Bihar as genuine.

E

By a letter dated 30.03.2004, it was laid down :

“An enquiry is going on in respect of the appointment of the teachers of the employees of different categories by the C.B.I. In view of a writ application bearing CWJC No.9847/98 filed in the Hon’ble High Court, Patna. If the appointment of any employees is found illegal after enquiry, salary already paid, will be recovered at a time after canceling his appointment.”

F

The Government of Bihar approved the continuance of the functioning of the Project Schools falling within the jurisdiction of the State

G

Submissions :

On behalf of the State :

Mr. Rakesh Dwivedi, the learned Senior Counsel appearing on behalf

H

A of the State of Bihar, submitted:

(i) The High Court committed a manifest error in arriving at a conclusion that the State had taken over 300 schools as Project Schools in the year 1984-85, although, in fact only 132 schools were taken over. Our attention, in this behalf, has been drawn to the counter affidavit filed by the teachers who were said to have admitted that except 75 selected schools, the others were proposed schools, and those 75 schools would be deemed to have been taken over.

(ii) Reliance placed by the Respondent on a letter dated 24.12.1995, whereby certain information was provided to the Vidhan Parishad could not have been the basis for arriving at the finding by the High Court that there was no controversy regarding establishment/take over of 300 schools of 1984-85 Project Scheme. Though a number of schools had been mentioned therein but in terms of the said letter the status of the schools had not been specified and in that view of the matter by reason of the said letter itself, the High Court could not have arrived at a conclusion that those schools had been taken over and the services of the teaching and non-teaching staff stood regularized. The State in its affidavit has categorically stated that the list of the schools was tentative in nature and not final one of taken over schools.

(iii) The High Court misread the second counter affidavit filed by the State wherein a list of 300 schools had been mentioned but a perusal thereof would show that 116 schools had not been accorded permission of establishment and the matter relating to recognition of 37 schools was pending consideration. The status of other schools had also been shown individually which would show that in some cases, the sites were disputed, some were under consideration and yet in some others screening had not been done, and buildings had not been constructed, or project report was not available or land was not available. Furthermore, some recommendations in relation to some schools had been rejected. In view of the stand taken by the State in the second counter affidavit, there is absolutely no doubt that 153 schools had not been recognized or taken over.

(iv) The expression "take over" was loosely used, as having regard to the provisions contained in Article 300A of the Constitution of India, no property can be taken over or acquired except by an appropriate legislation. Reliance, in this behalf, has been placed on *Bishambhar Dayal Chandra Mohan and Ors. etc. v. State of U.P. & Ors. etc.*, [1982] 1 SCC 39 and *Jilubhai Nanbhai Khachar and Ors. v. State of Gujarat and Anr.*, [1995] 1

Supp. 596. Whenever the State intended to take over the schools it had passed enactments, as for example, Bihar Non-gazetted Educational Institutions "Taking Over" Act, 1988 and the Bihar Non Government Elementary School "Taking Over of Control" Act, 1976. A

Referring to a decision of this Court in *State of Madhya Pradesh and Anr. v. Thakur Bharat Singh*, AIR (1967) SC 1170 : [1967] 2 SCR 454, Mr. Dwivedi would submit that an administrative order having civil consequences must be supported by law. B

(v) As regard the issue pertaining to the competence of the State to lay down qualification/criteria for the 2nd phase of schools which is the subject-matter of the aforementioned circular letter dated 04.02.1989, by reason thereof, not only the strength of the teachers was confined to 5, but as the educational qualifications were prescribed thereby the same must be held to have been given retrospective effect. Only because the strength of 9 teachers was fixed for the first phase of schools by the Government, the same would not mean that in relation to the schools set up during the second phase by private persons, identical standard was automatically required to be maintained. C
Although the State Government by an order dated 25.01.2000 sanctioned additional posts for approved schools, it may be necessary to consider the question about the correctness of the impugned judgment on a legal principle, having regard to the fact that the State has the sole jurisdiction to sanction strength of a school wherefor financial stringency may be a relevant factor. D
In any event, as regularization of the teaching and non-teaching staff was required to be done prospectively, the State had the requisite jurisdiction to lay down the criteria therefor in terms of Government letter dated 04.02.1989. E
For the said purpose in view of the fact that unqualified and untrained teachers were not entitled to claim regularization the order dated 04.02.1989, would not become retrospective merely because it is drawn on antecedent facts. F

(vi) The second phase of the schools could not have been given the benefit of the criteria mentioned in the letter dated 2.11.1985, having regard to the fact that the first phase schools were established by the Government; but so far as the second phase schools are concerned, criteria therefor was prescribed for the first time by the Government in terms of the aforementioned circular letter dated 04.02.1989. Since the State was merely to provide salaries to regularized teachers of recognized private schools, it was within the domain of the State to prescribe the strength of the teachers. If the private schools wanted to have more staff, salaries to such surplus staff were required to be H

A paid by them from its own funds.

(vii) In a matter of this nature, it was argued, Article 14 of the Constitution of India will have no application, inasmuch as the State is not bound to provide salaries to all teachers or to provide a common strength of teachers for private schools.

