Sultan Sadik vs Sanjay Raj Subba And Ors on 5 January, 2004

Equivalent citations: AIR 2004 SUPREME COURT 1377, 2004 (2) SCC 377, 2004 AIR SCW 278, 2004 (2) SRJ 435, 2004 (1) CTLJ 473, 2004 (1) SCALE 112, 2004 (1) ACE 69, 2004 (1) SLT 438, (2004) 15 ALLINDCAS 143 (SC), (2004) 1 JT 23 (SC), (2004) 3 SCT 395, (2004) 1 SUPREME 186, (2004) 1 RECCIVR 767, (2004) 1 WLC(SC)CVL 524, (2004) 2 ALL WC 1560, (2004) 1 SCALE 112, (2004) 15 INDLD 74

Bench: Chief Justice, S.B. Sinha

CASE NO.:
Appeal (civil) 8425 of 2002

PETITIONER:
Sultan Sadik

RESPONDENT:
Sanjay Raj Subba and Ors.

DATE OF JUDGMENT: 05/01/2004

BENCH:
CJI & S.B. Sinha.

JUDGMENT:

J U D G M E N T S.B. SINHA :

The appellant herein was elected from 110 Naoboicha Legislative Assembly Constituency in the State of Assam. An election petition was filed by the first respondent herein questioning the election of the appellant in terms of Sections 100 (1) of the Representation of the People Act, 1951 (hereinafter referred to and called as 'the said Act', for the sake of brevity), on the ground that he stood disqualified being the holder of a post of profit under the State of Assam.

BACKGROUND FACTS :

The appellant was said to have been appointed as an Assistant Teacher in 'Pabha Chariali M.E. Madarassa School' (hereinafter referred to as 'the said School'). He was working therein as an Assistant Teacher without any remuneration. Primary education is imparted in the said School. It appears that the primary education in the State of Assam used to be governed by three Acts, known as 'Assam Basic Education Act, 1954', Assam, Elementary Education Act, 1962' and 'Assam Elementary Education Act, 1968'.

> In terms of the 1968 Act, the Regional Boards of Elementary Education were constituted which took over the management of elementary schools and pre-primary schools. There also existed a State Board of Elementary Education constituted under Section 4 of Assam Elementary Education Act, 1968.
>
> The State thereafter enacted the Assam Elementary Education (Provincialisation) Act, 1974 (Assam Act No. VI of 1975) to provide for provincialisation of the elementary education in the State of Assam, in terms whereof the services of employees of the different categories of the State Board and Regional Boards for Elementary Education were to be provincialised for the purpose of bringing them under the direct management and control of the State Government. Pursuant to or in furtherance of the said Act, all assets and liabilities of the State Board and all Regional Boards vested in the State Government. In terms of Section 3 of the 1974 Act, the services of all teachers of elementary schools and pre-primary schools maintained by the Regional Boards of Elementary Education, all employees of the State Board of Elementary Education, all teachers appointed by the Regional Boards of Elementary Education and all ministerial staff appointed by the State Board of Elementary Education were provincialised under the said Act.

The consequence of vesting of the institutions maintained by the authorities under the aforementioned three Acts is provided in Section 4A thereof which reads thus :

> "Services of all teachers and employees who rendered services under the following repealed Acts and whose services are taken over by the Government on provincialisation on 5th September, 1975 under the principal Act shall be deemed to be services under the Government and shall qualify and count for pension and other retirement benefits."

Section 27 (1) of the 1974 Act provides for rule making power. Pursuant to or in furtherance thereof, the State of Assam made rules for regulating the terms and conditions of services of teachers of elementary schools and employees employed therein known as 'the Assam Elementary Education (Provincialisation) Service and Conduct Rules, 1981 (hereinafter referred to as 'the 1981 Rules').

> "Service" has been defined in Rule 2(xii) of the 1981 Rules to mean :
>
> "'Service' means service rendered under the State Board for Elementary Education constituted under the Assam Elementary Education Act, 1968 and service rendered under the Government before or after provincialisation both in respect of teachers and other employees."

