GAHC010079752021

Judgment reserved on **: 27th January, 2022.**

Judgment delivered on **: 4th February, 2022.**

IN THE GAUHATI HIGH COURT

(HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)

WRIT PETITION (C) NO.3038 OF 2021

1. Md. Imad Uddin Barbhuiya,
Son of Late Muhib Ali,
Village: Katigorah Pt, 3, PO: Lattimara,
PS: Katigorah, District: Cachar, Assam.

2. Md. Nurul Islam Barbhuiya,
Son of Habib Ali Barbhuiya,
Village: Salchapra, PS: Silchar, District: Cachar, Assam.

3. Md. Matiur Rahman,
Son of Late Abdur Rashid,
Village: Kazirgram, PO: Bhanga Bazar,
District: Karimganj, Assam.

4. Md. Abdul Jalil,
Son of Saud Abdul Malik,
Village: Gorkapon, PO: Badarpur,
District: Karimganj, Assam.

5. Sk. Md. Esaruhullah,
Son of Md. Azizur Rahman,
Village: Uttar Moragodadhar, PO: Uttar Moragodadhar, District: Dhubri, Assam.

6. Md. Ibrahim Ali,
Son of Late Intaz Ali,
Village: 3 No. Borghuli, PO: B/Saponari, District: Nagaon, Assam.

7. Md. Nurul Hoque CHoudhary,
Son of Late Akib Ali Choudhary,
Village: Doboka Patar, PO: Doboka, PS: Doboka, District: Hojai, Assam.

8. Nilufa Yasmin,
Daughter of Lokman Ali Sheikh,
Village: Boalkamari Part-III, PO: Barkanda, District: Dhubri, Assam.

9. Amjad Ali Bepari,
Son of Late Tamser Ali Bepari,
Village: Jhapusabari, PO: Jhapusabari, District: Dhubri, Assam.

10. Abdus Salam,
Son of Late Abdul Azi Pondith,
Village: Pabor Chara, PO: Pabor Chara, District: Dhubri, Assam.

11. Sukur Ali,
Son of Azim Uddin Sheikh,
Village: Boalkamari, PO: Barbanda, District: Dhubri, Assam.

12. Md. Hussain Ahmed,
Son of Md. Jalal Uddin,
Village: East Haitorkha, PO: Patharkandi, District: Karimganj, Assam.

13. Abu Md. Sufian,
Son of Late Md. Imdadur Rahman,
Village: Durlavpur, PO: Kanaibazar, District: Karimganj, Assam.

.....Petitioners

-***Versus***-

1. The State of Assam, to be represented by the Principal Secretary to the Government of Assam, Education (Secondary) Department, Dispur, Guwahati – 6.

2. The Commissioner and Secretary, Government of Assam, Education (Secondary) Department, Dispur, Guwahati – 6.

3. The Director of Secondary Education, Assam, Kahilipara, Guwahati – 19.

4. The Board of Secondary Education, Assam, to be represented by its Secretary, Bamunimaidam, Guwahati.

5. The Secretary,
Assam Legislative Assembly, Secretariat, Dispur,
Guwahati – 6.

*.....**Respondents***

For the Writ Petitioners : Mr. Sanjay Hegde, Senior Advocate.
Mr. A.R. Bhuyan, Advocate.

For the Respondents : Mr. D. Saikia,
Advocate General, Assam.
Ms. P. Chakraborty, SC, Education (Secondary) Department, Assam.

– B E F O R E –
HON'BLE THE CHIEF JUSTICE MR. SUDHANSHU DHULIA
HON'BLE MR. JUSTICE SOUMITRA SAIKIA

JUDGMENT & ORDER

(Sudhanshu Dhulia, CJ)

This writ petition throws a challenge to the legislative as well as executive decisions of the State of Assam, which have been taken in the recent past. By these recent legislative and executive decisions, religious instructions, which were so far being imparted in the "provincialised Madrasas" of the State, have come to an end. Petitioners' case is that this action of the State Government amounts to an invasion of their fundamental

rights given to them under Articles 25 and 26 as well as under Articles 29 and 30 of the Constitution of India. It has further been argued that this is also violative of Articles 14 and 21 of the Constitution of India.

2. Before we deal with this question, a brief history of secondary and higher secondary education in Assam would be in order.

3. Prior to the introduction of modern education in Assam, school level education was largely a community driven effort. "Maktabs" and "Madrasas" were opened in various places in Assam by members of Muslim community to give the kind of education to children, the community thought would be in their best interest.

4. Generally in the late 19th and first half of 20th Century, Government schools were opened which imparted, *inter alia*, modern education in languages, humanities and sciences. Yet these schools were few and far between. All parts of Assam could not be reached, due to logistical and financial constraints. Local communities thus came forward to establish private schools in Assam. These were called "Venture Schools". There were venture Madrasas as well, where largely religious education was imparted. Later, these schools, both venture schools and venture Madrasas, or at least a large number of them, started getting financial support from the Government under a scheme known as "deficit financing". Gradually, some of these schools under deficit finance scheme were

"provincialised". The Assam Secondary Education (Provincialisation) Act, 1977 provincialised many such schools which were under deficit scheme and the teaching and non-teaching staffs of these schools became Government servants. A similar move was made by the Government later in the year 1995 to provincialise such venture Madrasas, which were under the deficit finance scheme. A total number of 74 Madrasas, which were till now under the deficit scheme, were provincialised under the 1995 provincialised Act, which is known as the Assam Madrassa Education (Provincialisation) Act, 1995. This happened in the year 1995-96 and the teaching as well as non-teaching staff of these Madrasas which were now provincialised, became Government servants. After the 1995 Provincialisation Act, the State came up with another Provincialisation Act, i.e. Assam Venture Madrassa Educational Institutions (Provincialisation of Services) Act, 2011, which was amended in the years 2013 and 2014, under which some more Madrasas were provincialised and then came the Assam Madrassa Education (Provincialisation of Services of Employees and Re-organisation of Madrassa Educational Institutions) Act, 2018, which repealed the 2011 Madrassa Provincialisation Act. Under the 2018 Provincialisation Act again several Madrasas were provincialised. Nevertheless, religious instructions and religious education continued to be imparted in these provincialised Madrasas, although they were now wholly maintained out of State funds.

5. A decision was then taken by the Government of Assam on 13.11.2020 in its meeting of Council of Ministers to convert the "provincialised" Madrasas into regular High Schools and to withdraw the teachings of theological subjects in such Madrasas. There was a similar decision taken in the same meeting to convert the "provincialised" Sanskrit Tolls into Study Centres. In Sanskrit Tolls, *inter alia*, religious instructions were being given, though these too were fully maintained out of State funds.

6. This was followed by an Act of the State Legislature, called Assam Repealing Act, 2020, which received the assent of the Governor of Assam on 27.01.2021. The Act repealed the Assam Madrassa Education (Provincialisation) Act, 1995 and the Assam Madrassa Education (Provincialisation of Services of Teachers and Reorganisation of Educational Institutions) Act, 2018. This was followed by a series of executive orders passed by the Government of Assam. The first order was issued on 12.02.2021. This order converts Madrasas into High Schools and brings it under the State Education Board. Religious teachings and instructions in these Madrasas are withdrawn. Fresh admissions under the old course were barred from 01.04.2021. It also directed that the teachers teaching theological subjects would now be provided training for teaching general subjects of their aptitude. Further, the State Madrassa Education Board was dissolved and all records, bank accounts, etc., of the Board was transferred to the Board of Secondary Education,

Assam. The State Madrasa Board also stands dissolved vide Notification dated 12.02.2021. Subsequently, orders dated 20.03.2021; 07.04.2021; 09.04.2021 and 12.04.2021 were then passed, removing courses relating to religious instructions from various grades of Madrasas. All these orders including the Repealing Act of 2020 have been challenged before this Court.