B

On behalf of the Schools/Teaching and non-teaching Staff :

Mr. P.S. Mishra, the learned Senior Counsel, appearing on behalf of the Respondents in some of the matters, on the other hand, would submit :

C

(i) The fact that 300 Project Schools were selected during 1984-85 is beyond any pale of doubt or dispute. The status of the said schools can be enumerated in the following categories :

D

(a) Schools established through public assistance but directly selected by Government, like 75 schools established and taken over from the date of issuance of letter No.108 dated 12.2.85.

E

(b) Schools established by public assistance but recommended by three Man Committee in terms of letter No.142 dated 23.2.85 to be taken over as Project School from the date of such recommendation. Reliance in this behalf is placed on Annexure R-1 (Colly) of I.A. No.114-130 of 2001 at Page 23 to Page 64.

F

(c) The schools as enumerated in category (a) and (b) as stated above are covered by one nomenclature, i.e. Project Schools. These schools are not like Zila Schools (Government Schools) or nationalized schools because it has been established/selected by Government under a scheme, aimed to provide at least four Secondary/High Schools out of which one must be Girls School. These schools as per Government scheme have been established in most cases by taking over private schools which have been either granted permission for establishment or was at least proposed schools.

G

(ii) Having accepted before the Full Bench that the process of selection of all schools was completed in the year 1986 on the basis of recommendations of a three-man Committee, the State cannot now take a different stand. In any event, the State has accepted in several documents that a number of Project Schools were taken over. Our attention has further been drawn to the fact that

H

during the pendency of the writ petitions, a direction was issued by the High Court to the Secretary to file a list of 300 Project Girls High Schools, which were selected and taken over in the financial year 1984-85, pursuant whereto an affidavit was filed enclosing a list of such schools. A

(iii) Such a stand, the State has taken before the Legislative Council, as would appear from the letter dated 26.12.1995. In any event, as the Cabinet itself has taken a decision on 25.01.2000, while implementing a part of the judgment by sanctioning four additional posts of teachers for 300 schools, the said question now does not survive. B

(iv) In a letter dated 07.12.1994 issued by the Secretary, Education Department, it was observed that 300 Project Schools were selected in the year 1984-85. It was further observed that the scheme is to be implemented from Class VIth to Class Xth wherefor the curriculum of education was also prescribed. It was highlighted that the present sanctioned strength of five teachers was not sufficient. C

(v) The State of Bihar having framed the aforementioned scheme of establishing girls' schools in 435 blocks which were identified where there were no recognized Girls High Schools and in that view of the matter the State Government decided to open altogether 650 Girls High Schools in different blocks during the following financial years : D

<u>"Year</u>	<u>No. of Blocks</u>
1981-82	150
1982-83	200
1983-84	200
1984-85	100"

150 schools were established in the year 1981-82. However, no such Girls schools were established in the year 1982-83 and, thus, by reason of the aforementioned circular letter dated 25.01.1985, a decision had been taken to open 300 schools in different blocks. Initially by a letter dated 12.02.1985, 75 schools in different blocks and districts were selected followed by letter no.142 dated 23.02.1985, in terms whereof it was decided to select 225 schools established by public assistance after necessary recommendation of the three-man Committee. During the said year, therefore, 300 schools were established. There are several other documents to show that the stand taken herein by the State as regard the number of schools is not correct. E F G

A (vi) It is not a case where the property belonging to the schools had been taken over. In view of the fact that such take over was by reason of an agreement between the parties, it is permissible for the State to do so in terms of Article 162 of the Constitution of India. The executive power can be exercised to supplement the legislative power and if no legislation is operating in the field, such executive powers which are implied, ancillary or inherent B would include such powers which are required to carry into effect the aims and objects of the Constitution.

C The primary duty of the executive is to take stock of the educational needs of the people in the State, in absence of any statute operating in the field-it, in furtherance of the said object, can issue necessary circulars, which cannot be said to be invalid in law as lacking legislative sanction. The stand of the State, that the list of 300 schools submitted to the legislative council was tentative in nature, was incorrect as would appear from the office order D dated 22.10.1999 wherein it had treated the said list to be final and on the basis whereof the services of the teaching and non-teaching staff of the Project Girls High Schools at Guthani, District Siwan had been regularized. Even the Headmistresses had been appointed in 224 Project Schools, as would appear from a letter dated 02.10.1988, wherefor funds had been sanctioned for their pay and allowances.

E (vii) A bare perusal of the second counter affidavit affirmed by Shri M.K. Agarwal in C.W.J.C. No.12326 of 1992, would show that the schools in Sl. Nos. 1 to 116 are only proposed schools and have not been accorded the requisite permission of establishment. However, in the third counter affidavit filed in the same writ petition, it has categorically been stated that the said schools have been selected by a three man committee, and that they F did not receive the opening permission [provisions of letter No. 142 sated 04.02.1989]. It has been further stated that schools at Sl. Nos. 117 -192 are those schools of 1984-1985 which are run by the Department and in many places the district authorities have appointed clerks and peons. It has also been stated that the schools at S. No. 215 to 230 are those schools whose cases have been disposed of by the Government. A perusal of the said list G shows that in these schools approval of services has been given and the said schools have been selected by the District Selection Committee. A screening committee was also constituted for recognition and regularization of services of the teachers belonging to the schools.

