(14)

CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH
NEW DELHI

OA Nos.1618/88,2027/92,2350/92 &

O.A.~~xxxxx~~ NO. 777 /1993 **Decided on :** 8-7-1995

Dr.J.P.Sharma & ors. ... Applicant(s)

(By Shri R.Venkataramani, Advocate)

versus

Delhi Administration & ors. ... Respondent(s)

(By ~~Mrs.~~ ish Ahlawat, Advocate)

CORAM

THE HON'BLE SHRI S.C.MATHUR,CHAIRMAN

THE HON'BLE SHRI J.P.SHARMA,MEMBER(J)

THE HON'BLE SHRI P.T.THIRUVENGADAM,MEMBER(A)

1. To be referred to the Reporter or not ? Yes.

2. Whether to be circulated to other Benches of the Tribunal ? Yes.

(S. C. Mathur)
Chairman

CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH
NEW DELHI

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1) O.A. NO. 1618 of 1988
2) O.A. NO. 2027 of 1992
3) O.A. NO. 2350 of 1992
4) O.A. NO. 777 of 1993

New Delhi this the 3rd day of July, 1995

CORAM :

HON'BLE SHRI JUSTICE S. C. MATHUR, CHAIRMAN

HON'BLE SHRI J. P. SHARMA, MEMBER (J)

HON'BLE SHRI P. T. THIRUVENGADAM, MEMBER(A)

1) O.A. NO. 1618/1988

Dr. J. P. Sharma,
R/O Sharma Market,
Atta Village, Sector 27,
NOIDA, U.P. ... Applicant

Versus

1. Chief Secretary,
Delhi Administration,
5, Alipur Road, Delhi. ...

2. Dr. V. P. Varshney,
Member Secretary,
Managing Committee,
S.D. Ayurvedic College,
Malkaganj Chowk, Malkaganj,
New Delhi. ... Respondents

2) O.A. NO. 2027/1992

Dr. M. M. S. Yadav,
A-70, Shastri Nagar,
Delhi - 110052. ... Applicant

Versus

Delhi Administration through
its Chief Secretary,
Alipur Road,
New Delhi. ... Respondent

3) O.A. NO. 2350/1992

1. Dr. B. P. Gupta,
B-1702, Shastri Nagar,
New Delhi - 110051.

2. Dr. Prem Prakash,
38, Gian Park, Ram Nagar,
New Delhi - 110051. ... Applicants

Versus

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Delhi Administration through
its Chief Secretary,
Alipur Road,
New Delhi. ... Respondent

4) O.A. NO. 777/1993

Dr. B. L. Bhardwaj,
B-83, East Azad Nagar,
Krishna Nagar,
Delhi - 110091. ... Applicant

Versus

1. Delhi Administration through
its Chief Secretary,
Alipur Road, Delhi.

2. Secretary,
Department of Health,
Delhi Administration,
Old Secretariat,
Delhi. ... Respondents

Shri R. Venkataramani, Counsel for Applicants

Mrs. Avnish Ahlawat, Counsel for Respondents

ORDER

Hon'ble Shri Justice S. C. Mathur —

Expressing disagreement with the view taken by a Division Bench of the Tribunal in O.A. No. 1340/88 - Nirmal Rai vs. Chief Secretary, Delhi Administration & Anr. decided on 25.10.1991, connected with O.A. No. 819/91 - Prakash Chand & Ors. vs. Delhi Administration, which was followed by other Division Benches in granting relief to the applicants of the cases, another Division Bench before which the present four applications came up for hearing opined reference of the 'matter' to a Larger Bench. This is how the four applications have come up before this Full Bench. In all the applications, except one, there is a single applicant. In one application, there are two applicants. Thus, the total number of persons seeking

relief from the Tribunal is five. Apart from expressing disagreement with the earlier decisions, the referring Bench has not formulated any question requiring answer from the Full Bench. Thus, the Full Bench has been constituted not to answer any specific question but to decide the whole case, including the correctness of the decision in Nirmal Rai's case.

2. Since the facts in all the cases are similar and the question of law arising is identical, all the four applications have been heard together and are being disposed of by this common order.

3. Shorn of details, the facts which are either admitted or undisputed or are established from the record are these:

Some time in the year 1972 Sanatan Dharma Sabha, which was a private society, established Sanatan Dharma Ayurvedic College, for short College, for imparting instructions in BAMS course which was a six and half years course in Ayurvedic System of treatment of diseases. The course had recogniation from the Central Council of Indian System of Medicine, Ministry of Health and Family Welfare, Government of India, for short Council. In 1977, the College was affiliated to the Examining Body of Ayurvedic and Unani System of Medicine, Delhi Administration, Delhi, a statutory body constituted under Section 31-A of the East Punjab Ayurvedic and Unani Practioners (Amendment) Act, 1954. The staff and the studemts of the College were dissatisfied with the management on a number of issues and they resorted to agitational means including Dharna at the Old Secretariat. Their