Rule 3(i) of the said Rules reads thus :

> "Terms and Conditions : The services of all teachers of Elementary Education taken over by the Government on provincialisation on 5th September, 1975, as provided

under Section 3 of the Assam Elementary Education (Provincialisation) Act, 1974, as amended, shall be subject to the following conditions :

(a) Services rendered during the repealed Acts :-

The Assam Basic Education Act, 1954 (Act XXVI of 1954), the Assam Elementary Education Act, 1962 (Act XXX of 1962), and the Assam Elementary Education Act, 1968 (Act XVIII) of 1969) shall be counted towards pension and other retirement benefits provided such services are substantive and permanent.

Explanation : Services rendered temporarily against leave or deputation vacancies shall be excluded.

(b) They shall be entitled to such scales of pay and allowances and other benefits as may be admissible to the teachers of corresponding rank of the Government School services with effect from the date of provincialisation.

(c) They shall be superannuated on attaining 58 years of age."

The said school was not being maintained by any authority constituted under any of the aforementioned statutes. A notification, however, was issued on or about 19.11.1991 whereby and whereunder the said school was provincialised. Indisputably, the names of the appellant herein and a large number of teachers were dropped from the list of approved teachers and their services had not been provincialised under the provisions of the 1974 Act.

All Assam Middle English School Association of which the appellant is said to be a member filed a writ petition before the Assam High Court for regularization of services of the dropped teachers, which was marked as Writ Petition No.2833 of 1997. The said writ petition was dismissed where-against an appeal before the Division Bench was filed being Writ Appeal No.474 of 1997. The Division Bench while reversing the judgment of the learned Single Judge by reason of a judgment and order dated 13.11.1998, inter alia, directed :

"For the purpose of enabling the Government to complete process of regularization/provincialisation, the appellants association will furnish all necessary documents and particulars including names of concerned assistant teachers to the Director of Elementary Education, Assam, within two weeks from today. It will be open for the State Government to consider regularization/provincialisation of Assistant Teachers dropped at the time of provincialisation of ME and ME Madrassas during the year 1991-92 in addition to 1123 Assistant Teachers in case they find genuineness in the claims of such additional Assistant Teachers.

The impugned order dated 25.6.97 of the learned Single Judge passed in CR No.2833/97 is set aside and the writ appeal is disposed of in terms of the aforesaid directions. But considering, however, the facts and circumstances of the case, the

parties shall bear their own costs."

Pursuant to or in furtherance of the said directions, the services of 190 working teachers were sought to be regularized w.e.f. 24.4.1998 by an order dated 8.1.1999 stating :

> "...The services of the teachers may be regularized out of the posts already allotted to you vide this office letter No.EPD/OB/6/98/156 dated 24.4.98. Before issuing the regularization order to the working teacher concern the Dist. Ele. Edn. Oficer should authenticate the same. The name of the teachers and the name of the schools as furnished the list received from Govt. The regularization of service of working teachers should be made on seniority basis as per physical verification report of Dist. Ele. Edn. Officer concerned and were working before the date of provincialisation of school and duly approval of the posts against section. No teachers should be regularized in case of readjustment of schools as per need of enrolment without prior approval of this Directorate..."

It appears that the District Elementary Education Officer by a letter dated 16.12.1999 addressed to the Secretary to the Government of Assam allegedly informed the latter about regularization of 97 numbers of dropped teachers and brought to his notice that it may be necessary to take steps for regularization of other teachers by creating posts therefor. As, allegedly, the order of the High Court was not complied with, a contempt petition was filed wherein in his affidavit the District Elementary Education Officer alleged that in compliance with the order of the court dated 13.11.1998, the services of 105 dropped teachers were regularized w.e.f. 24.4.1998 by an order dated 30.10.2000, and therein the name of the appellant found place at Sl. No.28. It, however, appears that the appellant herein stopped attending the said school whereafter the Head Master of the said School by letters dated 2.5.2000, 12.6.2000 and 21.8.2000 asked the appellant to come to the school with sufficient cause for his absence failing which action would be taken against him. The appellant neither joined the School nor replied to the said notices. The Managing Committee of the said School adopted a resolution to the following effect :

> "Since Md. Sultan Sadique, Assistant Teacher has unauthorisedly been absent from his duty without any notice/intimation and it has been informed him on 2.5.2000, 12.6.2000 and 21.8.2000 by serving written notices. But no reply has been received from him in this regard.
>
> The matter has thoroughly been discussed in today's and unanimously decides that in the interest of the school, Md. Sultan Sadik, Assistant Teacher of the Pabha Charali M.E. Madrassa has been released from his post with immediate effect.
>
> It has also been decided to inform the authority concerned to take necessary action."