7. This writ petition has been filed before this Court by a group of petitioners, who are thirteen in number. They claim to be either President of the Managing Committees and in some cases even donors and "mutawallis" of the land, on which these Madrasas were built. The services of the teachers of these Madrasas as well as the entire staff employed in these Madrasas were provincialised in the year 1995-96, by virtue of an Act, known as the Assam Madrassa Education (Provincialisation) Act, 1955. The Madrassas in question are of three types – (a) Pre-Senior Madrasas; (b) Senior Madrasas, and (c) Title Madrasa. Pre-Senior Madrasas impart education from Class VI to VIII, Senior Madrasas Class VIII to XII and Title Madrasas does this at Graduate and Post-Graduate levels. There are four Arabic Colleges as well which impart education from Class VI to Post-Graduate level. The Pre-Senior Madrasas, Senior Madrasas, Arabic Colleges and Title Madrasas which are affected by the Repealing Act and the consequential executive orders are total 401 in numbers and the break up is as follows:-

Sl. No.	Category of Madrassa	Total No. of Madrassa Provincialised	Classes
1.	Pre-Senior Madrassa	250 Nos.	Class VI to VII
2.	Senior Madrassa	133 Nos.	Class VIII to XII
3.	Arabic College	4 Nos.	Class VI to PG Level
4.	Title Madrassa	14 Nos.	Post-Graduate Level
	Total	401 Nos.	

8. We must clarify at the very threshold that the changes brought about by the above legislative and executive action of the State are for the "Provincialised Madrasas" alone, which are Government schools. This is not for the "Community Madrasas" or the "Qawmi Madrasas" and "Maktabs", which continue to function in Assam as usual. We have also been informed by the counsel representing the petitioners, Mr. A.R. Bhuyan that these Madrasas continue to get financial aid from the State. Thus the change in curriculum has been brought about only in 'Provincialised Madrasas'.

9. The case of the petitioners is that the Repealing Act as well as the subsequent orders passed by the Government is violative of the fundamental rights given to them under Articles 25, 26, 29 and 30 of the Constitution of India, amongst various other rights.

10. Learned senior counsel for the petitioners Sri Sanjay Hegde has relied upon the seminal decision of the Apex Court ***In Re Kerala Education Bill, 1957,*** reported in

AIR 1958 SC 956. Apart from the judgment in ***Re Kerala Education Bill,*** learned senior counsel for the petitioners has also relied upon the decision of the Apex Court in ***Ahmadabad St. Xavier's College Society -Vs- State of Gujarat***, reported in ***(1974) 1 SCC 717***, as well as ***T.M.A. Pai Foundation -Vs- State of Karnataka***, reported in ***(2002) 8 SCC 481,*** which reiterate, by and large, the position of law as laid down in ***Re Kerala Education Bill*** case.

11. The learned counsel would argue that Articles 29 and 30 confers four distinct rights on the minorities. First is the right of any section of the minorities to conserve its own language, script or culture [Article 29(1)]. The second is the right of all religious and linguistic minorities to establish and administer educational institutions of their choice [Article 30(1)]. The third is the right of an educational institution not to be discriminated against in the matter of State aid only on the ground that it is under the management of a religious or linguistic minority [Article 30(2)]. The fourth is the right of the citizen not to be denied admission into any State maintained or State aided educational institution on the ground of religion, caste, race or language [Article 29(2)].

12. He would argue that the petitioner Madrasas are educational institutions established by a religious minority for the purposes of imparting education including religious education to minorities within the State of Assam. They

satisfy both the requirements for claiming the benefit of Article 30(1) as they are educational institutions, and secondly, they have been established by a religious minority. It is their right under Article 30(1) to 'establish' and 'administer' educational institutions of their 'choice' which gives them a right, *inter alia,* to decide their own curriculum, which is based on their perception to preserve their religion or culture. The vesting of this discretion on minorities is strengthened by use of the word 'choice' in Article 30(1). The word indicates that the extent of the right is to be determined, not with reference to any concept of State necessity and general social interest but with reference to the educational institutions themselves, that is, with reference to its goal of making the institutions effective vehicles of education for the minority community or persons of other communities who choose to be admitted in these institutions. Therefore, the State's decision of withdrawing subjects on theological aspects and converting Madrasas to ordinary high schools, by bringing them under the State Education Board, is a direct violation of the constitutionally guaranteed fundamental right of the individual petitioners as well as that of the Madrasas, which are established by members of the minority community.

13. Mr. Sanjay Hegde would also argue that receiving financial aid by the Madrasas in the form of provincialisation of the services of its employees under the Act of 1995, through which the liability to pay their salaries and emoluments have been taken over by the Government,

cannot be a ground to disentitle Madrasas from exercising their rights under Article 30 of the Constitution to establish and administer educational institutions of their choice.

14. While exercising the aforementioned rights, as these Madrasas have been established by minorities, they do not cease to be minority institutions merely because they take financial aid which is offered by the State. Moreover, the financial aid given by the State to a minority institution cannot have such conditions attached to it, which will dilute or abridge the rights of the minority institution to establish or administer that institution, as observed in ***T.M.A. Pai Foundation -Vs- State of Karnataka***, reported in ***(2002) 8 SCC 481***. In Paragraph 143 of the said judgment, the Apex Court held as under:-

> *"143. This means that the right under Article 30(1) implies that any grant that is given by the State to the minority institution cannot have such conditions attached to it, which will in any way dilute or abridge the rights of the minority institution to establish and administer that institution. The conditions that can normally be permitted to be imposed, on the educational institutions receiving the grant, must be related to the proper utilisation of the grant and fulfilment of the objectives of the grant. Any such secular conditions so laid, such as a proper audit with regard to the utilization of the funds and the manner in which the funds are to be utilized, will be applicable and would not dilute the minority status of the educational institutions. Such conditions would be valid if they are also imposed on other educational institutions receiving the grant."*

15. The learned senior counsel has also strong objections to the assumption of the Government that the students in Madrasas lack the opportunity of getting the

necessary education to make them employable for various jobs, or make them more competitive for the examinations. This, according to the petitioners, is a complete misconception and a false notion, as the standard of education in Madrasas is not as bad as is being portrayed by the Government. In any case, the students of Madrasas always have the option of opting out of the Madrasa education system and entering Government schools or Universities. Moreover, the State has not conducted any formal study to come to the above conclusion and it lacks a scientific and even empirical base and, therefore, the conclusion reached by the State Government is without any basis.

16. As regarding Article 28(1) of the Constitution, the learned senior counsel for the petitioners would argue that this would not be applicable in their case as these Madrasas are not wholly maintained out of State funds. Moreover, Clause (2) of Article 28 of the Constitution creates an exception, which is in their favour.