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demands included:-(1) increase in the quantum of grant-in-aid to the college; (2) regular pay scales for the staff, both teaching and non-teaching instead of fixed pay;(3) recogniation of the College by the University of Delhi; and (4) grant of internship allowance to the students of the College.Under directions of the Council new admissions to the course were stopped after the academic session 1985-86. The College had to be run for a limited period to enable the students who had already been admitted to the first year of the course to complete the course. The management was unable to ensure smooth functioning of the College during this period. The agitation intensified to an extent where the Government could no longer be a silent spectator. The Director of Health Services was asked to inquire into the allegations of irregularities committed by the management and submit report. He submitted report on 28.4.1986. In his report, he mentioned that the Manager refused to show the records. He also observed that the allegations of irregularities could not be substantiated either by the students or by the teachers. The agitation continued and was rather intensified further. On 15.4.1986, a meeting was convened by the Secretary Medical of the Delhi Administration. At this meeting, it was decided that in order to save the career of the students , classes be started in the building of the Senior Secondary School, B Block, Janak Puri, New Delhi. The building at Krishnanagar,

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where the classes were being held was not found suitable. This decision was implemented and the classes started in the new building. Meanwhile, the Medical and Health Department of the Delhi Administration prepared note for consideration of the Executive Council of the Delhi Administration. The note mentions that in a meeting held with the representatives of the students of the College in the office of the Chief Executive Councillor it was decided that a note for taking over the management of the College by the Delhi Administration be prepared and put up to the Executive Council. The note further mentions that if the Delhi Administration is to run the College properly, the following will need attention:

1. Accommodation: The College is presently run in 5 rooms in a school building in Janak puri. At least 10 rooms are required. It is reported by the Dte. of Education recently, the said building will be useful for this purpose.

2. Laboratory : Laboratory facilities are not available for the students at present, Laboratories will have to be set up. It may entail an expenditure of Rs.3,83,722.00/-

3. Facilities (Clinical Training) There is no hospital attached to the college. Clinical training may be arranged in Din Dayal Upadhyay Hospital Civil Hospital Etc.

4. Staff The existing staff of the college may be retained by the Delhi Administration and paid the same wages they were drawing at the time of shifting the College from its original location to Janak puri. The annual expenditure in this regard will be Rs.2,05,140/ - as shown in the annexure.

5. Management The Management of the College may be vested in a Committee with E.C. (Health) as Chairman, Secretary(Medical) Secretary(Finance), Principal S.D. Ayurvedic College, M.S.D.D.U.Hospital as Members and D.H.S. as Member Secretary.

The liability of the Administration to run the college should be limited to a period of 4 or 5 years only till the present classes pass out.

The college was given grant-in-aid of Rs.20,000 during 1984-85. A sum of Rs.1,27,520/- was sanctioned as

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grant-in-aid for the college during 1985-86 but the amount was not disbursed due to the agitation of the students and teachers of the college."

The above note was put up before the Executive Council on 15.10.1986. The matter was considered under item reading " Taking over of the management of Sanatan Dharam Ayurvedic College, Krishna Nagar, by Delhi Administration".

The decision under the item reads " The proposal contained in the Memorandum of the Department of Medical and Health Services was considered by the Executive Council. The proposal was found acceptable in principal. A committee comprising (i) Secretary(Medical as Convener (ii) Secretary (Finance) (iii) Secretary(Law and Judicial) as members, may work out the modalities for implementing the proposal". The matter ultimately came up before the Executive Council on 13.2.1987. The meeting noted that fresh admissions in the College had been closed and the affiliation had been withdrawn. Thereafter, it discussed the modalities for release of funds to the College by the Delhi Administration. The Council was informed by the Director Medical Services that the administration had released Rs.2,20,000 to the Chairman Examining Body on account of grant-in-aid with the clear direction that the amount shall be utilised for meeting day to day requirements and payment of salaries to the staff of the institution and that the remunerations will be the same as they were drawing under their parent management. In respect of the take over, the minutes of the meeting contain the following observations:

> " The matter was discussed in consultation with Under Secretary(Law) and as per his advice, the following decision was taken.
>
> (a) In view of the fact that the institution cannot be legally taken over by the administration coupled with the fact that the relevant Act does not contain any provision in regard to the running of the institution by another body in the event of failure on the part of the

management the only possible action to the proposition considered by the committee in this case is that the grant-in-aid be released to the examining body for running the S.D.Ayurvedic College. The amount of grant-in-aid should be spent by the examining body in accordance with the norms already approved and exclusively be utilised for running the S.D.Ayurvedic College for which separate account should be maintained".

From this decision, it would appear that the Executive Council was advised by the Law Department of the Delhi Administration that there was no statutory provision under which the administration of the College could be taken over by the Government and this advice was accepted by the Executive Council. Therefore, instead of taking over the management of the College a scheme was formulated whereby funds required for smooth functioning of the College for a limited period were released in favour of the examining body which was to utilise the same for the limited purposes mentioned in the decision of the Executive Council.

4. The above decision contained prospect of termination of services of the employees of the College. Some employees filed Writ Petition No.1775/87 in the Delhi High Court which was rejected without a speaking order. Another Writ Petition(CWP 513/88) was also rejected. The directions sought against the Delhi Administration in the earlier Writ Petition were as follows:

(a) not to close down the College in a phased manner;

(b) not to stop admission for fresh batches;and

(c) not to terminate the services of the writ petitioners in a phased manner.

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5. The management of the College was not lagging behind in challenging the decision of the Delhi Administration. It filed Civil Suit in the Court of Sub Judge First Class Delhi. One of the plaintiffs in the suit was Sanatan Dharam Ayurvedic College. One of the defendants in the suit was the Delhi Administration. The suit, it appears, was ultimately dismissed.