H (viii) Out of the schools which fall within the orbit of proposed schools

at Sl. Nos. 1 to 116, there are many schools which have been recognized as valid in terms of the Government letter dated 04.08.2003. A

(ix) In ground 'F' of the Special Leave Petition filed by the State, it has admitted that the construction of buildings of 248 schools have been completed. In view of the admitted position as regard selection of schools, the High Court was not called upon to consider the validity of the decision of the Government to take over/selection of particular Project Schools and, thus, the State should not be permitted to raise the said question at this state. B

Mr. Ravindrā Shrivastava, the learned Senior Counsel appearing on behalf of the Respondents in Civil Appeal Nos.6626-6675 of 2001, supplemented the submissions of Mr. Mishra, urging that as the Full Bench was called upon to decide the broad and general proposition as regard the question of absorption of the second phase schools comprising 300 taken over schools, no decision from the High Court was invited as regard validity of the taken over thereof and, thus, they should not be permitted to raise the said contention before this Court for the first time. C D

Our attention, in this behalf, has been drawn to the following statements made in the Counter Affidavit filed in CWJC No.12326 of 1992 :

"That it is submitted that the list of Project Schools in the second phase number 304 and the excess of four such project schools is due to the fact that four of them were later on added by specific Government order." E

Our attention has further been drawn to the second supplementary counter affidavit wherein the following statements have been made :

"(a) Those schools established with public assistance but directly selected by Government will be deemed to be taken over schools on and from the date of issuance of such a letter. F

(b) Those schools established with public assistance but recommended by three man committee consisting of District Magistrate, DDO, DEO vide letter No.142 dated 23.2.1985 will be deemed to be taken over school on and from the date of an issuance of such letter in favor of the school concerned." G

It was submitted on the basis thereof that no difference now exists in the status of the two categories of schools. In any event, having regard to the H

A decision of the Cabinet to sanction four additional posts in each of the 300 Project Schools, the State must be deemed to have accepted the factum of taking over of the said number of schools. Despite the fact that the teachers had continuously been working and the Cabinet directed to release funds, before this Court certain new points are raised to which the State is not entitled to. The State has adopted an inconstant, discriminatory, unjust and arbitrary attitude towards the teachers so far as payment of salaries to them is concerned. The submission that in absence of any legislation, the schools could not be taken over is barred by the principle of equitable estoppel.

Mr. Sunil Kumar, the learned counsel appearing on behalf of the Appellants in Civil Appeal Nos.6676-6678 and 6679-6680 of 2001, would submit that those appeals are confined to some portions of the impugned judgment, namely, paragraph nos. 24 to 27 thereof, whereby the benefit of regularization had been denied to such of the teachers of the erstwhile High Schools who were either basic trained or had have their training in Physical Education. It was submitted that the Government has issued several circulars, from a perusal whereof it would appear that the State has equated basic trained teachers as well as those teachers trained in Physical Education with the Bachelors of Education, which has also been noticed by the High Court but it committed an error in arriving at a finding that whereas such equivalence may be applicable in relation to the appointments of teachers of High Schools which were under private management, but such equivalence would not apply to Project Schools.

It was submitted that having regard to the fact that teachers of Physical Education as well as teachers who were basic trained having been held to possess requisite qualification for appointments in High Schools when the same had been taken over as Project Schools by the State, there cannot be any reason for not recognizing their services on the said basis.

Mr. Shrivastava appearing in Civil Appeal No. 6681 of 2001 would submit that the Appellant therein was a clerk who was appointed in the school when he was below 18 years of age by the Managing Committee of the school. Although his services were regularized and his salary was paid subject to the decision of this case, the Appellant is highly prejudiced by that part of the judgment of the High Court whereby minimum age for appointment had been taken to be 18 years. The learned counsel submitted that it would prove to be harsh, if his services are not directed to be regularized.

Analysis :

The State framed the scheme in question having constitutional goal in mind. Imparting education is the primary duty of the State. Although establishment of High Schools may not be a constitutional function in the sense that citizens of India above 14 years might not have any fundamental right in relation thereto but education as a part of human development, indisputably is a human right. The framers while providing for equality clause under the constitutional scheme had in their mind that women and children require special treatment and only in that view of the matter, protective discrimination and affirmative action were contemplated in terms of clause (3) of Article 15 of the Constitution of India.

In this case, however, the shifting of stand by the State of Bihar is apparent. Whereas the main scheme framed in the year 1981 postulated establishment of schools by itself and that too in the most backward areas of the then State of Bihar, namely, Chhotanagpur and Santhal Pargana, the facts noticed hereinbefore clearly show that the main purpose for which the said scheme was formulated had been greatly deviated from. In stead and place of establishing more and more girls' schools in Chhotanagpur and Santhal Pargana regions, more and more schools were sought to be established in other parts of the State as well. The paradigm shift on the part of the State of Bihar in the matter of implementation of scheme did not end there. Only after establishment of 75 schools directly and appointing teaching and non-teaching staff through Vidyalaya Sewa Board, it for reasons undisclosed, intended to give recognition to the private schools.