17. Great reliance has been placed by the petitioners on the Constitution Bench judgment of the Supreme Court rendered in the case of ***In Re Kerala Education Bill, 1957***. The said case was decided on a reference made by the President under Article 143(1) of the Constitution of India seeking opinion of the Supreme Court on a question which was of considerable public importance. The question arose out of certain provisions in the Kerala Education Bill of

1957. The Bill was passed by the Legislative Assembly of the State of Kerala in September, 1957 but was reserved by the Governor of Kerala for consideration of the President. The Bill was regarding administration and control of various educational institutions in Kerala, including educational institutions established and administered by the minorities. For our purposes, what is relevant is that the major provisions of the Bill were upheld by the Supreme Court, except certain provisions such as Clauses 14 and 15, which according to the Supreme Court, takes away the rights given to minorities under Article 30(1) of the Constitution of India. The Court had rejected the State's contention that the State could impose any condition on a school simply because it is given grant to that school as that would be violative of the rights given to the minorities under Article 30(1) of the Constitution of India. At the same time, the contention of the Management Committees of such schools that the State cannot impose any condition on them was also rejected. A reasonable control by the State in such schools was permissible and it was said that the right under Article 30 though was a right to establish and to administer educational institution of their choice, which means that the right to administer these schools effectively and it does not include the right to mal-administer such schools.

18. But we do not see as to how ***Kerala Education Bill*** case is applicable in the present case. We are not dealing with schools which are simply under a grant-in-aid

of the Government, we are dealing with schools, which have been provincialised. In other words, these are Government schools. Moreover, it is yet to be seen whether these schools were established and are being administered by a minority community.

19. In the counter affidavit filed on behalf of the State, before replying to the points raised by the petitioners, two preliminary objections have been raised. The first objection is regarding the locus of the petitioners. The learned Advocate General of the State, Mr. Devajit Saikia would argue that the petitioners before this Court claim to be either owners of the land on which the Madrasas were constructed or the members of the management committee or the mutawallis. They are not the ones who have been in any way affected by the repealing Act or by subsequent Executive Orders of the Government. No student or teacher has come forward with any kind of objection and the petition at the hands of the present petitioners is not maintainable. Their second objection is that the petitioners have not impleaded any of the students, even in their representative capacity, or the teachers, who are the direct beneficiaries of the provincialisation of the schools and hence the petition can be dismissed on the grounds of locus or misjoinder of necessary parties.

20. Technicalities apart, the learned Advocate General would argue that all the State has done is that it has

removed religious teachings which are in the form of religious instructions, from Government schools. The schools from where these teachings have now been stopped are not private institutions, leave aside minority institutions. They were provincialised way back in the year 1995-96 and since then they have lost their minority status. Since these institutions are not minority institutions and all the teaching as well as non-teaching staff of these institutions are Government servants, there is no question of Article 29 and 30 coming into play in any manner in the present case.

21. Mr. D. Saikia would rely upon the case of ***S. Azeez Basha -Vs- Union of India***, reported in ***AIR 1968 SC 662*** and would argue that these Madrasas though may have been established by a religious minority community but after these schools were provincialised in the year 1995-96, they are not the schools which can be said to be established by minority community. They are in any case not being administered by minority community. In the case of ***S. Azeez Basha***, where it was held *"Once an institution is established under a particular Act, and/or conversion of a private institution to an institution under a particular Act, then such institution is considered to be an institution established and formed under that particular Act and the original institution loses its status of its previous nature."* Mr. D. Saikia would submit that the attention of this Court has been unnecessarily diverted to look into the matter from the perspective of protection of minority rights under

Article 29 and 30 of the Constitution of India, whereas the fact is that the only question here is whether an educational institution, which is wholly funded by the State (as it is the case here), can impart any religious instructions? In other words, the matter has to be looked into from the mandate of the Constitution given in Clause (1) of Article 28 of the Constitution of India, which says "no religious instruction shall be provided in any educational institution wholly maintained out of State funds". Yet religious instructions were being imparted in these schools. This is not permissible in an educational institution wholly funded by the State in terms of the mandate of Clause (1) of Article 28 of the Constitution of India and therefore, what the State has done is only what has been mandated by the Constitution!

22. The learned Advocate General has also relied upon a decision of the learned Single Judge of this Court given in ***Nurul Islam & Ors. -Vs- State of Assam & Ors.***, reported in ***2019 (4) Gauhati Law Times 124***. In the said writ petition, the petitioners have questioned the condition wherein they were supposed to qualify the Teachers Eligibility Test (TET) for being appointed as a teacher in a provincialised Madrasa on grounds that this is violative of Articles 29 and 30 of the Constitution of India. This argument of the petitioners was rejected by the learned Single Judge who came to the conclusion that the Madrasas, which have became provincialised after the 1995 Act, do not come under the purview of Articles 29 and 30

of the Constitution and they are not institutions which have been established and administered by a religious or linguistic minority. Nothing has been placed before us to show that this order of the learned Single Judge was taken further in a writ appeal before this Court, or before the Apex Court.

23. The learned Advocate General also draws a distinction between religious instructions and religious teachings or religious philosophy and to substantiate his argument, has referred to two decisions of the Supreme Court, which are (A) ***DAV College -Vs- State of Punjab***, reported in ***(1971) 2 SCC 269 [Equivalent citations: AIR 1971 SC 1737, 1971 SCR 688]*** and (B) ***Aruna Roy -Vs- Union of India***, reported in ***(2002) 7 SCC 368***. He would then argue that what was being taught in these schools was nothing but religious instructions, which is in violation of the Constitution of India. This has now been stopped. He would then submit that not only the Madrasas have been closed but a similar action has been the case of "Sanskrit Tolls" as well where *inter alia* religious teachings were imparted in Sanskrit language Therefore, the State has been religiously neutral while implementing the mandate of Clause (1) of Article 28 of the Constitution of India.

24. Learned Advocate General would then submit that in the present case what is under challenge after all is a policy decision of the State. It is a policy decision taken

after much deliberation. It was ultimately taken in the interest of the State and its students. Before arriving at such a decision, the State had done a complete study of the matter. Wide consultations were done with all the stakeholders and their opinion sought. Giving the details of the education in Madrasas in his counter affidavit, he would refer to the subjects taught in the Madrasas:

Affiliating Body	Types of institution	Name of Examination/ course	Subjects useful for further study in main stream	Theological subjects
Board of Secondary Education	High Madrassa and Higher Secondary Madrassa	Assam High Madrassa	1. Literature 2. Science 3. Math 4. Social Science	Fiqh and Aquaid
State Madrassa Board	Pre Senior Madrassa	Pre Senior	1. Literature 2. Science 3. Math 4. Social Science	1. The Holy Quaran 2. Islamic Studies
	Senior Madrassa	Dakhil	1. Literature 2. Science 3. Math 4. Social Science	1. The Holy Quaran 2. Fiqh
		Intermediate	Nil	1. Holy Quaran 2. Hadith 3. Fiqh 4. Usul Al Fiqh 5. Aquaid 6. History of Islam
		FADIL AL MAARIF (FM)	Arabic Language	1. Tasfir 2. Hadith 3. Fiqh 4. Faraid 5. Usul Al Fiqh 6. Aquaid 7. History of Islam
	Title Madrassa	MUMTAZ MUHADDITH	Nil	1. Hadith 2. Tasfir

	and Arabic College	EEN (MM)		3. History of Islam

It has then been argued that total number of students who had studied in pre-senior Madrasa in final year was about 25,000 and many of them did not take admission in senior Madrasa but preferred studying in general high school. The total number of students that appeared in 2018 was 1542, in 2019 it goes down to 1458 and in 2020, it was 1224. In other words, the number of students appearing in pre-senior Madrasa is on a decline. Moreover, the students who come out from the Madrasas are unlikely to get admission in professional courses or even in higher studies and therefore, they largely remain unemployed. Learned Advocate General would argue that Government has done nothing more than a change in the subjects taught in these Madrasas, from religious instructions to general subjects such as social sciences and science and language, which are only for the benefit of the students and it has been done as per the policy decision taken by the Government.