6. In implementation of the above scheme, the administration started dispensing with the services of surplus staff in a phased manner. The services of Smt. Nirmal Rai, who had worked on ad hoc basis as Lab.Assistant and of the applicants in Prakash Chand 's case who had worked as Chowkidars, Sweepers, Clerks were dispensed with. Smt. Nirmal Rai filed OA No. 1340/88 and Prakash Chand & others filed OA No.819/91 in this Tribunal. Their claim was that they were entitled to be re-deployed in accordance with the Re-deployment of Surplus Staff in the Central Civil Services and Posts(Supplementary) Rules, 1989 (for short, the Rules). This plea was contested on behalf of the Delhi Administration. On behalf of the Delhi Administration, it was pleaded that the applicants in the aforesaid application were never Government servants and, therefore, they were neither entitled to file applications in the Tribunal nor they were entitled to redeployment under the Rules. The Tribunal through its judgement dated 25.10.1991 overruled the objections of the Delhi Administration. The Tribunal allowed the OAs and issued the following directions:

> " ... The applications are disposed of with the directions to the respondents to treat the applicants as the employees of the Delhi Administration who have been

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rendered surplus consequent upon the closure of the Sanatan Dharam Ayurvedic College with effect from April, 1991. The applicants shall be given alternative placement in posts in the Delhi Administration commensurate with their qualifications and experience, in accordance with an appropriate scheme to be prepared by them. They would also be entitled to pay and allowances for the period from the take-over of the Management of the said College till they are given alternative jobs and all consequential benefits. The respondents shall comply with the above directions within a period of three months from the date of communication of this order."

Against this judgement , the Delhi Administration filed Special Leave Petition before their Lordships of the Supreme Court which was dismissed on 21.7.1992. Thereafter, OA No.2462/ 89 was filed by Ram Dev Sharma and others which was allowed on 22.4.1992 following the judgement dated 25.10.1991 in Smt.Nirmal Rai's case(supra). The said judgement was followed while allowing OA Nos.2279/89, 1207/90, 2224/90 and 2169/91 on 31.7.1992.

7. The services of Dr.J.P.Sharma, applicant in OA No.1618/88 were dispensed with by order dated 8.7.1988. He has sought a writ for quashing the termination order in which he has been described as surplus. In the alternative, he has sought a direction to the respondents to absorb him in service in any other college or department run and managed by the Delhi Administration. He has also sought payment of arrears of salary since 23.4.1986 on the basis of equal pay for equal work.

8. In OA No.2027/92, Dr.M.M.S.Yadav has invoked the principle of equal pay for equal work applicable

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to permanent employees in Government service with effect from 23.4.1986. He has also sought an order restraining the respondents from removing him from service. This OA was filed on 5.8.1992. In the reply of the administration, it is stated that the applicant's services had been terminated with effect from 30.7.1992.

9. In OA No.2350/92, Dr.B.P.Gupta and Dr. Prem Parkash have invoked the principle of equal pay for equal work and prayed for payment of arrears of salary on that basis. They have also prayed for declaring the order dated 6.7.1988 as null and void. By this order, the services of the applicants were dispensed with on the ground that they had become surplus. This OA was filed on 14.8.1992. Accordingly, the question of limitation is also involved in this case. The applicants have filed an application seeking condonation of delay.

10. In OA No.777/93, Dr.B.L.Bhardwaj has prayed for quashing of the order dated 29.4.1989 whereby he was declared surplus with effect from 30.4.1989. He has also prayed for reinstatement in service with consequential benefits. He has also invoked the principle of equal pay for equal work and claimed balance of salary. This OA was filed on 18.4.1993. The question of limitation is involved. The applicant has not made any application for condonation of delay.

11. When the present applications came up for hearing before a Division Bench, the said Bench expressed reservations about the judgements

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cited before it, observing in paragraphs 8 and 9 of the referring order as follows:

> "8. We have gone through the judgements highlighted by the learned counsel for the applicant but we are in respectful disagreement with most of the observations made therein. While there are certain facts stated in the aforesaid order, there is also certain controversy on facts. The learned counsel for the applicant, further stressed that according to judicial discipline there should not be any discrimination as some of the employees have been given the benefit of the Redeployment of Surplus Staff under the Central Civil Services and Posts(Supplementary) Rules, 1989.
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> 9. Since we are not in full agreement with the decision given by the Coordinate Principal Bench in the OA No.1340/88 decided on 25.10.1991, we are of the opinion that the matter be placed before Hon'ble Chairman to refer the matter, if deemed proper, to a larger Bench for decision in this bunch of cases and also on the point of limitation which has been kept open."