The State in implementation of the scheme failed and/or neglected to adhere to one stand. It although took a categorical stand that Project Schools would not be in the category of nationalized schools or government schools, we do not know on what basis while identifying and selecting private schools for recognition thereof funds were also allotted for construction of the buildings. We, furthermore, fail to understand as to how in the special leave petition it was contended that construction of buildings of 248 schools out of the proposed 300 schools is over. Allocation of fund for construction of school buildings or actual construction thereof does not go with the contention that the private schools were to be recognized.

The State of Bihar, thus, took different stands at different point of time. We have, therefore, not been given a clear picture as to how many schools

A were constructed by the State itself or how many of them had been constructed with public assistance and/or how many of the schools were identified and proposed to be recognized/taken over. The Respondents, however, point out that in a meeting of the Administrative Post Sanction Committee held on 10.07.1995 under the chairmanship of the Chief Secretary, Government of Bihar, a decision was taken to call for a list of 300 Project Girls High Schools. A list of the said schools pursuant thereto was said to have been sent by the Director, Secondary Education, to the Secretary, Administrative Post Sanction Committee, Bihar. In response to a query, a list of 300 Project Girls High Schools was sent to the Bihar Legislative Council. However, therein also certain schools were stated to be under construction. From the said letter of the Director dated 26.12.1995, it does not appear that all the schools were functioning. The Secretary of the Department of Education, however, at the instance of the High Court filed an affidavit in CWJC No.12326 of 1992, wherein existence of 300 Project High Schools was accepted.

D Moreover, in the second counter affidavit affirmed by Shri M.K. Agarwal, filed in CWJC No.12326 of 1992, it was stated that the schools at Sl. No. 1 to 116 are those schools which are proposed schools and have not been accorded permission for establishment. However, in the third counter affidavit, it has been stated :

E “(A) S.L. No.1 to 116 are those Project Schools of 1984-85 which have not received the permission of establishment by the Director, Secondary Education, Budh Marg, Patna. These schools were selected by three man committee but did not receive opening permission by the Director, Secondary Education within the provision of letter No. 142 dated 4.2.1989.

F (B) S.L. No.117 to 192 are those Project Schools of 1984-85 which are run by the Department on the basis of deputation of teachers from nationalized High Schools. In many places the District Authorities of the department have appointed clerks and peons whose number is yet to be ascertained from the D.E.O.'s of respective Districts.

G (C) S.L. No.193 to 214 are those project schools of 1984-85 whose cases are under consideration either by the Screening Committee or by Government.

H (D) From S.L. No. 215 to 230 are those project schools of 1984-85 whose cases have been disposed of by the Government. The letter no.

and date of each school is mentioned in the chart of Annexure X/2.” A

From what has been noticed hereinbefore, it is evident that the officer of the State had at different points of time took different stands. We, however, fail to understand as to how 300 Project Girls High Schools could be started when from the materials brought on records, it is evident that a large number of boys schools also were selected for recognition by the 3-Man Committee. B

Although no specific contention has been raised before us, from the circular letter dated 30.03.2004, it appears that an enquiry as regard appointment of teachers of the employees of different categories of schools is being carried out by CBI. We, however, do not intend to make any comment thereupon. C

It is also of some interest to notice that whereas emphasis was laid on spreading of education amongst women by establishing at least one Girls High Schools school in each identified block, for all intent and purport a shift was made towards Boys High Schools. D

On the other hand, the consistent stand of the State before the High Court as also before us was that the three-man Committee was appointed for the purpose of identification of such schools which were situated in various blocks. For what precise reason is the bone of contention between the parties, namely whether they are to be recognized or the schools were to be taken over lock stock and barrel; whether management continues to be in the private hands and the State only intended to pay salaries of teachers; whether 5 or 9 posts in the Project Schools recognized; or whether the management of such schools had also been taken over. Whether the properties belonging to the Managing Committee of the erstwhile schools vested in the State of Bihar one way or the other is not known. It is also not known, as to what extent, if any, there had been public participation in the establishment of the schools, viz. how the land of the schools was donated; who constructed the buildings; or how the Managing Committee of such schools was constituted. If it is a case of taking over of the schools, in the absence of a legislation, the right, title and interest of the erstwhile proprietary of the school and/or Managing Committee did not vest in the State. E F G

We have not been apprised as to whether any agreement as such had been entered into by and between the Managing Committee of the erstwhile schools and the three-man Committee headed by the Collector of the district. We also fail to understand that if the process of selection was completed in H

A the year 1986, as urged by Mr. Mishra, how those schools could be taken over in 1984-85.