25. Stressing on the policy decision of the State, the learned Advocate General relies upon two seminal decisions of the Supreme Court, i.e. ***Balco Employees Union (Regd.) -Vs- Union of India & Ors.,*** reported in ***(2002) 2 SCC 333*** and ***Parisons Agrotech (P) Limited & Ors. -Vs- Union of India & Ors.,*** reported in ***(2015) 9 SCC 657***, learned Advocate General would argue that once the Court comes to a conclusion that the policy decision taken

by the State is a well-considered decision and is within the parameter of the Article 14 of the Constitution, the Court would normally not interfere in the policy decision of the State.

26. Both sides were heard at length. To our mind, the question before this Court has to be seen from the broad perspective of a fundamental constitutional value, which is 'secularism'. In a country which has multiple religions, the State has to be neutral while dealing with the matters relating to religion. This aspect was well understood even during colonial Rule. In 1854, Charles Wood, the President of the Board of Control of the British East India Company wrote a long despatch/letter to the Governor General of India, Lord Dalhousie. This is also known as "Wood's Despatch" or "the education despatch of 1854". In this letter, Charles Wood suggested that amongst various measures prescribed, the State should be religiously neutral and must provide secular education. In paragraphs 52 and 53 of the despatch, Charles Wood wrote as under:

> *"52. We have, therefore, resolved to adopt in India the system of grants in aid, which has been carried out in this country with very great success; and we confidently anticipate, by thus drawing support from local resources, in addition to contributions from the State, a far more rapid progress of education than would follow a mere increase of expenditure by the Government; while it possesses the additional advantage of fostering a spirit of reliance upon local exertions and combination for local purposes, which is of itself of no mean importance to the well-being of a nation.*

53. The system of grants in aid which we propose to establish in India, will be based on an entire abstinence from interference with the religious instruction conveyed in the schools assisted. Aid will be given (so far as the requirements of each particular district, as compared with others, and the funds at the disposal of the Government may render it possible) to all schools which impart a good secular education, provided that they are under adequate local management (by the term "local management", we understand one or more persons, such as private patrons, voluntary subscribers, or the trustees of endowments, who will undertake the general superintendence of the school, and be answerable for its performance for some given time); and provided also that their managers consent that the schools shall be subject to Government inspection, and agree to any conditions which may be laid down for the regulation of such grants.

In paragraphs 56 and 57 of the despatch, Charles Wood wrote as under:

"56. The amount, and continuance of the assistance given will depend upon the periodical reports of inspectors, who will be selected with special reference to their possessing the confidence of the native communities. In their periodical inspections, no notice whatsoever should be taken by them of the religious doctrines which may be taught in any school; and their duty should be strictly confined to ascertaining whether the secular knowledge conveyed in such as to entitle it to consideration in the distribution of the sum which will be applied to grants in aid. They should also assist in the establishment of schools, by their advice, wherever they may have opportunities of doing so.

57. We confide the practical adaption of the general principles we have laid down as to grants in aid to your discretions, aided by the educational departments of the different Presidencies. In carrying into effect our views, which apply alike to all schools and institutions, whether male or female, Anglo-vernacular or vernacular, it is of the greatest importance that the conditions under which schools will be assisted should be clearly and publicly placed before the natives of India. For this purpose Government notifications should be drawn up, and

> *promulgated, in the different vernacular languages. It may be advisable distinctly to assert in them the principles of perfect religious neutrality on which the grants will be awarded; and care should be taken to avoid holding out expectations which, from any cause, may be liable to disappointment."*
>
> *(Emphasis provided)*

27. During our freedom struggle, as a challenge set up by the Simon Commission (which was constituted to frame a Constitution for India, and which did not have a single Indian as its Member), an All Parties Conference was called in the year 1928, which appointed a committee under Motilal Nehru to give its recommendations as to the nature of the Indian Constitution. Amongst its various recommendations, the Nehru Committee had made the following two recommendations, which are relevant for our present purpose:

> *"(xi) There shall be no state religion for the Commonwealth of India or for any province in the Commonwealth, nor shall the state either directly or indirectly endow any relivison or give any preference or impose any disability on account of religious belief or religious status.*
>
> *(xii) No person attending any school receiving state aid or other public money shall be compelled to attend the religious instruction that may be given in the school."*

28. There are different castes, creeds, communities, religions, cultures, languages and traditions in India. If India is to remain strong and united, and a robust democracy, then the State has to be secular. There is no other way. Secularism in the matter of governance also means treating everyone equally. We live in a democracy

and under a Constitution where all citizens are equal before the law. Therefore, preference given by the State to any one religion, in a multi-religious society like ours, negates the principle of Articles 14 and 15 of the Constitution of India. It is thus the secular nature of the State which mandates that no religious instruction shall be provided in any educational institution wholly maintained out of State funds [Article 28(1)].

29. In ***S.R. Bommai vs. Union of India (AIR 1994 SC 1981)*** it has been held by the Hon'ble Apex Court that secularism is a basic structure of the Constitution. The State has to treat all religions equally. The State has no religion. In fact, though secularism has not been defined in the Indian Constitution, it has been defined in various judgments of the Apex Court. Secularism can be best understood in the words of Mahatma Gandhi, for whom secularism meant equal respect, not equal disrespect, for all religions. To take this point further, though India is a secular nation, but it is not against religion, rather it protects religious rights. We have a fundamental right of freedom of conscience and freedom of religion. But then like any other fundamental right, the Right to Freedom of Religion and Cultural and Educational Rights are not absolute rights. They have their limitations under the Constitution. Therefore, though a religious minority has a right to establish and administer educational institution of its choice, yet once such educational institution starts getting maintained wholly out of the State funds then

religious instructions cannot be imparted in such an institution.

We may also add that the mandate of Article 28 is for all educational institution and not just for those institutions who are established and administered by a minority.

30. Article 28 of the Constitution of India reads as under:

> *"28. Freedom as to attendance at religious instruction or religious worship in certain educational institutions*
>
> *(1) No religious instruction shall be provided in any educational institution wholly maintained out of State funds.*
>
> *(2) Nothing in clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution.*
>
> *(3) No person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto."*

Clause (1) of Article 28 is extremely important. It states in clear and unambiguous terms that no religious instructions shall be imparted in any educational institution which is wholly maintained out of State funds. There is another restriction in Clause (3), which is that an educational institution, which is receiving aid out of State funds (it may not be fully funded), religious instructions or

religious worship cannot be forced upon the students. An exception is carved out in Clause (2) of Article 28 providing that an educational institution, which has been established under any endowment or trust but is being administered by the State, religious instruction can be imparted. We must state here for the sake of record that the petitioners have placed no evidence before this Court to show that they are covered by the exception given in Clause (2) of Article 28.