12. From the facts stated hereinabove, it is apparent that the applicants started their employment under a private society. They now seek employment under the Delhi Administration on the ground that they are retrenched employees. The only provision of law on which they place reliance is the Rules. These Rules apply to Government staff rendered surplus. These Rules do not apply to redeployment of staff of private organisation which is rendered surplus. In order to claim benefit of the Rules, the applicants assert that by the scheme formulated by the Delhi Administration the applicants became employees of the Delhi Administration. They could become employees of the Delhi Administration only if a specific order had been passed in that behalf. No such order has been brought to our notice. They could also become employees of the Delhi Administration if the institution in which the applicants were employed was taken over by the Delhi Administration along with the staff. It is specifically noted in the minutes of 13.2.1987 that there is no provision

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of law under which the institution could be taken over by the Delhi Administration. Indeed, the institution could be taken over by the Delhi Administration only if a law existed in that behalf. Our attention has not been drawn to any provision of law under which the Delhi Administration could take over the institution in which the applicants were employed. The observation contained in the minute of 13.2.1987, therefore, cannot be said to be incorrect. Even if a provision of law existed for take over, the institution could become vested in the Delhi Administration by a positive act of take over. The Delhi Administration has not exhibited any positive act of take over. By releasing grant-in-aid in favour of the examining body also, the position of the applicants is not improved. The examining body was not a department of the Delhi Administration. It is a statutory body. The institution was not vested even in the examining body. Only grant-in-aid was released in favour of the examining body instead of the managing committee. This was done obviously because there was mis-management in the institution and if the grant-in-aid had been released in favour of the committee of management, there was likelihood of the applicants not getting salary despite performance of duty. The scheme was indeed formulated by officers of the Delhi Administration but it was not formulated by and on behalf of the Delhi Administration. The scheme was formulated only in discharge of the State's obligation to ensure law and order. The situation prevailing in the College, it appears, was volatile. The management was impervious to the grievances of the students and the staff. The students and the staff looked upon the Government for redress. The Government had no obligation to protect

or alter the service conditions of the applicants. It intervened only to bring about a state of normalcy which would ensure the students already admitted to the course to complete the same and to ensure payment of salary to the staff which was required to be retained in order to achieve the first objective. The scheme formulated is non-statutory.

13. A person becomes a Government servant only when he is recruited in accordance with prescribed rules. In the present case, the applicants do not claim to have been recruited to the post on which they continued to work till the final closure of the College, under any rule, regulation or order. Their salaries continued to be paid out of the special grant sanctioned by the Government. Grant was being given to the College earlier also. By release of grant and payment of salary therefrom the status of the applicants did not change.

14. We may now examine the basis on which the applicants in the present applications claim to have become employees of the Delhi Administration.

15. In paragraph 6.2 of J.P.Sharma's Original Application, the averment made is this:-

> "That the management of the S.D. Ayurvedic College was completely taken over by the Delhi Administration, Delhi with effect from 23.4.1986- Annexure-II- and thus the petitioner also became the employee of the respondent Delhi Administration, Delhi. The applicant since 23.4.1986 in continuation of his service is serving Delhi Administration without any break in service."

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Annexure-II referred to in this paragraph contains the minutes of the executive council held at Raj Niwas on 15.10.1986 . Present at the meeting were Sh.H.L. Kapur, Lt.Governor, Delhi; Shri Jag Pravesh Chandra, Chief Executive Councillor; Shri Bansi Lal Chauhan, Executive Councillor(Health); Shri Prem Singh, Executive Councillor(Development); Shri Kulanand Bhartiya, Executive Councillor(Education); Shri R.D. Kapur, Secretary(Medical); Shri I.S.Khan, Secretary(Finance); Shri B.S.Choudhary, Secretary, Executive Council. Relevant extract from the minutes has been reproduced hereinabove. These minutes are not final. The final minutes are of 13.2.1987 which have been reproduced hereinabove. These minutes specifically note that take over of the College is not legally permissible. The minutes of 15.10.1986 are of no avail to the applicants.

16. Part of the Annexure-II is the copy of written statement filed on behalf of the Delhi Administration in regular suit filed by Shri Sanatan Dharam Sabha in the court of Sub Judge Ist Class, Delhi. Specific reliance is placed upon paragraph 14 of the written statement wherein it is stated, "Taking into confidence of the students teachers Managing Committee it was decided that management of the College may be taken over. As such on 15.10.1986 the Management was taken over

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completely and a Governing Body was elected and a committee was appointed to frame rules and regulations." The assertion made in this paragraph does not amount to the staff of the college becoming employees of the Delhi Administration. Take over of management is one thing and take over of the staff is quite another. The Government may take over a private institution without taking over the staff and assets. From this assertion an inference of vesting of the college in the Government cannot be drawn. If the vesting of the college in the Government cannot be infered, the take over of the staff by the Delhi Administration also cannot be infered. Accordingly, this assertion is wholly insufficient to sustain the applicants' plea of having become Government servants w.e.f. 23.4.1986.

17. In paragraph 6.3 it is asserted, "That since 23-4-1986 the salary of the petitioner was also paid by the respondent Delhi Administration-Annex-III." Annexure-III is copy of the pay bill for the month of January, 1988. The original pay bill appears to be on printed form on which at the top is printed, "S. D. Ayurvedic College (Delhi Administration)". The bill is signed by Dr. R. C. Choudhury. Dr. R. C. Choudhury was the Principal of the college. Nothing turns upon this document. The mere mention of Delhi Administration in this form cannot amount to vesting of the college and the staff in the Delhi Administration. For such vesting specific order of the Government is required which, in the present case, is wanting.

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18. The papers relied upon by the applicants cannot be said to contain any admission of the Delhi Administration that the employees of the College became employees of the said Administration.

19. In an attempt to clothe minutes relied upon by the applicants with statutory status, the learned counsel for the applicants invites our attention to certain provisions of the Constitution. In particular, he refers to Article 162 and to Entry 25 of List III of the Seventh Schedule(Concurrent List). According to him, Entry 25 refers to education including medical education and, therefore, the Delhi Administration was competent to make law in respect of the matters before it and in view of Article 162 it was competent to the said Administration to issue administrative instructions in respect thereof. On this basis, it is pressed that the minutes of the meeting contain executive instructions referable to Article 162 of the Constitution.