Take over or Regularization of the Services :

B So far as taking over of the services of the teaching and non-teaching staff of the Project Schools is concerned, even the same is surrounded by mystery. Counsel appearing on behalf of the Respondents had unequivocally stated that the services of the teaching and non-teaching staff had been regularized. The expression 'regularization' has a definite connotation. Regularization of services must precede a legislative act or in absence of legislation, rules framed in terms of proviso appended to Article 309 of the
 C Constitution of India. [See *State of UP v. Neeraj Awasthi*, (2005) (10) SCALE 286]

D The concept of regularization pre-supposes irregular appointment at the first instance so as to enable the employer to regularize the same. The dispute in this behalf does not revolve round the question of regularization of the services of teaching and non-teaching staff of the schools who were
 E thithertobefore appointed by Management of Private schools. Had the legislature of the State of Bihar made an enactment nationalizing the schools like Bihar Non-Government Elementary Schools "Taking over" Control Act, 1976 the terms and conditions for taking over of the services of the teaching
 F and non-teaching staff could have been laid down therein so that as and from the appointed day specified therein the teaching and non-teaching staff in stead of continuing in the services all the Managing Committee of the School would have become government servants. In this view of the matter, in absence of any policy decision of the State it cannot be said that the services of the teachers had been taken over, whether along with properties of the schools or not, so as to enable the courts of law to arrive at a definite conclusion that the teaching and non-teaching staff for all intent and purport have become the employees of the State.

G It is one thing to say that the Management of the school has been taken over together with the services of the teaching and non-teaching staff and it is another thing to say that the State has recognized the schools and is bound to pay the salary and such teaching and non-teaching staff on the same scale and pay as it has been paying to its own teachers. In case of nationalization of schools, furthermore in terms of the provisions of the Statute itself, the educational or qualification as also other qualifications for taking over the
 H services of the teachers would be laid down. In absence of any such legislation,

it was expected of the State to lay down such criteria in clear terms by way of policy decision or guidelines not only for the purpose of letting the teachers know as to where they stand but also for the purpose of determining as to whether such teachers are available in the schools who are entitled to salaries and other emoluments payable to them by the State. If new schools were established, indisputably teaching and non-teaching staff thereof were required to be appointed through Vidyalaya Sewa Board in conformity with the existing rules as well as Articles 14 and 16 of the Constitution of India. It is, thus, not a case where the concept of regularization could have been invoked.

Three-men Committee :

There is nothing on record to show as to the precise job required to be performed by the three men Committee i.e. they were to identify such schools which met the criteria laid down in the Circular letter dated 25.9.1981 or 25.1.1985 or whether they were also to scrutinize the academic and other qualifications required for appointment of the teaching and non-teaching staff. Except certain statements made in the affidavit before the High Court as also before us the parties herein had not produced any document to show that on what term or terms the process of recognition/taking over of the private schools had been made.

Public Participation :

In the matter of schools which were said to have been established by way of public participation, things are no better. The Circular letter except mentioning that such schools can be established also by public participation did not indicate as to what were the roles to be played by the members of public. Did the said public participation mean gift of land or construction of building or any donation of a large sum by some of them? The Circular letter merely suggest that if some persons donate a land specified therein or more, name of schools can be as per his choice. The list of the schools shown to us discloses that there are such schools which were named after somebody. But most of schools were shown as Project Schools. If a school has been established as a Project School without the name of the erstwhile school or without the name of the school as per the choice of the donor, in terms of the policy decision of the State it would have been expected that the number of such schools would have been much more. It is curious to not that even in relation to a large number of schools mentioned by the Director of Education in his response to the questions which were placed before the Bihar Vidhan

A Sabha it was remarked that certain schools were still to be identified or their identity is not known or building was to yet be constructed. The question as to how a school could be taken over where the identity of the land is not known or where no building is in existence. On what basis this assumes significance, the three men Committee could identify such schools is left to one's imagination.

B

Number of Schools :

C There is no dispute about 150 schools. Various documents as also the affidavits filed on behalf of the State in no uncertain terms show that besides the schools which were established by the State and are being run by it, there are various other schools over which there was a dispute about their identification.

D The Government established 75 schools and three men Committee identified 57 schools. The teachers of the said schools were appointed by Vidya Sewa Board, but the documents produced and the affidavits affirmed by the parties point out 300 schools. We have noticed some discrepancies hereinbefore to show that the number of the schools mentioned by either side may not be entirely correct but the fact remains that before the Cabinet also, a representation was made by the authorities of the State themselves that 300 schools are in place. It is only on that basis the Cabinet sanctioned 1200 more posts.

E

Circular letter dated 23.02.1985 :

F The said circular letter shows that the Government had selected 75 Girls High Schools in each of the 700 blocks out of the selection of 300 blocks. A list thereof was attached therewith. According to the respondent even in this category there were both the categories of schools which were either taken over and selected by the Government and those which were proposed to be established as Project Schools. It is stated in the said letter that for the selection of the schools in the rest of the blocks and where the schools have not by them been established for the selection of site for the purpose of construction of building three men committees are constituted. Paragraph 2 of the said letter laid down the mode and manner of implementation thereof. An annexure appended thereto shows the name of the schools and the dates of recognition of the three men committee.

G

H

Circular letter dated 4.2.1989

We have noticed that there is no dispute that in the years 1982-83 and 1983-84, no school was recognized or established. We have also noticed hereinbefore that one of the conditions for recognition was that the teachers were required to be appointed by the Vidyalaya Sewa Board. In the aforementioned context, the letter dated 4.2.1989 is required to be considered for the purpose of this case.