A copy of the said resolution was forwarded to the appellant herein and a copy thereof was sent to the District Elementary Education Officer and the Block Elementary Education Officer by the Head Master of the said School by letter dated 30.8.2000, which is to the following effect :

"Office of the Head Master and Secretary Pabha Charali ME Madrassa, P.O. Kutubpur : Dist. Lakhimpur Date : 30.8.2000 To Md. Sultan Sadik Assistant Teacher Pabha Charali M.E. Madrassa Subject : Release from service Sir, With reference to the subject cited above and due respect it has been informed you that the Managing Committee of Pabha Charali M.E. Madrassa vide its resolution No.1 passed in its meeting held on 25.8.2000 decided to release you from the post of Assistant Teacher from Pabha Charali M.E. Madrassa.

This decision will be implemented with immediate effect.

Sincerely yours, Sd/- illegible Seal : Headmaster Pabha Charali M.E. Madrass, PO Kutubpur Dist. Lakhimpur"

It is not in dispute that that the appellant herein despite receipt of the said purported order dated 30.8.2000 did not question the legality or validity thereof. He accepted the said order.

A notification for holding an election was issued on 16.4.2001. The appellant and the first respondent herein amongst others pursuant thereto filed their nomination papers. The first respondent herein filed objections to the nomination of the appellant on the ground that he was a Government employee and hence ineligible for contesting the election. The appellant herein took the stand that as despite order of regularization passed in his favour, he did not join duties nor received any salary, he was not a Government employee. The said plea was accepted. In the election, as noticed hereinbefore, the appellant was elected whereafter the election petition was filed by the first respondent.

ISSUES :

The High Court having regard to the pleadings of the parties, inter alia, framed the following issues:

"(5) Whether the Respondent No.1 on the date of his nomination held any office of profit ?

(6) Whether on the date of scrutiny of nomination papers and also on the date of election the Respondent No.1 was disqualified for being chosen to the Legislative Assembly of the 191(1)(A) of the Indian Constitution and Section 100(1)(a) and Section 100(1((d)(iv) of the Act ?"

HIGH COURT JUDGMENT :

The High Court in its impugned judgment held that : (i) an Assistant Teacher in the school whose services had been provincialised by the Government of Assam would be holder of an office of profit under the State of Assam, in view of the order of the High Court in Writ Appeal No.474 of 1997 whereby and whereunder the State was directed

> to consider cases of 1123 dropped teachers for regularization/provincialisation; (ii) As pursuant to or in furtherance thereof the services of several teachers including that of the appellant were regularized in terms of order dated 8.1.1999 (Ext.9) as also the order dated 30.10.2000 (Ext.14) wherein the name of the appellant found place at Sl. No.28, he would be deemed to have become an Assistant Teacher with retrospective effect from 24.4.1998.

Keeping in view the fact that the appellant was in Government service on 25.8.2000, the Managing Committee of the said school had no authority to terminate his services without approval of the appropriate authority of the Government thereabout; (iii) Although proceedings of the Managing Committee bore the endorsement of the Block Elementary Education Officer, it had no authority to terminate the services of the appellant. Even if the appellant was a dropped teacher, the question of the Managing Committee releasing or relieving him would not arise and, thus, the said order dated 25.8.2000 is of no legal effect; (iv) There is no explanation as to why even after 30.8.2000 the Head Master requested the District Elementary Education Officer to take action against the appellant for his absence from duty, which also shows that the Head Master considered him to be a regularized teacher on that day; (v) The letter dated 30.10.2000 must be presumed to have been served upon the appellant in terms of Section 114 of the Evidence Act; (vi) As the effect of regularization of provincialisation/regularization has been provided for under the Act, the non-joining or non-drawing of any salary by the appellant was irrelevant.

On the aforementioned findings, the election petition was allowed by the High Court.