20. Article 154 of the Constitution provides that executive power of the State shall be exercised in accordance with the Constitution. Article 166 lays down that the executive action of the State shall be expressed to be taken in the name of the Governor. Clause(3) of this Article prescribes that the order made in the name of the Governor shall be authenticated.

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The minutes of the meeting do not fit into this constitutional scheme. There is no assertion in the Original Applications that the minutes were authenticated. Accordingly, the reliance placed on Article 162 and Entry 25 is misconceived. Further, even if the minutes are treated to be statutory they do not, as already pointed out, contain any decision to take over the employees of the College.

21. The College was the property of the society. The society had the right to administer it and engage employees and settle terms of employment with them. Taking over of the College or its management and its employees without framing law would violate Article 300A of the Constitution which provides that no person shall be deprived of his property save by authority of law. The minutes relied upon by the applicants cannot constitute law within the meaning of Article 300A. The Executive Council, therefore, rightly restricted its role in alleviating the grievances of the students. In restricting its role, the Executive Council, has expressly avoided the take over the employees of the College. The services of the staff were indeed required for alleviating the grievances of the students. These services could be available to the Administration only on payment of salary to the staff. The Administration, therefore, took upon itself

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the burden of releasing funds for payment of salary.

22. The next item relied upon for claiming the status of Government servant is the order dated 21.11.1987 passed by the Sub Judge Ist Class, Delhi on the application for interim injunction. In this order, the learned Sub Judge has observed:

> " What has been shifted by the Delhi Administration is not the building but in fact the management has been taken over by the Delhi Administration of S.D.Ayurvedic College and once the management is taken over then it is for Delhi Administration to see where the college is to be run and no injunction as prayed for can be granted thereby putting a question mark before the careers of students of S.D.Ayurvedic College earlier run by plaintiff Sabha and now run by Delhi Administration because if the order regarding re-transfer of the college is passed it will amount to compel the students to join a disaffiliated institution and thereby causing irreparable loss and injury to them and also making the order of Delhi Administration to take over the management ineffective."

Earlier, the learned Judge had referred to the pleadings of the Delhi Administration where it was stated that the management of the College has been taken over by the Delhi Administration. The word "management" in the pleadings of the Delhi Administration and in the order had been used in the limited sense in which the responsibility was taken over by the Delhi Administration. The observations relied upon by the applicants do not amount to saying that the services of the applicants were also taken over by the Delhi Administration. This order is also of no avail to the applicants.

23. The applicants place strong reliance upon the judgement of the Tribunal in Smt.Nirmal Rai's

case. It is claimed that the judgement is in rem and, therefore, the Administration is bound to give benefit of that judgement to the applicants. Pleas of issue estoppel and estoppel by judgement have also been raised. We may first consider the basis on which the said judgement proceeds and grants relief.

24. A copy of the judgement of the Tribunal is Annexure 'A-1' to the rejoinder in Dr.J.P.Sharma's case. In the first 5 paragraphs, the Bench has narrated the history of the case. In para 6, it has negatived the Administration's plea that the applications were barred by the principle of res judicata . On behalf of the Delhi Administration, the plea of res judicata was raised on the basis of the dismissal of the writ petition by the Delhi High Court. The Delhi High Court has not given any reason for the dismissal and, therefore, it could not be said as to what finding was recorded by that court on the applicants' claim of having become Government servants. The Tribunal, therefore, held that the order of the Delhi High Court dismissing the writ petition would not operate as res judicata between the parties. After dealing with the question of res judicata, the Tribunal proceeds to consider the applicants' claim on merits in paragraphs 8 and 9 of the judgement wherein it is observed as follows:-

> " 8. We have gone through the records of the case carefully and have considered the rival contentions. The respondents have stated that the College has been finally closed down after April, 1991 examinations and that the employees of the College have been rendered

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surplus. The question whether or not the Delhi Administration is bound to protect the interests of the employees who would be rendered surplus, arises for consideration.

" 9. The fact of take-over of Management of the College has not been disputed. The take-over of the Management appears to have been formalised by a Government resolution which is not on record. The contention of the respondents that they took over the responsibility of the students only and not the staff, is not convincing. The basic thing in taking over of Management is that the employees of the erstwhile Management cease to be employees of the Management and they become the employees of the authority taking over from the Management which, in the instant case, is the Delhi Administration. Proper management of the School would not be possible without the assistance of the teaching and non-teaching staff."

(Emphasis supplied).

From the emphasised portion, it would appear that the Bench clothed the applicants of the cases with the status of employees of the Delhi Administration because it was of the opinion that transfer of employees was an automatic consequence of take over of the management of the College. With utmost respect to the Members of the Division Bench, we are unable to subscribe to this view. What is takenover by the Government will depend upon the terms of the instrument by which the take over is effected. In the present case, that instrument is the minutes of 13.2.1987. The Bench observed that the take over has been formalised by a Government resolution which is not on record. If the resolution was not on record, the only finding that could be recorded was that the applicants had failed to substantiate that they became Government servants. The finding of the applicants becoming Government servants, therefore, we say so with utmost respect to the Members of the Division Bench, is entirely conjectural. It is not based on either facts or law, as no law has been cited in support of the

proposition that change of status automatically follows the take over of management. The Bench has not adverted to Article 300A of the Constitution at all. It has not examined the impact of the sweeping statement made by it on the right of the owners of the College. We are not aware of any law under which the Government can take over a College or its management or its employees without framing any law.