31. In Part III of the Constitution, there are two sets of Rights, one under Articles 25 to 28, under the heading "Right to Freedom of Religion", and the other sets of Rights under Articles 29 and 30, under the heading "Cultural and Educational Rights". These Rights often overlap with one another and has to be examined in their totality. It is now a settled position of law that each of the fundamental rights or each of the Articles in Part III of the Constitution is not a complete code in itself, giving a distinct and isolated right. Starting from the Bank Nationalisation[1] case, followed by Maneka Gandi's[2] case and later pronouncements of the Apex Court, fundamental rights have to be read together as many of these rights overlap one another and, therefore, have to be read together. When we do this, we find that Article 28(1) of the Constitution sets out a limitation to what has been given to the minorities under Articles 25 and 26 of the Constitution of India, and this again has to be seen in the context of Article 30(1) of the Constitution.

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[1] Rustom Cavasjee Cooper -Vs- Union of India :: 1970 (1) SCC 248.

[2] Maneka Gandhi -Vs- Union of India :: 1978 (1) SCC 248

In its much broader sense, Article 28 along with Article 27[3] only underline the secular nature of a State[4]. Let us now examine whether these schools, i.e. the Madrasas in question, can be said to be educational institutions established and administered by a religious or linguistic minority. Needless to say, 'establish' and 'administer' have to be read conjunctively. But before we do that, let us first clarify as to what is meant by "Provincialisation".

32. The word "Provincialisation" would mean brining something within the fold of a province, in other words, bringing it within the ownership of the Government. Mr. Sanjay Hegde, learned Senior Advocate for the petitioners while making his submissions on this point, submitted that "provincialisation" is not the same thing as "nationalisation". To us, however, the two substantially mean the same, though the two are only different to the extent that they operate at two different levels. When the Central Government brings something within its control and ownership, which earlier was under private ownership, that would be "nationalisation"; like the nationalisation of Banks in the year 1971. This was done by the centre. A similar action at the level of a State, i.e. a province, would be called "provincialisation". Naturally, when the Madrasas in Assam were provincialised in the year 1995 by a State

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[3] **Freedom as to payment of taxes for promotion of any particular religion**.—No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.

[4] Please see: Constitutional Law of India by H.M. Seervai, Volume 2, Fourth Edition (Page 1259) published by Universal Law Publishing Co. Pvt. Limited.

Legislation, it cannot be called "nationalisation of Madrasss", it has to be "provincialisation of Madrasas". The effect, however, in both cases remains the same.

33. The Act which had provincialised Madrassa Education in Assam first came in the year 1995 and is called "The Assam Madrassa Education (Provincialisation) Act, 1995" (from hereinafter referred to as "1995 Act"). Section 2(o) of the 1995 Act defines "provincialisation" as follows:

> *"2(o) Provincialisation means taking over the liabilities for payment of salaries including dearness allowances, medical relief and such other allowances as admissible to the Government servants of similar category and gratuity, pensions, leave encashment etc. as admissible, under the existing rules, to the Government servants serving under the Government of Assam."*

"Madrassa Education" has been defined under Section 2(k) as follows:

> *"2 (k) "Madrassa Education" means a system of education in which instruction is imparted in Arabic, Persian, Urdu, Quran, Tafsir, Hadith, Figh, Usul, Aquid, Montique, Hikmat, Islamic History along with general subjects like Mathematics, Science, Indian Language, English, Hindi, Social Studies, etc. at Secondary School level, the syllabi, curriculum and examination for which are regulated by the Assam State Madrassa Education Board up to the level of Fajil-E-Marif (F.M.) and Mumtazul Muhaddisin (M.M.);"*

Section 3[5] of the 1995 Act makes all employees of Madrasa Government employees from the appointed day.

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[5] **3. Employees to be Government Servants**- Subject to the provision of Article 309 of the Constitution of India, all employees of Madrassa, now covered by deficit scheme of grants-

Section 4 for the first time provides that these employees, after their superannuation, will be provided pension and gratuity. Thereafter, under Section 5[6] the entire

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in-aid under the Government of Assam shall be deemed to have become the employees of the Government on and from the appointed day on the following terms and conditions, namely –

(a) all rules including service rules and rules of conduct and discipline, which are applicable to the Government servants of corresponding grade, similarly placed shall be applicable to employees of the Madrassa;

(b) all employees shall be entitled to such emoluments as salary and allowances etc. as admissible to them:

Provided that no employee shall get as emoluments any amount which is less than the amount he was getting immediately before the appointed day;

(c) Services of all employees shall be encadred in appropriate cadres in accordance with the rules as may be prescribed by the Government for this purpose;

(d) The inter-se-seniority of the employees of a cadre or class shall be determined on the basis of the rule as may be prescribed by the Government.

[6]**5. Government to take over Madrassa and Employees thereof** – (1) With effect from the appointed day the administration, management and control of all employees of all Madrassa the services of whose employees are provincialised under the provisions of Section 3 or Section 7, as the case may be, shall vest in the Government and the Managing Committee or Governing Body, as the case may be, of such Madrassa shall exercise such functions as may be specified by the Government or under the rules made under this Act, until such Managing Committee or the Governing Body, as the case may be, is either reconstituted or replaced under the rules prescribed.

(2) The selection for recruitment to any post, teaching or non-teaching, in a Madrassa except the post of Superintendent of a Senior Madrassa and Principal of a Title Madrassa or an Arabic College shall be made by a Selection Board, which shall be constituted by the President of the Managing Committee or the Governing Body, as the case may be, of the Madrassa for each such Madrassa stated below –

(i) President of the Managing Committee of the Senior Madrassa or the President of the Governing Body of the Title Madrassa or the Arabic College, as the case may be – Chairman.

(ii) Superintendent of the Senior Madrassa or the Principal of the Title Madrassa or the Arabic College, as the case may be – Member Secretary.

(iii) Two academicians to be selected by the Managing Committee of the Senior Madrassa from outside the Managing Committee or Governing Body of the Title Madrassa or the Arabic College from outside the Governing Body, as the case may be – Member.

(iv) Two members selected by the Managing Committee of the Senior Madrassa from the Managing Committee or selected by the Governing Body of the Title Madrassa or the Arabic College from the Governing Body, as the case may be – Members.

(v) One representative to be nominated by the Deputy Director of Madrassa Education, Assam – Member.

(3) The selection for appointment to the post of Superintendent of the Senior Madrassa or Principal of a Title Madrassa or Principal of an Arabic College shall be made by the State Selection Board which shall be constituted by the Government as stated below –

(i) Chairman, State Madrassa Education Board, Assam – Chairman.

(ii) Deputy Director of Madrassa Education, Assam – Member- Secretary.

(iii) One expert from the theological subject, to be nominated by the Deputy Director of Madrassa Education, Assam – Member.

(iv) One expert from the secular subject, to be nominated by the Deputy Director of Madrassa Education, Assam – Member.

(v) Senior-most Superintendent amongst the Superintendents of Senior Madrassas in the State/Senior-most Principal amongst the Principals of Title Madrassas in the

administration, management and control of all Madrasas and the services of their employees, who were provincialised under Section 3 and 7[7] of the 1995 Act, now vests with the Government. The Managing Committee or the Governing Body, as the case may be, of these Madrasas could exercise only such functions as would be specified by the Government under the rules framed under the 1995 Act.

34. The petitioners belong to a minority community, i.e. Muslim minority community, and hence have asserted their right as a religious minority community to establish and administer educational institutions of their choice. The State, on the other hand, denies that the educational institutions were neither established, or are being administered by a minority, be it linguistic or religious. The educational institutions in question are admittedly provincialised schools, the entire teaching and non-teaching staff of these educational institutions are Government servants, the school being a Government institute cannot be said to be either established or being administered by a minority.