SUBMISSIONS :

> Mr. V.A. Mohta, learned Senior Counsel appearing on behalf of the appellant would submit that having regard to the fact that the appellant had been served with notices on 2.5.2000, 12.6.2000 and 21.8.2000 by the School and furthermore in view of the order dated 30.8.2000 as also the resolution of the Managing Committee dated 25.8.2000, the purported order of regularization dated 30.10.2000 cannot be said to have been acted upon. The learned counsel would urge that the High Court committed a manifest error insofar as it failed to consider the purport of the letter dated 30.8.2000 (Ext.G), genuineness whereof is not in dispute.

Mr. Mohta would submit that as the appellant has accepted the said order of termination, the first respondent had no locus standi to question the same. Our attention in this behalf has also been drawn to the show cause filed by the District Elementary Education Officer, Lakhimpur in the contempt proceedings. The learned counsel would contend that as the order of regularization was passed only on 30.10.2000, the same was non est in the eye of law. It was further submitted that even from the said order dated 30.10.2000, it would appear that one Naseema Begum claimed seniority over the appellant on the ground that he superseded her and, thus, even the order of regularization did not attain finality. The learned counsel would submit that in terms of Rule 8 of 1981 Rules, a register is required to be opened at the beginning of service by the DI of School and as no service records had been opened the appellant cannot be said to be holder of an office of profit

under the State. Relying on or on the basis of a decision in R.P. Moidutty vs. P.T. Kunju Mohammad and Another [(2000) 1 SCC 481], the learned counsel would argue that the first respondent herein has failed to discharge his heavy onus. Mr. Mohta would also contend that the High Court committed an error in setting aside the election on mere surmises and conjectures.

Mr. U.N. Bachawat, learned Senior Counsel appearing on behalf of the respondents, on the other hand, would submit that the expression 'regularization' connotes that the services of a person who has irregularly been appointed would be made regular and, thus, such an order can be given to have a retrospective effect. Strong reliance, in this regard has been placed on State of Mysore and Another vs. S.V. Narayanappa [AIR 1967 SC 1071] and B.N. Nagarajan and Others etc. vs. State of Karnataka and Others etc. [AIR 1979 SC 1676].

The learned counsel would contend that as the institution stood provincialised in terms of notification dated 19.11.1991 issued by the State of Assam, as would appear from the deposition of the Head Master of the School, the consequences provided for in Section 4A of the Act and Rule 3 of the 1981 Rules shall ensue in terms whereof the appellant would be deemed to be a Government servant with retrospective effect from 24.4.1998. Mr. Bachawat would urge that keeping in view of the provisions of Section 87 of the Representation of the People Act and having regard to the pleadings of the parties as contained in Para 16 of the election petition and para 18 of the written statement wherefrom it would appear that the factum of provincialism had not been denied or disputed and, thus, the same would be deemed to have been admitted and, in that view of the matter it was not necessary for the High Court to consider the effect of mode of provincialisation of teachers. The learned counsel would contend that the role of the Managing Committee of a provincialised school being a limited one, the purported resolution dated 25.8.2000 and letter dated 30.10.2000 being wholly illegal and without jurisdiction , the same would be non est in the eye of law. Strong reliance in this behalf has been placed on Mysore State Road Transport Corporation vs. Mirja Khasim Ali Beg and Another [AIR 1977 SC 747]. The learned counsel would submit that in view of the aforementioned legal position, it was not even necessary for the authorities of the State of Assam to communicate the order of regularization dated 30.10.2000 insofar as the same would be deemed to be communicated as soon as it went out of the control of the District Elementary Education Officer. Reliance has been placed on State of Punjab vs. Khemi Ram [AIR 1970 SC 214]. Non- receipt of salary by the appellant is also not relevant in view of the fact that the State has made budgetary provision therefor according to Mr. Bachawat and in support of his aforementioned contention he relied upon M.V. Rajashekaran & Ors. vs. Vatal Nagaraj & Ors. [JT 2002 (1) SC 237].

ANALYSIS :

> The parties have not brought on records the offer of appointment, if any, issued in favour of the appellant herein by the Managing Committee of the said School at the time of his joining. Admittedly, he had been rendering his services in the School without any remuneration. The terms and conditions of his job are not known. It is admitted from the records that he fought election in the year 1998 and during the relevant period he discontinued going to the School but thereafter again he started going to the School. It is also not disputed he had not been going to the School for a

long time, as a result whereof the said letters 2.5.2000, 12.6.2000 and 21.8.2000 came to be issued . The authenticity of the letter of the Head Master dated 30.8.2000 is not in dispute.