25. The Bench appears to have come to the above conclusion also because" proper management of the School would not be possible without the assistance of the teaching and non-teaching staff." We may assume such assistance to be necessary, but then the question is whether there is no other mode of getting such assistance apart from taking over of the services of such staff ? Continued payment of salary out of the grant-in-aid released by the Administration is also a mode of getting such assistance and this mode was actually adopted in the present case.

26. If we have to expose the law of take over of an institution, we would say this: the institution is the property of those who own it. Right to run and manage the institution vests in the owners. Government may acquire the institution wholly or partly by framing law. Resolution adopted at meetings cannot be equated with law. Whether the institution has been acquired wholly or partly will depend upon the language of the law. There is no general presumption that take over of management necessarily entails take over of the employees also. The extent to which the take over affects the existing status of the institution and of its employees depends upon the terms of the instrument by which the take over is effected.

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27. The above propositions of law were not kept in view by the Division Bench which decided Smt.Nirmal Rai's case. In our opinion, the said case was not correctly decided.

28. The learned counsel for the respondents has invited our attention to Delhi School Education Act, 1973 and the Yoga Undertakings(Taking Over of Management) Act, 1977 and submitted that even a limited take over is permissible. We find substance in the statement of the learned counsel.

29. According to the learned counsel for the applicants, the judgement of the Tribunal was in rem and the Delhi Administration could not refuse to follow and enforce it. The argument is based on the direction contained in the operative order where the Delhi Administration has been enjoined to prepare an appropriate scheme. The operative part of the aforesaid order has been reproduced hereinabove. The direction to prepare an appropriate scheme has been given in order to ensure alternative placement of the applicants and not of all the employees of the institution generally. This is apparent from the observation" the applicants shall be given alternative placement..... in accordance with an appropriate scheme to be prepared by them". We are, therefore, unable to agree with the submission of the learned counsel for the applicants that the judgement of the Tribunal in Smt.Nirmal Rai's case is in rem; in our opinion, it is in personam.

30. The plea of issue estoppel or estoppel by judgement need not detain us long. There can be no estoppel against law. If a Bench of the Tribunal decides a case without taking law into consideration, it cannot be said that a Larger Bench cannot subsequently examine the correctness of the judgement. In fact, Larger

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Benches are constituted when there is conflict of decisions, when substantial question of law requiring authoritative pronouncement is raised and when a Bench before which an earlier judgement is cited expresses reservations about the correctness of the view taken in the earlier judgement. Several decisions were cited by the learned counsel for the applicants in support of the plea of issue estoppel and estoppel by judgement. These authorities may be examined.

30A. Smt.Radharani Dass w/o Narayan Chandra Ghose Vs. Smt.Binodamoyee Dassi w/o Abnash Chandra Ghosh (29) A.I.R 1942 Cal.92) reliance has been placed by the learned counsel upon observations contained at page 98 of the report. The observations are to the following effect:

> " Perhaps the shortest way to describe the difference between the plea of res judicata and an estoppel is to say that while the former prohibits the Court from entering into an inquiry at all as to a matter already adjudicated upon, the latter prohibits a party after the inquiry has already been entered upon, from proving anything which would contradict his own previous declaration or acts to the prejudice of another party who relying upon those declarations or acts, has altered his position. In other words res judicata prohibits an inquiry in limine, whilst an estoppel is only a piece of evidence." (emphasis supplied)

The emphasised portion clearly shows that the proposition of law laid down is that a party is debarred from pleading in subsequent litigation something which runs counter to his pleading in the earlier litigation on the basis of which the other party has altered his position. In the present applications, the Delhi Administration has not altered its stand. In the earlier litigation also

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the stand of the Delhi Administration was that the applicants were not employees of the Delhi Administration and in the present litigation also their stand is the same. This authority instead of helping the applicants helps the respondents.

31. In Sri Raja V.Sarvagnaya Kumara Krishna Yachendra Bahadur Vari, Rajah of Venkatagiri v. Province of Madres (A.I.R.(34) 1947 Madras 5), the Taxing Authority which in the previous Assessment Year assessed on the basis of certain fact was held estopped from proceeding to assess on a different basis in the subsequent year. The position of a Taxing Authority is entirely different from that of a court of a judicial authority. The Taxing Authority becomes a party to the assessment proceedings representing the State or its instrumentality. That is not the position of a court or a judicial Tribunal. If the principle of estoppel is applied against courts and judicial authorities a wrong judgement will continue to hold the field for ever and the whole concept of constituting Larger Benches to correct errors

(39)

in previous judgements will disappear. This authority has no application to the present case.

32. In Samavedam Sarangapani Ayyangar v. Kandala Venkata Narasimhacharyulu and anr.(A.I.R.(39) 1952 Madras 384) it was held that Section 11 of the Civil Procedure Code is not an exhaustive statement of the doctrine of 'res judicata' and the principle has a wider application than is warranted by the strict language of the section. In none of the present applications, the plea of res judicata has been raised. This authority is, therefore, inappropriate in the present case.

