

HIGH COURT OF ORISSA: CUTTACK.

W.P.(C) Nos.2207/ 2012, 29737/ 2011, 7579/ 2008 and 9406/ 2008

In the matters of applications under Articles 226 and 227 of the Constitution of India.

(in W.P.(C) No.2207/2012)

Dr. Shyamal Ku. Saha and others Petitioners

-Versus-

State of Orissa and others Opp. Parties.

For Petitioners : Mr. Jayanta Dash, Sr. Advocate
and Digambara Mishra

For Opp. Parties : Mr. Ashok Mohanty, Sr. Adv.,
Advocate General and
Mr. Sangram Das,
Addl. Standing Counsel
(for O.Ps.1 and 2)

M/s. B. Mohanty, T.K. Pattnaik,
A. Patnaik, S. Patnaik
Mr. Ashok Parija
(for O.Ps.5 & 7)

Mr. Sanjit Mohanty, Sr. Adv.
and N.C. Sahoo (for O.P.6)

M/s. P.K. Nanda, K. Badhei and
S. Mishra (for O.P.3)

M/s. B.D. Das, G. Sabar, J. Das and
D.P. Jena (for O.P.4)

(in W.P.(C) No.29737 of 2011)

Dr. Shyamal Ku. Saha Petitioner

-Versus-

State of Orissa and others Opp. Parties.

For Petitioner : M/s. Manoj Ku. Mishra
and D. Mishra

For Opp. Parties : Mr. Ashok Mohanty, Sr. Adv.,
Advocate General and
Mr. Sangram Das,
Addl. Standing Counsel
(for O.Ps.1 and 2)

M/s. P.K. Nanda, K. Badhei
and S. Mishra (for O.Ps.3)

M/s. B.D. Das, G. Sabar, T. Padhi
& D.P. Jena (for O.Ps.4 & 5)

M/s. Sanjit Mohanty
and N.Ch. Sahoo (for O.P.6)

(in W.P.(C) No.7579 of 2008)

Nishikanta Kar Petitioner

-Versus-

State of Orissa and others Opp. Parties.

For Petitioner : M/s. Manoj Ku. Mishra, P.K. Das
& D. Mishra

For Opp. Parties : Mr. Ashok Mohanty, Sr. Adv.,
Advocate General and
Mr. Sangram Das,
Addl. Standing Counsel
(for O.Ps.1 and 2)

M/s. Sanjit Mohanty
M/s. N.C. Sahoo & S. Nanda
(for O.Ps.3 to 6)

M/s. S.K. Das, R.N. Mishra-2
& S.K. Mishra (for O.P.7)

M/s. B. Routray, D. Mohapatra,
P.K. Sahoo, S. Jena,
Mr. Aswini Ku. Mishra,

M/s. J. Sengupta, D.K. Panda,
G. Sinha, A. Mishra, S. Mishra

M/s. Jayanta Ku. Rath and
D.N. Rath (for interveners)

(in W.P.(C) No.9406 of 2008)

Surendranath Mishra Petitioner

-Versus-

State of Orissa and others Opp. Parties.

For Petitioner : M/s. Budhadev Routray, S. Das,
S. Jena, P.K. Sahoo
and B.B. Routray

For Opp. Parties : Mr. Ashok Mohanty, Sr. Adv.,
Advocate General and
Mr. Sangram Das,
Addl. Standing Counsel
(for O.Ps.1 and 2)

PRESENT:

**THE HONOURABLE SHRI JUSTICE L. MOHAPATRA
AND
THE HONOURABLE SHRI JUSTICE B.K. PATEL**

Date of hearing – 10.5.2012 : Date of judgment –26.6.2012

B.K. PATEL, J. Adjudication of all these four writ applications depends upon the answer to the common question as to whether Stewart Science College, Cuttack (for short ‘the College’) is a Minority Educational Institution so as to be entitled to protection under Article 30 of the Constitution of India and Section 2 of the Orissa Education Act, 1969 (for short ‘the Act’).

2. Article 30 of the Constitution of India reads:

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

(1A) In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.

(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.”