The question in the aforementioned situation would be as regard the effect thereof vis-`-vis his purported regularization in terms of letter dated 30.10.2000 w.e.f. 24.4.1998.

LEGAL IMPLICATIONS :

The statutory provisions, as referred to hereinbefore, ex facie demonstrate that the 1974 Act was enacted for the purpose of the provincialisation of services of employees of different categories of the State Board and Regional Boards for Elementary Education and bringing them under direct management and control of the State Government.

The pleadings of the parties before the High Court do not reveal that the School in question was maintained by the Regional Board. Had it been so, the question of the appellant being a dropped teacher would not have arisen. Furthermore, no occasion would have also arisen for the State of Assam to issue a separate notification dated 19.11.1991 for provincialisation of the said school. We have also not been shown any provision of law in terms whereof such a notification could be issued. Be that as it may, the fact remains that the appellant herein was not recognised as a teacher working in the said School. He continued to render voluntary services without receiving any remuneration. It may be that such rendition of service by the appellant or the teachers similarly situated was on the hope or belief that their services would also be provincialised by the State one day or the other. But only by reason thereof, it is difficult to conceive that a relationship of a master and servant came into being by and between the management of the School and the appellant.

Even if such a relationship existed, the same was a fragile one. The services of the appellant in terms of the 1974 Act or the rules framed thereunder were not protected.. He did not enjoy any status; his services could be dispensed with by the Managing Committee of the said School at any time. Even after provincialisation of the School, keeping in view the admitted fact that the appellant was not an approved teacher, it must be held that he was merely rendering some services and, thus, either in law or on fact, no jural relationship between the State and the appellant came into being.

The High Court, however, proceeded on the basis that such a relationship existed. It opined that the order of the Division Bench dated 13.11.1998 was mandatory in character. The fact that the said order attained finality is not in dispute but a bare perusal of the directions issued therein would reveal that the Association was asked to furnish necessary documents and particulars including names of the concerned teachers so as to enable the State to consider and complete the process of regularization/provincialisation of ME Madrassas during the year 1991-92 in addition to 1123 Assistant Teachers in case they find genuineness of claims of such Assistant Teachers.

The order dated 8.1.1999 of the Director of Elementary Education stated that the services of the teachers should be regularized out of the posts already allotted to the concerned District Elementary Education Officer. He was asked to authenticate list of working teachers before regularization of services of such teachers. Despite that the name of the appellant appeared at Sl. No.56 thereof, such a direction was not final. The letter of the District Elementary Education Officer dated 16.12.1999, although discloses that he had finalized the list of 97 names, no order pursuant thereto had been issued. Even the order dated 30.10.2000 says that such purported provincialisation/regularization was provisional in nature. Such regularization was further subject to the outcome of order dated 25.9.2000 in Writ Appeal No.474 under C.R. No.2833 of 1997 in Contempt Case (C) No. 420 of 2000 of the High Court of Gauhati. From the list of dropped teachers purported to have been regularized from 24.4.1998, it appears that there existed a factual dispute as to whether the appellant superseded one Mst. Naseema Begum who had joined the said School on 1.4.1984 or not. The appellant contended that he even did not receive the said purported order of regularization. The High Court having regard to the provisions contained in Section 114 of the Evidence Act, was of the opinion that a presumption that he had received the said order could be drawn but it failed to take into consideration that such presumption stood rebutted when the appellant stated on oath that he did not receive such letter. In such an event, the onus was on the election petitioner to show that the same had been delivered or tendered to him by the postal peon of the concerned post office. It is not a case where the High Court directed regularization of services of the appellant. It is furthermore not a case where the posts were existing on the date on which the appellant joined the said School. The additional posts, admittedly, had been created by the State in the year 1998. Prior to 30.10.2000, thus, there existed no relationship of master and servant. The offer came to be made by the State to the appellant only on the issuance of the said order. The said offer was not only required to be communicated but also was required to be accepted by the appellant.

It is true that the school in question stood provincialised in terms of the notification issued by the State of Assam but the same by itself would not lead to the conclusion that the services of the Assistant Teachers working therein stood automatically provincialised. Had such consequences of provincialisation of the school been flown from the notification, it would not have been necessary for the teachers to approach the High Court. The very fact that even in terms of the order of the High Court, the genuineness of claims of the concerned Assistant Teachers was required to be verified is itself a pointer to the fact that no order of regularization could be passed pursuant to or in furtherance of the judgment of the High Court only.