Whereas in respect of the schools established by the State 9 posts were sanctioned for the schools which were selected for recognition / taken over through the agency of the three men committee, only 5 posts were sanctioned. It has not been disputed that in the High Schools in question students are taught from class VI to X, i.e., five classes. It has also not been disputed that every subject has been categorized in three groups, viz. language groups, humanity group and science group and other teachers were to be appointed accordingly.

The State is no doubt entitled to lay down qualification or sanction the requisite number of posts. It may also in certain situations provide for relaxation therefrom or lay down such terms and conditions as they may deem fit and proper. It is also permissible for the State to appoint a screening committee for the purpose of finding out whether the teachers satisfy the requirements laid down therein. The State is also entitled to fix the age limit of such teachers. How many teachers were required to be appointed and strength of the teaching staff and the non-teaching staff again is a matter of policy decision of the State. Indisputably, if somebody has any say in this behalf it will be the Bihar Senior School Education Board, a statutory authority who is statutorily enjoined to lay down the criteria for the purpose of recognition of said schools by it. But for all intent and purport this issue has become academic. In view of the fact that the State itself has realized the difficulty which the schools would face if only 5 posts are sanctioned in each school. The Cabinet itself realized that like any school run by the Government, it is necessary to have at least 9 teachers even in the project schools. The strength of the teachers for such schools has not only been sanctioned, sanction therefor was given with retrospective effect and retroactive operation. Necessary funds were allocated for the said purpose. Although, thus, it was the prerogative of the State to lay down the criteria, the same has been laid down. Therefore, correctness or otherwise of the finding of the High Court that the State was bound to recognize at least 9 teachers in each school, for

A all intent and purport is now academic.

It is furthermore not in dispute that the State for the first time in its letter dated 04.02.1989 laid down the qualifications for the teachers as also the strength thereof.

B The validity and/or legality of the said Government order dated 04.02.1989 was questioned before the High Court. The High Court, as noticed supra set aside the said directions holding that 9 teachers were required to be appointed in each of the schools. This part of the order of the High Court does not require elaborate consideration as the State Government had now sanctioned 4 additional posts with retrospective effect.

C
Deviation :

D However, deviation as regard implementation of the original scheme in the second phase is explicit. The circular letter dated 27.05.1981 must be read as a whole. By reason of the said circular letter 650 schools were to be established in the entire State including Chhotanagpur and Santhal Pargana, which now forms part of the State of Jharkhand. It has clearly been stated that at the time of preparing proposal for establishment of new High Schools priority was to be given to those High Schools which were granted permission for establishment for proposed High Schools and efforts were to be made that getting all the conditions regarding recognition completed from those High Schools. What was, however, emphasized was that schools in respect whereof prior permission was obtained and not of those schools which had already been functioning. If the schools had already been functioning, in excess of the number of schools sought to be established by the State, the purpose of establishing more schools would not have been achieved. It was in that sense that the State thought of granting recognition of such schools which were yet to be established, but local resources, like land, building etc. could be properly utilized as a result whereof the expenditure on the part of the State would be minimal. However, in the event, such schools having prior permission for establishment are not available, then the District Education Officer were asked to select such places where the Government land were easily available so that expenses to be incurred on purchase/acquisition of land could be saved.

H Reliance has been placed on paragraph 11 of the said letter for showing that the Government intended to take over the existing High Schools. The said paragraph contemplates establishment of 33 Girls High Schools in 15

districts, where at least 4 Boys High Schools are functioning. The sentence 'The selection of the above High Schools will be made by the District Education Officers as mentioned in para 4' would not mean that some schools which had already been functioning were required to be taken over. The deviation from the prescribed policy of the State, however, started in the year 1982. The letter dated 12.10.1982 does not appear to be very clear. Whereas Rs.1.5 crores had been sanctioned for construction of the building, teaching aids, learning materials and establishment cost of the school, but then it is beyond anybody's comprehension as to how the District Education Officers were directed to inspect these schools and to issue notification formally taking over their management and control as a result whereof the same would vest in the State Government. The said para does not appear to be in consonance with the main para as in terms thereof, the State Government intended to open 78 schools in TSP area and 72 schools in non-sub plan area. The other parts of the said circular letter also are not in consonance with the first para thereof but paras 2, 5 and 10, if read conjointly, give an impression that the Government intended to recognize some schools also. Para 10 of the said letter, however, is in two parts, namely, (i) ad hoc teachers would be appointed so as to avoid unnecessary delay in appointing regular teachers; and (ii) a committee headed by RDE will interview the teachers appointed by the previous management committee of the school without advertisement, which would mean that such teachers may also be appointed on an ad hoc basis.

We, however, fail to understand as to how by reason of the said circular letter, the policy decision adopted by the State could be deviated from; but having regard to the order proposed by us, it may not be necessary to say anything further at this stage.

Take over :

The word 'take over' would mean that the Government had thought of taking over of the properties and assets of the schools together with teaching and non-teaching staff. Take over of schools in the context of the policy decision of the State does not appear to be an expression of an intendment for complete take over or the management of the school. In the former sense take over of such schools would be violative of Article 300-A of the Constitution of India. Article 300-A embodies the 'doctrine of eminent domain' which comprises of two parts, (i) acquisition of property in public interest; and (ii) payment of reasonable compensation therefor.