State, Senior-most Principal amongst the Principals of Arabic College in the State, as the case may be, to be nominated by the Deputy Director of Madrassa Education, Assam – Member.

(vi) Two members from the State Madrassa Education Board, Assam to be selected by it – Member.

[7] 7. **Provincialisation of new Madrassa** – The Government may, by notification published in the Official Gazette, provincialise on the same terms and conditions as provided in clauses (a) to (d) of sub-section (1) of Section 3 and Section 4, the services of the employees of the Madrassa institutions which may be recognised after this Act has come into force.

35. Petitioners would argue that when these schools were initially established as venture Madrasas in Assam, their establishment was by a minority community. There can be no doubt on this aspect. But then the petitioners' case is that these religious institutions being first brought under "Deficit Financing Scheme" and then later being provincialised in the year 1995-96, will not change the basic character of this institute, and will remain a minority institute, being established and administered by minorities. Being a minority institute, they have a choice to run the educational institution as they want, including the kind of syllabus and subject they want to teach to such students admitted in these educational institutions. The case of the State, on the other hand, is that though the schools were initially established by minorities, once the schools were provincialised in the year 1995-96 (there is no dispute that these schools were provincialised), they cease to have a minority status.

36. Mr. D. Saikia, learned Advocate General of the State has relied upon a constitution bench judgment of the Apex Court in ***S. Azeez Basha***, where it was held that a college known as Muhammadan Anglo Oriental College, Aligarh, which was established by Sir Syed Ahmad Khan and other members of the Muslim community, once becomes a University under a statute in 1920, ceases to be a minority institute. Aligarh Muslim University Act of 1920 was amended by the Parliament in the year 1951 and 1965. These two amendments were challenged before the

Apex Court and the case of the petitioners was that these amendments amount to violation of the rights of the minorities given under Article 30(1) of the Constitution as AMU is a minority institute. The Court, however, gave a finding that the College was established by minorities but it became a University in the year 1920 and, therefore, it cannot be said that the University was established by a minority as it took place by virtue of the 1920 Act, which was passed by the Central Legislature and, therefore, the University was not established by a minority or was being administered by a minority and therefore the amendment made by the Parliament in the year 1951 and 1965 cannot be struck down as unconstitutional. We must deal with the facts of ***S. Azeez Basha*** case in detail.

37. Five writ petitions were filed before the Apex Court which attacked the constitutionality of the Aligarh Muslim University (Amendment) Act, i.e. Act No. 62 of 1951 as well as Aligarh Muslim University (Amendment) Act, i.e. Act No. 19 of 1965. The main challenge of the petitioners was that the provisions given in Article 30(1) of the Constitution of India, which require that "all minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice" has been violated. Their case was that AMU was established by a Muslim minority and it was the Muslims who had administered it under the 1920 Act. The Amendment Acts of 1951 and 1965 take away or abridge some of these rights which cannot be done as they are

ultra vires Article 30(1) of the Constitution of India. The petitioners, *inter alia*, had also alleged violation of their rights given to them under Articles 14, 19, 25, 26, 29 and 31 of the Constitution of India. The amendments in question, particularly the 1965 amendment, changed the composition of the main Administrative Bodies of the University such as the University Court, it also dilutes its powers and now even non-Muslims could become its members.

38. The petitions were opposed by the Union of India and the stand taken by the Union of India was that AMU was established in 1920 by Aligarh Muslim University Act, 40 of 1920 and, therefore, this establishment was not by Muslim minority but by the Government of India by virtue of a statute, namely, the 1920 Act and, therefore, the Muslim minority could not claim any fundamental right to administer the AMU under Article 30(1) of the Constitution of India. It was also contended that as AMU was established by the 1920 Act, and the Parliament had the right to amend that statute as it thought fit in the interest of education and the amendments made by the Acts of 1951 and 1965 were perfectly valid as there was no question of their taking away the right of the Muslim minorities to administer the AMU and, therefore, they cannot claim the right to administer it. The petitioners' case was that Sir Syed Ahmad Khan, the great social reformer and a Muslim intellectual, wanted to establish an institute of higher learning for Muslims so that they are not

neglected in modern education. He thus conceived of an institute where liberal education in literature and science can be imparted to Muslims. With this object in mind, he organized a Committee called Muhammadan Anglo Oriental College Fund Committee, which collected funds for establishment of the College and with their efforts initially a School was opened in May, 1873. In 1876, the School became a High School and in 1877 Lord Lytton, the then Viceroy of India, laid the foundation stone for the establishment of a College known as Muhammadan Anglo Oriental College, Aligarh. It was a flourishing institute. Thereafter, the idea of establishing a Muslim University gathered strength and from 1911 onwards funds were collected and a Muslim University Association was established for the purpose of establishing a teaching University at Aligarh. It was due to the effort of this Association, and after long negotiations between the Association and the Government of India, that eventually in the year 1920 Aligarh Muslim University was established by the 1920 Act. It was thus the Muhammadan Anglo Oriental College that became the University. Prior to that, a large amount of money was also collected by the Association for the University as the Government of India had made it a condition that Rs.30 Lakhs must be collected for the University before a University could be established. The major part of the funds which was needed for establishment of the University was also donated by Muslims.

39. The 1920 Act, as the Apex Court has the occasion to examine it, gave the final power for interference in the affairs of the University to the Government through Lord Rector, who was the then Governor General of India. In the 1951 Act, one of the amendment which was made was in Section 9 of 1920 Act, which gave power to the Court (i.e. the Court of the University) to make statues providing for compulsory religious instruction in the case of Muslim students. According to the Apex Court, this amendment was made only in the interest of the University and in view of Article 28(3) of the Constitution of India, which lays down that *"no person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto*."

40. By the 1965 Act, the composition and powers of the Court of the University were changed. The case of the petitioners, therefore, was that by this amendment made in 1965, Muslim communities were deprived of their right to administer AMU and this amendment was in violation of Article 30(1) of the Constitution of India. This argument of the petitioner was negated by the Apex Court. Paragraph 26 of the judgment reads as under:-

"26. From the history we have set out above, it will be clear that those who were in-charge of the M.A.O. College, the Muslim University Association and the Muslim University Foundation Committee were keen to bring into existence a university at Aligarh. There was nothing in law then to prevent them from doing so, if they so desired without asking Government to help them in the matter. But if they had brought into existence a university on their own, the degrees of that university were not bound to be recognised by Government. It seems to us that it must have been felt by the persons concerned that it would be no use bringing into existence a university, if the degrees conferred by the said university were not to be recognised by Government. That appears to be the reason why they approached the Government for bringing into existence a university at Aligarh, whose degrees would be recognised by Government and that is why we find Section 6 of the 1920 Act laying down that 'the degrees, diplomas, and other academic distinctions granted or conferred to or on persons by the university shall be recognised by the Government.....'. It may be accepted for present purposes that the M.A.O. College and the Muslim University Association and the Muslim University Foundation Committee were institutions established by the Muslim minority and two of them were administered by Societies registered under the Societies Registration Act 21 of 1860. But if the M.A.0. College was to be converted into a university of the kind whose degrees were bound to be recognised by Government, it would not be possible for those who were in-charge of the M.A.0. College to do so. That is why the three institutions to which we have already referred approached the Government to bring into existence a university whose degrees would be recognised by Government. The 1920 Act was then passed by the Central Legislature and the university of the type that was established thereunder, namely, one whose degrees would be recognised by Government, came to be established. It was clearly brought into existence by the 1920 Act for it could not have been brought into existence otherwise. It was thus the Central Legislature which brought into existence the Aligarh University and must be held to have established it. It would not be possible for the Muslim minority to establish a university of the kind whose degrees were bound to be recognised by Government and therefore it must be held that the Aligarh University was brought into existence by the Central Legislature and the