It is not a case, it will bear repetition to state, where the State or its authorised officer made an appointment of an employee either on ad hoc basis or on daily wages or on contract basis or otherwise. Only in cases of such irregularities in the matter of appointment, the employees can be regularized in their services.

In S.V. Narayanappa (supra) whereupon Mr. Bachawat strongly relied, this Court stated that for the purpose of application of a Government order, it must be shown that the local candidate claiming the benefit thereof must satisfy that he was initially appointed prior to 31.12. 1959 and was in service on 1.1.1960 and continued till 22.9.1961. It was held :

> "...This construction finds support from sub-cl. (iii) which provides that local service prior to regularization would be counted for the purposes of leave, pension and increments though not for seniority as seniority was to be fixed from the length of service calculated from the date of regularization. It is manifest that unless the local service was continuous such service could not be taken into account for the purposes, in particular of pension and increments. How would increments, for example, be granted unless the service prior to such increments was continuous? The same consideration would also apply in the case of pension. It had, therefore, to be provided as has been done in sub-cl.
>
> (iv) that a break in service would not be condoned for a period howsoever short. Continuity of service is thus a condition for both sub-cls. 2 and 3..."

Yet again in B.N. Nagarajan (supra), this Court repelled the argument that regularization gives a colour of permanence and the appellants therein must be deemed to have acquired substantive rights stating :

> "...The argument however is unacceptable to us for two reasons. Firstly the words "regular" or "regularization" do not connote permanence. They are terms calculated to condone any procedural irregularities and are meant to cure only such defects as are attributable to the methodology followed in making the appointments. They cannot be construed so as to convey an idea of the nature of tenure of the appointments...."

It is interesting to note that therein this Court quoted with approval a decision of this Court in R.N. Nanjundappa vs. T. Thimmaiah [(1972) 2 SCR 799], which is to the following effect :

> "...If the appointment itself is in infraction of the rules or if it is in violation of the provisions of the Constitution illegality cannot be regularized. Ratification or regularization is possible of an act which is within the power of province of the authority but there has been some non-compliance with procedure or manner which does not go to the root of the appointment. Regularization cannot be said to be a mode of recruitment. To accede to such a proposition would be to introduce a new head of appointment in defiance of rules or it may have the effect of setting at naught the rules."

These decisions of this Court do not support the contention of Mr. Bachawat and in fact run counter thereto. It is not the case of the parties that there existed even semblance of any legal right of the appellant and there existed a relationship of employer and employee between the State and him. In law the appellant did not enjoy any status. His services had not been recognized by the State. The terms and conditions of his services were not governed by any statute and, thus, the same were not protected. The relationship of employer and employee, if any, between the State and the appellant was to come into being (may be with retrospective effect) only upon receipt of the offer of an appointment dated 30.10.2000 and acceptance thereof by him. A contract of service in absence of

any statutory provisions must be preceded by an offer and acceptance. A contract of service in absence of any statute, a fortiori is also governed by the provisions of the Indian Contract Act. It is, therefore, not correct to contend that the order dated 30.10.2000 was not required to be communicated for making a valid contract of service. It was absolutely necessary to communicate the said order to the appellant by the State, acceptance thereof whether expressly or by necessary implications by the appellant was also required. The appellant did not do it nor it is the case of the State or the statutory authorities that such a relationship had come into being.

The decision of this Court in Khemi Ram (supra) relied upon by Mr. Bachawat is not apposite as therein an order of suspension was in question. This Court in the said decision itself referred to its decision in State of Punjab vs. Amar Singh Harika [(AIR 1966 SC 1313], which stated that communication of an order dismissing an employee from service is imperative. If communication of an order for terminating the jural relationship is imperative, a fortiori it would also be imperative at the threshold.

The High Court proceeded to render its opinion on a wrong premise. It was not a case where the High Court having regard to the provisions contained in Article 191 of the Constitution of India vis-`-vis- Section 100 of the Representation of the People Act was required to determine a question as to whether the appellant being holder of an office of profit of the Government of the Assam was wrongfully dismissed from his services. Only holding of an office of profit under the Government of India or the Government of any State would render a candidate disqualified from contesting an election. Only in that event, the High Court could have been entitled to declare such election as a void one, but the question involved herein is not so.