3. Section 2 of the Act reads:

“Act not to apply to certain institutions- Nothing contained in this Act shall apply to educational institutions of their choice established and administered by minorities having the right under Clause (1) or Article 30 of the Constitution.

Provided that the State Government may, by notification, apply or adopt to an educational institution established and administered by minorities, such of the provisions of the Act; so however that the rights under Article 30 of the Constitution are not infringed.”

4. It is not disputed that Stewart Science College, Cuttack is an Aided Educational Institution within the meaning of Section 3(b) of the Act. The College was established prior to independence. The College is managed by Diocese of Cuttack, Church of North India (CNI), through its Governing Body. All the writ petitioners are working as Readers in the College and they do not belong to Christian Community.

5. In the Writ Petitions petitioners have assailed the Resolutions of Minutes of Eighteenth Ordinary Meeting of the Diocesan

Council dated 9th -11th July, 2007 and the Minutes of the Governing Body of the College dated 6.10.2007 providing the modalities for appointment of Principal of the College to the effect that the Diocese of Cuttack, CNI and the Secretary DEB shall interview and appoint/promote any qualified person as Principal either from the staff of the same College on the basis of “merit-cum-seniority” or from outside to fill up the vacancy, subject of course to the restrictions regarding qualifications to be followed as prescribed by the State. Also, the petitioners have assailed in Writ Petition nos.2207 of 2012, 7579 of 2008 and 9406 of 2008 appointment/ proposed appointment of the private opposite parties as Principal of the College. Apart from the Management of the College and private opposite parties, State of Orissa in the Department of Higher Education as well as Director, Higher Education have been impleaded as opposite parties.

6. Petitioners’ case is that by interim order dated 29.6.2009 passed in W.P.(C) No.7579 of 2008, which is still in force, it was directed by this Court that the senior most Reader of the College shall officiate as the Principal of the College purely on temporary basis but the same shall not confer any right on the officiating Principal. Petitioners are senior approved Readers in the College. Diocese of Cuttack, CNI, a society registered under the Societies Registration Act, has framed Constitution in accordance with which the College is under

the management of the Diocese through the Governing Body. The College receives full aid from the State Government. Therefore, provisions of Orissa Education Act as well as Rules, circulars and guidelines framed thereunder are binding in the matter of administration of the College. In fact, Article 7 of the Constitution of the College provides, *inter alia*, that the Governing Body shall exercise powers and discharge the function to ensure that the appointment of teaching and non-teaching staff are made in accordance the provisions made by the Management and in accordance with Act, rules and instructions of the department. The Governing Body is also required to submit reports and returns to the Director, Higher Education, Orissa. Further, Article 15 of the Constitution of the College provides, *inter alia*, that the Governing Body shall exercise such other powers and perform such other functions as may from time to time be assigned by orders of the Government. Not only it has adopted the practice but also Government has issued guidelines to the effect that senior most approved reader of aided college is to be appointed as Principal. In the year 2000 the Governing Body of the College sought for a clarification from the Government with regard to mode of appointment of Principal. In response thereto, it was clarified by letter dated 31.10.2000 of the Director, Higher Education that the posts of Principal in Non-Government Aided Colleges are being filled up from among the Readers

taking into consideration their seniority on the basis of approved date of initial joining as Lecturer and their efficiency. Accordingly, one Rabindra Sahoo, Reader in Physics being the senior most Reader in the College was appointed as the Principal. His appointment was approved by the Director, Higher Education under letter dated 18.12.2000 which is Annexure-5 to W.P.(C) NO.2207 of 2012. It is the further case of the petitioners that from the year 1973, when the College received aid from the State Government, the Governing Body applied and adopted the provisions under the Act as well as Rules and guidelines framed thereunder in the matter of appointment of Principal. It is also pleaded that though Clause-III of Article 6 of the Constitution of the College provides that the Principal shall be Christians appointed by the management, since 1973 till 2008 the then senior most Reader of the College has been appointed as Principal following the norms prescribed by the State Government and during that period no person belonging to Christian Community was appointed as Principal. However, in order to avoid appointment of senior most Reader as Principal, the impugned resolutions were passed declaring that Principal shall be appointed on the basis of "merit-cum-seniority" and in accordance with said resolutions private opposite parties who are junior to petitioners are being appointed as Principal.