A In *Jilubhai Nanbhai Khachar*, (*supra*), *this Court held* :

B “The right of eminent domain is the right of the sovereign State, through its regular agencies, to reassert, either temporarily or permanently, its dominion over any portion of the soil of the State including private property without its owner’s consent on account of public exigency and for the public good. Eminent domain is the highest and most exact idea of property remaining in the Government, or in the aggregate body of the people in their sovereign capacity. It gives the right to resume possession of the property in the manner directed by the Constitution and the laws of the State, whenever the public interest requires it. The term ‘expropriation’ is practically synonymous with the term “eminent domain.”

C In *Bishambhar Dayal* (*supra*) this Court held that seizure of the food stuff in terms of an order made under Section 3 of the Essential Commodities Act, 1955 would not be hit by Article 300-A of the Constitution of India but categorically stated that such a course could not have been taken under Article D 162 of the Constitution of India, in the following terms :

E “There still remains the question whether the seizure of wheat amounts to deprivation of property without the authority of law. Article 300-A provides that no person shall be deprived of his property save by authority of law. The State Government cannot while taking recourse to the executive power of the State under Article 162, deprive a person of his property. Such power can be exercised only by authority of law and not by a mere executive fiat or order. Article 162, as is clear from the opening words, is subject to other provisions of the Constitution. It is, therefore, necessarily subject to Article 300-A. F The word “law” in the context of Article 300-A must mean an Act of Parliament or of a State legislature, a rule, or a statutory order, having the force of law, that is positive or State made law...”

G In *Thakur Bharat Singh* (*supra*), this Court categorically held that the State or its officers in exercise of executive authority cannot infringe rights of citizens merely because a legislature of State has power to legislate in regard to subject on which executive order is passed.

H The right to manage an institution is also a right to property. In view of a decision of an eleven-Judge Bench of this Court in *T.M.A. Pai Foundation and Ors. v. State of Karnataka*, [2002] 8 SCC 481 establishment and

management of an educational institution has been held to be a part of fundamental right being a right of occupation as envisaged under Article 19(1)(g) of the Constitution of India. A citizen cannot be deprived of the said right except in accordance with law. The requirement of law for the purpose of clause (6) of Article 19 of the Constitution of India can by no stretch of imagination be achieved by issuing a circular or a policy decision in terms of Article 162 of the Constitution of India or otherwise. Such a law, it is trite, must be one enacted by legislature.

In *Rai Sahib Ram Jawaya Kapur and Ors v. The State of Punjab*, [1955] 2 SCR 225, whereupon reliance was placed by Mr. Mishra, this Court observed :

“...The executive indeed can exercise the powers of departmental or subordinate legislation when such powers are delegated to it by the legislature. It can also, when so empowered, exercise judicial function in a limited way. The executive Government, however, can never go against the provisions of the Constitution or of any law. This is clear from the provisions of Article 154 of the Constitution but, as we have already stated, it does not follow from this that in order to enable the executive to function, there must be a law already in existence and that the powers of the executive are limited merely to the carrying out of these laws.”

The said decision, however, was distinguished by this Court in *Thakur Bharat Singh* (supra), stating that the executive action which was upheld therein was although not supported by legislation, but it did not operate to prejudice of any citizen. It was categorically held :

“...All executive action which operates to the prejudice of any person must have the authority of law to support it, and the terms of Article 358 do not detract from that rule. Article 358 expressly authorises the State to take legislative or executive action provided such action was competent for the State to make or take, but for the provisions contained in Part III of the Constitution. Article 358 does not purport to invest the State with arbitrary authority to take action to the prejudice of citizens and others: it merely provides that so long as the proclamation of emergency subsists laws may be enacted, and exclusive action may be taken in pursuance of lawful authority, which if the provisions of Article 19 were operative would have been invalid. Our federal structure is founded on certain fundamental principles:

A (1) the sovereignty of the people with limited Government authority i.e. the Government must be conducted in accordance with the will of the majority of the people. The people govern themselves through their representatives, whereas the official agencies of the executive Government possess only such powers as have been conferred upon them by the people; (2) There is a distribution of powers between the three organs of the State - legislative, executive and judicial - each organ having some check direct or indirect on the other; and (3) the rule of law which includes judicial review of arbitrary executive action..."

B

C In *Union of India and Ors v. M/s Graphic Industries Co. & Ors.*, JT (1994) 5 SC 237, it has been held that the letter written by an authority to the private persons cannot give rise to a legitimate expectation.

D Therefore, there cannot be any doubt whatsoever that the word 'take over' has been used loosely. It is well settled that a circular letter issued by an officer of the State without fulfilling the mandatory provisions of Articles 162 and 166 of the Constitution of India cannot be categorized as a decision by a State. [See *Sri Dwarka Nath Tewari and Ors. v. State of Bihar and Ors.*, AIR (1959) SC 249.