What was necessary to be considered by the High Court was as to whether any relationship of employer and employee between the State of Assam and the appellant herein came into being. The submission of Mr. Bachawat, therefore, to the effect that the High Court had the requisite jurisdiction by invoking the doctrine of "implied powers"

> to go into the question of termination/dismissal/removal of the appellant does not arise for consideration in the instant case.
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> EFFECT OF RESOLUTION DATED 25.8.2000 :
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> Furthermore, even the de facto relationship of employer and employee (as contra-distinguished from de jure relationship) existed, the same came to an end in view of the aforementioned resolution of the Managing Committee of the said School and the communication thereof by the Head Master of the said School to the appellant in terms of letter dated 30.8.2000. An administrative order can be challenged in a proper forum only by the right person for a right remedy.
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> In Administrative Law, Eighth Edition by HWR Wade & C.F. Forsyth, at p. 293, it is stated :

> "An officer de facto is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law."

The question as to whether the relationship of the appellant with the said School could be validly terminated by the Managing Committee or not could have been raised only in an appropriate proceeding where the State was a necessary party.

An order may be void for one and voidable for the other. An invalid order necessarily need not be non est; in a given situation it has to be declared as such. In an election petition, the High Court was not concerned with the said issue.

In Administrative Law, Eighth Edition by HWR Wade & C.F. Forsyth, at page 309, it is stated :

> "Effect on third parties :
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> If an act or order is held to be ultra vires and void it is natural to assume that, being a nullity, it is to be treated as non-existent by all who would otherwise be concerned. But the judgment of a court binds only the parties to it, so that here also there are problems of relativity. Once again Lord Diplock has supplied the answer.
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> Although such a decision is directly binding only as between the parties to the proceedings in which it was made, the application of the doctrine of precedent has the consequence of enabling the benefit of it to accrue to all other persons whose legal rights have been interfered with in reliance on the law which the statutory instrument purported to declare.
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> In effect, therefore, the court's judgment of nullity operates erga omnes, i.e. for and against everyone concerned.
>
> Patent and latent invalidity In a well-known passage Lord Radcliffe said :
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> An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders.
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> This must be equally true even where the 'brand of invalidity' is plainly visible : for there also the order can effectively be resisted in law only by obtaining the decision of the court. The necessity of recourse to the court has been pointed out repeatedly in the House of Lords and Privy Council, without distinction between patent and latent defects. Lord Diplock spoke still more clearly, saying that it leads to confusion to use such terms as 'voidable' 'voidable ab initio', 'void' or 'a nullity' as descriptive of the status of subordinate legislation alleged to be ultra vires for patent or for latlent

> defects, before its validity has been pronounced on by a court of competent jurisdiction."

The appellant herein had accepted the order of termination. In that view of the matter, the High Court could not have proceeded on the basis that the order of termination was illegal. So long as the order of provincialisation was not issued, as noticed hereinbefore, there was no relationship of employer and employee between the appellant and the State of Assam. The appellant had been working subject to the discretion of the Managing Committee. His voluntary services could be refused to be taken by the Managing Committee of the School. The question would have been otherwise, had the purported service conditions of the appellant been governed by a statute or statutory rules, regularization of a teacher would be permissible in law, if he remains a teacher on the day on which such an order is passed. Had he been in service on 30.10.2000, the same could have been regularized with retrospective effect but he was not in service of the School and on that date the question of his regularization would not arise. It is only in that context the High Court was required to consider as to whether the validity or otherwise of the order of termination passed by the Managing Committee could have been the subject matter of a decision by an Election Tribunal.

The contention of Mr. Bachawat to the effect that services of an employee can only be terminated in certain situations could have been accepted if the jural relationship had come into being and not otherwise.

CONCLUSION :

> For the reasons aforementioned, we are of the opinion that the High Court has committed a manifest error in holding that the appellant being a holder of an office of profit disentitled himself from contesting the election in terms of Article 191 of the Constitution of India.
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> The appeal, therefore, is allowed. The judgment and order of the High Court under challenge is set aside. However, in the facts and circumstances of the case, there shall be no order as to costs.