Government of India. If that is so, the Muslim minority cannot claim to administer it, for it was not brought into existence by it. Article 30(1), which protects educational institutions brought into existence and administered by a minority, cannot help the petitioners and any amendment of the 1920 Act would not be ultra vires Article 30(1) of the Constitution. The Aligarh University not having been established by the Muslim minority, any amendment of the 1920 Act by which it was established, would be within the legislative power of Parliament subject of course to the provisions of the Constitution. The Aligarh University not having been established by the Muslim minority, no amendment of the Act can be struck down as unconstitutional under Article 30(1).”

41. Thus, it was held that AMU was established not by a minority community but it was established under a statute and, therefore, minorities do not have a right to administer it. Before we come and draw a parallel of AMU and the provincialised Madrasas in Assam, we must also state that subsequently in the year 1981, an amendment was made in the University Act of 1920, which sought to remove the defects in the 1920 Act, which took away the character of minority from AMU. In other words, the basis of ***S. Azeez Basha*** case was removed, or so it was thought.

42. In that background, the AMU in the year 2005 reserved some seats in the Post Graduate Medical Course for only Muslim students. This reservation was challenged before the Allahabad High Court. It was argued that it has already been held in ***S. Azeez Basha*** case that AMU is not a minority institute yet reservations of seats had been done only for Muslim students, which is violative of Articles 14 and 15 of the Constitution of India as well as other provisions of the Constitution of India. The defence taken

by the AMU as well as by the Union of India was that ***S. Azeez Basha*** case is no more applicable as the basis of ***S. Azeez Basha*** judgment has been taken away by the Amendment Act of 1981. The learned Single Judge, however, held otherwise and allowed the writ petition holding that the AMU is still a minority institution and, therefore, it has no right to reserve seats for Muslim students.

43. The matter was taken in appeal before the Division Bench by the AMU as well as by the Union of India. Their appeals were dismissed. The matter ultimately went to the Apex Court, where while considering the importance of the matter, the two Judge Bench of Supreme Court has held that the matter should be considered by a larger Bench. In other words, whether AMU is a minority institute or not will now be considered by the larger Bench. It is yet to be considered by a larger Bench. All the same, ***S. Azeez Basha*** still holds the field and is binding authority on us.

44. We have absolutely no doubt in our mind that the ratio laid down by the Apex Court in ***S. Azeez Basha's*** case is fully applicable in the present case. The venture Madrasas, which were established by a minority community, would cease to be an educational institution established by a minority community once such a school has been provincialised under the 1995 Act or the subsequent Provincialisation Acts. We have already seen the meaning of provincialisation and the way

provincialisation changes the nature of the school, inasmuch as, it is now fully under control of the Government and in fact the teaching and the non-teaching staffs of the Madrasas are Government servants, which has never been in tough. Therefore, these are not minority institutions anymore.

45. Consequently, the claim of the petitioners that these Madrasas are minority institutions and were established and administered by the minority is a claim which has no foundation and is hence not acceptable.

46. Be that as it may, and irrespective of the status of these institutions, the petitioners still have to face the mandate of Article 28(1) of the Constitution. The Madrasas in question, which are "wholly maintained out of State funds", cannot impart religious instructions in terms of the mandate of Article 28(1) of the Constitution of India.

47. What Clause (1) of Article 28 of the Constitution prohibits is religious instruction in an educational institution which is wholly maintained out of State funds. We must here make a very clear distinction between religious instructions and religious studies or even religious education. Whereas "religious instruction" has a very restrictive meaning, religious education or religious studies are much wider terms.

48. During the debates in the Constituent Assembly, what was placed before the Constituent Assembly was

Article 22 (present Article 28) in its Draft form[8], which read as under:

> *"22: Freedom as to attendance at religious instruction or religious worship in certain educational institutions—*
>
> *(1)No religious instruction shall be provided by the State in any educational institution wholly maintained out of State funds:*
>
> *Provided that nothing in this clause shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction be imparted in such institution.*
>
> *(2)No person attending any educational institution recognized by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person, or if such person is a minor, his guardian has given his consent thereto.*
>
> *(3)Nothing in this Article shall prevent any community or denomination from providing religious instruction for pupils of that community or denomination in an educational institution outside its working hours."*

49. One of the Members of the Constituent Assembly Pandit Lakshmi Kanta Maitra raised a question on Clause (1) of Article 22. His objection was that there are many educational institutions which are wholly managed by the Government, like Sanskrit College, Calcutta where *Vedas, Smrithis, Gita* and *Upanishads* are taught. Similarly in several parts of Bengal, there are Sanskrit institutions where instructions in these subjects are given but now if no religious instruction can be given by an institution wholly

[8] Our source is: India's Constitution - Origins and Evolution (Volume 2) by Samaraditya Pal.

maintained out of State funds then all these institutions will have to be closed down. To this, Doctor B.R. Ambedkar[9] replied:

> *"My own view is this, that religious instruction is to be distinguished from research or study. Those are quite different things."*

50. This distinction is now well established by two seminal decisions of the Apex Court, these are – **(a)** ***DAV College -Vs- State of Punjab & Ors.***[10], and **(b)** ***Ms. Aruna Roy & Ors. -Vs- Union of India & Ors.***[11]

The petitioner in the ***DAV College*** case had challenged the constitutional validity of certain provisions of Guru Nanak University, Amritsar Act, i.e. Act 21 of 1969, particularly Sections 4 & 5. What is relevant for our purposes is Sub-section (2) of Section 4, which reads as under:-

> *"4.—The University shall exercise the following powers and perform the following duties:*
>
> *(1)* * * *
>
> *(2) To make provision for study and research on the life and teachings of Guru Nanak and their cultural and religious impact in the context of Indian and World Civilisations."*

The petitioner, i.e. DAV College Trust, which was formed in the memory of Swami Dayanand Saraswati, the founder of Arya Samaj, claimed that since Guru Nanak

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[9] Our source is: India's Constitution - Origins and Evolution (Volume 2) by Samaraditya Pal (Page 1016).
[10] (1971) 2 SCC 269
[11] (2002) 7 SCC 368

University is wholly maintained out of State funds, the provisions contained in Section 4(2) offense Clause (1) of Article 28 of the Constitution of India, as it requires the teaching of Guru Nanak Day in the University and Colleges. This argument was negated by the Apex Court. In Paragraph 24 of the judgment, it was said as under:-

> *"24. … If the university makes provision for an academic study and research of the life and teachings of any saint it cannot on any reasonable view be considered to require colleges affiliated to the university to compulsorily study his life and teachings or to do research in them. The impugned provision would merely indicate that the university can institute courses of study or provide research facilities for any student of the university whether he belongs to the majority or the minority community to engage himself in such study or research but be it remembered that this study and research on the life and teachings of the Guru Nanak must be a study in relation to their culture and religious impact in the context of Indian and world civilizations which is mostly an academic and philosophical study."*