E If the said circular letter does not satisfy the requirement of Article 162 of the Constitution of India, the question of a valid take over in the sense that the properties and/or management thereof would vest in the State of Bihar, does not arise. Furthermore, the District Education Officer is not empowered to issue a notification formally taking over of management and control and vesting the same into the State Government. In any event, if teachers were required to be appointed in the manner laid down therein, it is beyond anybody's comprehension as to how the management of the school is taken over together with the teaching and non-teaching staff who had already been working therein.

F

G Conclusion :

H Even if there is no dispute as regard number of schools, in view of the stand taken by the State and particularly in view of the fact that it appears from the records that recognition of the school, if any, had wrongly been granted to some schools where buildings were also not completed or the process of selection was also not over, it may be necessary for the State to have a further look in the matter.

It is furthermore necessary to scrutinize as to whether the teaching and non-teaching staff appointed for the said purpose fulfill the criteria in terms of the policy decision of the State or not. Their qualifications laid down under other relevant statutes for the purpose of obtaining permission must also be scrutinized. A

We do not find any merit in the contention raised by the learned counsel appearing on behalf of the Respondents that the principle of equitable estoppel would apply against the State of Bihar. It is now well known, the rule of estoppel has no application where contention as regard constitutional provision or a statute is raised. The right of the State to raise a question as regard its actions being invalid under the constitutional scheme of India is now well recognized. If by reason of a constitutional provision, its action cannot be supported or the State intends to withdraw or modify a policy decision, no exception thereto can be taken. It is, however, one thing to say that such an action is required to be judged having regard to the fundamental rights of a citizen but it is another thing to say that by applying the rule of estoppel, the State would not be permitted to raise the said question at all. So far as the impugned circular dated 18.02.1989 is concerned, the State has, in our opinion, a right to support the validity thereof in terms of the constitutional framework. B C D

Having said so, we must observe that the ultimate decision must be left at the hands of the State. In view of the Cabinet decision dated 25.01.2000, 300 schools are said to have been recognized. We have, however, our doubts as to whether all correct facts have been placed before the Cabinet or not particularly in view of the fact that many of the schools which were established in Chhotanagpur and Santhal Pargana are now in the State of Jharkhand. We have pondered over the matter but we are not very sure as to whether apart from the schools which had been identified by the three-man committee and admittedly recognized by the State, any final decision had been taken as regard recognition or otherwise of the remaining schools by the appropriate authority. E F

For the said purpose, we are of the opinion that a committee should be constituted for the said purpose. G

The Chief Secretary of the State of Bihar is, therefore, requested to constitute a committee comprising of two officers and one Educationist of repute and/or a retired Judicial officer. In the event a Judicial Officer is appointed as a member of the committee, he would be the chairman thereof. H

- A Remuneration of the Judicial Officers and/or the Educationist shall be determined by mutual agreement.

The Chief Secretary is hereby requested to place at the disposal of the committee the requisite staff, which may be required by the committee, from amongst the staff of one or the other department of the State.

- B In the event it is found that teachers have been appointed on ad hoc basis, the Vidyalay Sewa Board shall be directed to make regular recruitment strictly in accordance with law.

- C All the concerned Regional Deputy Directors of Education must also submit their reports in respect of the Project Schools within four weeks from date before the committee.

- D The Committee shall also deal with all such individual cases of the Appellants, as has been directed in para 35 of the judgment of the High Court.

All the educational institutions claiming recognition or having any other claims would file their representations together with all supporting documents within three weeks from date. In their applications, the institutions must also give details of the students admitted in each class year-wise.

- E Although from the records, it appears that about 300 schools laid their claims having been recognized which is also evident from the decision of the Cabinet, we are of the opinion that the question as to how many schools fulfil the criteria laid down by the State Government in terms of its policy decision must be considered afresh.

- F As the constitution of the Committee may take some time, such claims may be filed in the office of the Education Secretary, who would open an appropriate cell in this behalf. The committee upon scrutinizing the claims of the institutions and/or the teaching and non-teaching staff would submit a report before the Chief Secretary within three months.

- G The Chief Secretary is requested to place the said report together with his comments thereupon before the appropriate authority in terms of the Rules of Executive Business and it is expected that the said authority of the Government of Bihar shall take appropriate decision thereupon within four months from date.

H

We would appreciate, if the State Government takes suitable action against those who may be found responsible for commission of irregularities and/or illegalities in the process of implementation of the Government scheme in accordance with law. A

As regard minimum age of the teaching and non teaching staff, indisputably the same should be 18 years. B

So far as educational qualification of the teaching staff is concerned, we are of the opinion that having regard to the fact that the limited number of teachers were to be appointed with a view to accomplish a constitutional goal of spreading literacy in the villages, particularly amongst the girls, the standard adopted in Zila Schools or Government schools constituted in urban areas may not be insisted upon, as was observed by the High Court, but keeping in view the fact that it is essentially a Government function, the question as to whether some teachers having B.T. training or training in Physical Education would be allowed to continue in the said Project Schools or not is left to the State, wherefor a decision in a decision in accordance with law may be taken. C D

These appeals are disposed of with the aforementioned observations and directions. In the facts and circumstances of the case, there shall be no order as to costs.

R.P.

Appeal disposed of. E