33. Mcllkenny v.Chief Constable of West Midlands Police Force and another ((1980(2 All ER 227) was a case in which subsequent litigation was held impermissible in respect of the same dispute between the same parties. Accordingly, this authority is also of no assistance to the applicants.

34. In Ambika Prasad Mishra Vs. State of U.P. and others(AIR 1980 SC 1762), it was observed that every new discovery or argumentative novelty cannot undo or compel reconsideration of a binding precedent. This observation was made in an entirely different context. It was made in the context of raising the plea of constitutional validity of an enactment whose validity

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had already been upheld by earlier judgement. No such situation arises in the present applications.

35. In Supreme Court Employees Welfare Association v. Union of India and others (AIR 1990 SC 334), it was observed that even an erroneous decision operates as res judicata. This dictum was laid down when the cause of action was the same. In the present applications, the cause of action is different from the one which enabled Smt.Nirmal Rai to approach the Tribunal. Further, this judgement deals with the question of res judicata which in the present applications has not been pleaded. In this judgement, it has also been observed that a decision on the question of jurisdiction cannot be res judicata in a subsequent suit or proceeding. In the case on hand, the question of jurisdiction is directly involved. If the respondents' plea that the applicants did not become Government servants and continued to be employees of a private society is upheld, the Tribunal will not, in view of Section 14 of the Administrative Tribunals Act, 1985(for short, the Act), have jurisdiction to entertain the applications. Section 14, which deals with the jurisdiction of the Tribunals does not confer jurisdiction upon the Tribunal to

entertain service matters of employees of private societies or organisations. This authority, therefore, instead of helping the applicants helps the respondents.

36. The learned counsel for the applicants has cited extracts from the following English publications on the law of evidence:

(1) Phipson on Evidence- Fourteenth Edition

(2) Evidence Cases and Materials- Third Edition by J.D.Heydon.

(3) The Modern Law of Evidence-Third Edition by Adrian Keane.

In view of the fact that Apex Court of the country has pronounced on the subject, it is not necessary to refer to the extracts cited by the learned counsel.

37. As against the authorities cited by the learned counsel for the applicants, the authorities cited by Smt.Avnish Ahlawat, learned counsel for the respondents, are more apt.

38. In Piara Singh V.The State of Punjab(AIR 1969 SC 961), it has been held by their Lordships:

> " For issue-estoppel to arise, there must have been distinctly raised and inevitably decided the same issue in the earlier proceedings between the same parties.
>
> (Emphasis supplied).

The applicants in the present applications were not parties to the applications filed by Smt.Nirmal Rai and Prakash Chand and, therefore, the present ligitation

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cannot be said to be between the same parties. The question of issue-estoppel, therefore, does not arise.

39. In Ravinder Singh v. State of Haryana(AIR 1975 SC 856) also the same proposition has been laid down in para 19 of the report wherein it is observed:

> " In order to invoke the rule of issue-estoppel not only the parties in the two trials must be the same but also the fact-in-issue proved or not in the earlier trial must be identical with what is sought to be reagitated in the subsequent trial."

40. The learned counsel for the respondents has invited our attention to certain passages in Sarkar on Evidence-Fourteenth Edition- to highlight when an earlier decision would not be open to review and when it will be so open. At page 1752, it is observed:

> " Where the decision of a higher court showed that the judge in a particular case had erred then it gives a right to the parties to relitigate as the circumstances amounted to an exception to the general principle of issue estoppel."

From this observation, it would appear that even when the earlier litigation was between the same parties the earlier decision may be reviewed if it is in conflict with the view expressed by a higher court. Applying the proposition by substituting the expression "higher courts" with "larger Benches", the decision rendered by a smaller Bench would be reviewable by a Larger Bench when it is constiuted to consider the correctness of the said judgement.

41. On the same page, there is an observation to the effect:

> "An issue estoppel is capable of binding non-parties also."

In support of the observation reference has been made to North West Water v.Binne(a firm),(1990) 3 All ER 547). From the case referred to, it appears that the proposition applies to a class action or determination of a dispute involving class or classes. By the observations reproduced hereinabove, the present Full Bench is not debarred from examining the correctness of the judgement rendered in Smt.Nirmal Rai's case.

42. At page 1753 under the heading " when matter may be reopened", it is observed:

> " The matter cannot be reopened (trial judge decision on the rights to house proprty between the wife and the mother) unless there are circumstances which make it fair and just that the issue should be reopened."

From this, it would appear that it is left to the court to decide whether it would be just and fair in the facts and circumstances of the case to reopen the earlier judgement. In the present applications, the issue raised is of fundamental character inasmuch as it touches upon the jurisdiction of the Tribunal to entertain the applications. We are, therefore, of the opinion that it is fair and just that the issue should be reopened.

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43. On the same page under the heading" Issue estoppel and jurisdiction", it is observed:

> " A party cannot be prevented by issue estoppel from putting before the court evidence to show that the court has no jurisdiction to make the order sought."

In view of this observation, there is no bar to the present Full Bench reconsidering the issue decided by the judgement in Smt.Nirmal Rai's case.

44. The learned counsel for the applicants has also challenged the reference of the applications to the present Full Bench. In other words, he has challenged the constitution of the Full Bench to hear the cases.