Later, in Paragraph 26 a fine distinction was made between what is religious instruction and religious education:-

> *"26. Even so the petitioners have still to make out that Section 4(2) implies that religious instruction will be given. We think that such a contention is too remote and divorced from the object of the provision. Religious instruction is that which is imparted for inculcating the tenets, the rituals, the observances, ceremonies and modes of worship of a particular sect or denomination. To provide for academic study of life and teaching or the philosophy and culture of any great saint of India in relation to or the impact on the Indian and world civilizations cannot be considered as making provision for religious instructions."*

(Emphasis provided)

51. In the case of ***Ms Aruna Roy***, a public interest litigation was filed under Article 32 of the Constitution of India before the Apex Court where the contention of the petitioner (Ms. Aruna Roy) was that National Curriculum Framework for School Education (NCFSE) which is published by National Council of Educational Research and Training (NCERT) is against the constitutional mandate, and is violative of Clause (1) of Article 28 of the Constitution of India since it emphasizes that children in the schools should be taught religious values, etc. In the curriculum (NCFSE) published by NCERT, certain instructions were to be given as to how education is to be conducted in schools and one of them was –

> *"(iv) For religion, it is stated that students have to be given the awareness that the essence of every religion is common, only practices differ."*

It was then contended that this is also against the secular values of the Constitution, etc.

The Apex Court clarified this aspect while negating the contention of the petitioner in Paragraph 53 of the judgment. It reads as under:-

> *"53. NCFSE nowhere talks of imparting religious instruction as prohibited under Article 28. What is sought is to have value-based education and for "religion" it is stated that students be given the awareness that the essence of every religion is common. Only practices differ. There is a specific caution that all steps should be taken in advance to ensure that no personal prejudices or narrow-minded perceptions are allowed to distort the real purpose. Dogmas and superstitions should not be propagated in the name of education about religions. What is*

sought to be imparted is incorporated in Article 51-A(e), which provides

> *'to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women'*

and to see that universal values, such as truth, righteous conduct, peace, love and non-violence be the foundation of education."

In Paragraphs 55, 56 & 57 of his concurring but separate judgment, Justice D.M. Dharmadhikari further clarified this aspect as under:-

> *"D.M. DHARMADHIKARI, J. (concurring)— I have carefully gone through the erudite and well-considered opinion of learned Brother M.B. Shah, J. I am in respectful agreement with his conclusion but I would like to add my own reasons. I am in agreement with the view that education of religions can be imparted even in "educational institutions" fully maintained out of State funds. But the education on religion which can be allowed to be imparted in "educational institutions fully maintained out of State funds" as mentioned in clause (1) of Article 28 of the Constitution has to be education of a nature different from religious education or religious instruction which can be imparted in educational institutions maintained by minorities or those "established under any endowment or trust" as referred in clause (2) of Article 28. I have, therefore, found it necessary to give my own opinion on the important issues raised on behalf of the petitioners questioning introduction of religious education in educational institutions fully maintained out of State funds. According to them, it runs counter to the concept of "secularism" which should guide the activities of the State in the field of education.*
>
> *56. Secularism is the basic structure of the Constitution. Clause (1) of Article 28 prohibits imparting of "religious instruction" in educational institutions fully maintained out of State funds. The case of D.A.V. College v. State of Punjab [(1971) 2 SCC 269] has been noted. The words "religious instruction" have been held as not prohibiting education of religions dissociated from "tenets, the*

> *rituals, observances, ceremonies and modes of worship of a particular sect or denomination". The academic study of the teaching and the philosophy of any great saint such as Kabir, Guru Nanak and Mahavir was held to be not prohibited by Article 28(1) of the Constitution.*
>
> *57. A distinction, thus, has been made between imparting "religious instruction" that is teaching of rituals, observances, customs and traditions and other non-essential observances or modes of worship in religions and teaching of philosophies of religions with more emphasis on study of essential moral and spiritual thoughts contained in various religions. There is a very thin dividing line between imparting of "religious instruction" and "study of religions". Special care has to be taken of avoiding possibility of imparting "religious instruction" in the name of "religious education" or "study of religions".*

52. It has not been disputed at the Bar that what is being taught in the provincialised Madrasas, at least a part of the study curriculum, in these Madrasas, is what we may call "religious instructions".

53. Learned senior counsel for the petitioners, Mr. Sanjay Hegde has then argued that these Madrasas, in any case, are not wholly funded by the State. His argument is that although the entire salary of the teaching and non-teaching staff are paid by the State, yet a fee is charged from the students and, moreover, examination fee, etc. is also being charged and, therefore, these Madrasas are religious institutions which are not fully funded by the State. This aspect was also clarified by the Apex Court in ***DAV College vs. State of Punjab.*** Elaborating upon the words "fully funded by the State", the Apex Court removed all such doubts as are being raised before this Court today.

Let us not forget that these educational institutions are Government institutions. It is not a grant-in-aid school. It is an admitted position that the entire salary of teaching and non-teaching staff of these provincialised Madrasas come from State exchequer. The annual maintenance, repairs of buildings etc. are all done by the State. Assuming that the students pay examination fees or tuition fees, but that in itself will not dilute the Government character of these Madrasas or make them any less "fully funded" by the State. This was explained by the Apex Court in the ***DAV College*** case as under:

> *".....During the course of the arguments however learned Advocate appearing on behalf of the State and the University suggested that this was not so because the University gets income from affiliation fees and examination fees as such it cannot be said that the University is wholly maintained out of State funds. We can only say that this was not a serious attempt to deny the averment. The income from affiliation fees and the examination fees as the term 'fee' itself indicates something that is charged for rendering the service in respect of those two items which is a sort of quid pro quo and could hardly be said to be an income for the purposes of running the University."*

54. We must reiterate that secularism is a basic feature of our Constitution and Article 28(1) is nothing but a strong assertion of our secular principles.

55. The executive orders which are under challenge before us have not dispensed with the services of teachers who were so far imparting education in the Madrasas. They will now be required to teach Arabic or may even be trained for teaching other subjects. We may here refer to

the Notification dated 12.02.2021, which is the main Notification. Though by and large, the absorption of these teachers in Middle, Secondary and Higher Secondary Schools seems to be in order, but some of these teachers in Arabic Colleges and Title Madrasas, we are told, were also teaching students at Graduate and Post-Graduate levels. They are being placed under Secondary Board, instead of being placed under a University. We say this for the reason that their counterparts, who were teaching in 'Sanskrit Tolls' have been placed under a University, after abolition of 'Sanskrit Tolls'. Therefore, we direct that if such teachers in Arabic Colleges and Title Madrasas, who were so far imparting education to students at Graduate and Post-Graduate levels, their case shall also be considered for bringing under a University, like it has been done for the teachers in Sanskrit Tolls. But as the teachers are not before us, this shall be subject to a representation being made by such teachers, before the Commissioner and Secretary, Education (Secondary) Department, which shall then be considered in terms of our observations, by passing a speaking order.

56. Subject to the above, we uphold the validity of Assam Repealing Act, 2020 and the subsequent executive orders and communications of the Government, referred in our judgment above.

57. Subject to the directions we have given for Title Madrasas and Arabic Colleges, the writ petition is hereby dismissed.

JUDGE **CHIEF JUSTICE**

M. Sharma

Comparing Assistant