45. Section 5 of the Act deals with the composition of the Tribunals and Benches thereof. Section 5(4)(d) reads as follows:

> "Notwithstanding anything contained in sub-section(1), the Chairman-
>
> (d) may, for the purpose of securing that any case or cases which, having regard to the nature of the questions involved, requires or require, in his opinion or under the rules made by the Central Government in this behalf, to be decided by a Bench composed of more than two Members issue such general or special orders, as he may deem fit; "

Under this provision, a case may be assigned to a Bench comprising more than two Members in two situations: (1) where the Chairman, having regard to the nature of the questions involved, is of the opinion that the case should be decided by a Bench

of more than two Members and (2) where under the rules made by the Central Government, it is obligatory that the case be heard by a Bench consisting of more than two Members. In either of the situations, the case may be referred to a Bench consisting of more than two Members. The mode of reference is by a general or special order issued by the Chairman. In the case on hand, the reference of the applications to this Full Bench was made by a special order. The jurisdiction to refer the case under the above provision to a Bench consisting of more than two Members may be exercised by the Chairman on his own motion or on a reference made by a Single Member Bench or Division Bench. There are no conditions prescribed for the formation of an opinion by the Chairman for taking action under clause (d). Of course, when a reference is made by a Division Bench for constitution of a Full Bench, the Chairman may decline to form a Full Bench if he finds that the dispute raised is already covered by a Full Bench decision of the Tribunal of which notice has not been taken in the referring order or by a decision of their Lordships of the Supreme Court. Where the Chairman does not decline to constitute a Full Bench for the hearing of the case,

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it is obvious that he agrees with the opinion of the referring Bench that the case deserves to be heard by a Larger Bench. Under the scheme of the Act, the power to assign a case to a Bench, subject to the provisions of the Act and the rules framed thereunder, vests in the Chairman. Once the Chairman has assigned a Case to a Bench his action is unchallengable except on the ground of violation of any provision of the Act or the rules framed thereunder.

46. The learned counsel for the applicants submits that the referring Bench was obliged to formulate questions arising in the case and requiring opinion of the Full Bench. The use of expression "questions involved" in clause(d) does not lead to the conclusion, the learned counsel canvasses. It is not obligatory for the exercise of power under clause(d) that the referring Bench must formulate questions of law. There may be a case where the decision of the application may rest on a single issue. In such a situation, the entire case may be referred to a Full Bench without formulation of questions. The present applications, in our opinion, fall in

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this category. The material question on which the decision of the applications rested was whether the applicants acquired the status of Government servants. Once the finding on this issue is in the negative all other issues raised by the applicants become irrelevant. It is only when the finding on this issue is in favour of the applicants that the necessity may arise for considering the other questions raised. In our opinion, therefore, the reference to Full Bench is not incompetent and the present Full Bench is fully competent to hear and decide the applications completely.

47. Another argument which was pressed by the counsel applicants' with some vehemence was that the judgement of the Tribunal in Smt.Nirmal Rai 's case attained finality when the Delhi Administration's Special Leave Petition was dismissed by their Lordships of the Supreme Court by order dated 21.7.1992. The order dismissing the S.L.P is on record and the same reads as under:

" The Special Leave Petitions are dismissed."

Thus the Special Leave Petitions were dismissed without a reasoned order.

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48. What is binding on all courts within the territory of India, as provided in Article 141, is the law declared by the Supreme Court. The dismissal of a Special Leave Petition by an unreasoned order does not amount to declaration of law under Article 141 of the Constitution and the said order cannot be treated as an affirmance of the view expressed by the court or the Tribunal against whose order or judgement the Special Leave Petition was preferred. We are, therefore, unable to accept the submission of the learned counsel that the judgement in Smt. Nirmal Rai's case has attained finality to the extent that the correctness of that judgement cannot be examined by a Larger Bench. We have examined the correctness of that judgement and we have given reasons for our disagreement with that judgement. The judgement, as already noticed, is not based on any proposition of law. It has been rendered without examining the law of take over of a private institution by the Government and the effect of such take over on the status of the employees. To make the position clear we overrule the judgement in Smt. Nirmal Rai and Pra kash Chand's cases.

49. The view taken by us has the support of the decision of the Apex Court in Hari Singh v.State of Haryana (JT 1993(3) SC 73)/and of a Full Bench of the Tribunal in C.K.Naidu and others v.Union of India (OA No.817 of 1987 connected with other OAs decided on 18.9.1989 at Bangalore and reported in Bahri Brothers Compilation of Full Bench Judgements of the Central Administrative Tribunals(1989-1991-Volume II)). We are also supported by the decision of Supreme Court in Supreme Court Employees Welfare Association v.U.O.I.&ors.(AIR 1990 SC 334).

50. In view of our finding that the applicants did not become employees of the Delhi Administration their status remained that of employees of the society even though the payment of salary to them was made out of the funds released by the Delhi Administration. In view of Section 14 of the Act, they are not entitled to bring their grievance before the Tribunal. The applications, therefore, suffer from the lack of jurisdiction also.

51. In view of the above, the applications are liable to dismissed on merit. It is, therefore, not necessary to go into the technical plea of limitation.

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52. In view of the aforesaid discussion, the applications are dismissed but without any order as to costs.

(P.T.THIRUVENGADAM)
MEMBER(A)

(J.P.SHARMA)
MEMBER(J)

(S.C.MATHUR)
CHAIRMAN

3.7.95

SNS

Attested
5/7/95