7. Further contention of the petitioners is that Stewart Science College is not a Minority Educational Institution. According to them, the College was established by Baptist Missionary Society Corporation, London (BMSC), an overseas club or association in 1944. The present Management has not established the College. The College has not obtained any Minority Status Certificate (MSC) from the National Commission for Minority Educational Institutions (for short 'the Commission') as prescribed under Section 11 (f) of the National Commission for Minority Educational Institutions Act, 2004 (for short 'the 2004 Act'). In absence of any statutory declaration by the Commission, the management cannot claim minority status.

8. Mr. Jayanta Dash, learned Senior Advocate and other learned counsel appearing for the opposite parties reiterated averments made in the Writ Petitions in course of their argument. It was further argued that there being no dispute that BMSC has established the College, there is no scope for the Diocese of Cuttack or the Governing Body to urge that the College was established by any Indian citizen or residents of India belonging to any Minority Community. BMSC was a body incorporated under English Companies Act, 1867 having its registered office at Gloucester, London. The Corporation appointed the Baptist Church Trust Association (BCTA) as the trustee. Subsequently, another deed of transfer styled as transfer deed from trustee to trustee

under Article 59 (D) of the Bombay Stamp Act, 1958 and Article 62 (E) of the Indian Stamp Act, 1899 was executed on 15.1.1996. Under the deed, BCTA, a company registered under the Companies Act, 1913 bearing Registration No.651 of 1932-33 transferred the trusteeship to Church of North India Trust Association, another company incorporated under Section 25 of the Indian Companies Act bearing Registration No.7936 of 1975-76 having its office at New Delhi. All these facts are fortified by the counter affidavit filed on behalf of the Director, Higher Education in W.P.(C) No.7762 of 2004 in which it was categorically averred that the present management had not established the College for which it does not have the right to administer by availing the protection under Article 30 (1) of the Constitution of India. In the present W.P.(C) No. 7579 of 2008 also counter affidavit has been filed on behalf of the Director specifically asserting at paragraph 9 that resolutions passed by the Governing Body and Management in contravention of Government Resolution issued under the Act laying down manner of appointment of Principal in Non-Government Aided Colleges is to be ignored which is illegal and the Management is estopped from deviating from the prescribed rule framed by the Government since the college is receiving grant-in-aid on direct payment scheme. It was further argued that even in the deed of transfer from trustee to trustee Stewart Science College, Cuttack does not form

part of the schedule. So far as BMSC is concerned, it was strenuously contended that the same being an alien corporation/ overseas society, cannot claim a fundamental right guaranteed by the Constitution of India. Also, such right cannot be claimed by succession or inheritance. The present management having not established the College cannot claim the right to administer the College to the exclusion of State authority by availing protection under Article 30(1) of the Constitution of India and Section 2 of the Act. In fact, Government of Orissa reconstituted Governing Body of the College in the year 1972 vide letter dated 21.12.72. Therefore, Stewart Science College was treated like any other Non-Government Aided Educational Institution. Neither the Commission nor any Court has recognized minority status of the College.

9. It was also argued that reliance placed by the opposite parties on the decision of this Court in W.P.(C) No.7762 and 7763 of 2004 (**Governing Body of Stewart Science College and another -vrs.- State of Orissa and other reported in CLT (2008) Supp. 302**) rendered by learned Single Judge is misconceived. The decision was rendered on the basis of an erroneous contention to the effect that the Commission has recognized minority status of Stewart Science College. It was argued that the order of the Commission on which the learned

Single Judge solely placed reliance related to Christ College, Cuttack only.

10. It was further argued that practice of appointment of Non-Christian Readers as Principal of the College for about last 40 years goes to show that provision under the Constitution of the College for appointment of Christians as Principal is no more adhered to and the provision has fallen into disuse. Instead norms prescribed by the State Government for appointment of senior most Reader as Principal is being scrupulously followed after the College became an Aided Educational Institution. Learned counsel for the petitioners also drew attention of this Court to the counter affidavit filed by the Management of the College in O.J.C. No.11191 of 2000 to urge that the Management admitted therein that Stewart Science College being an Aided Educational Institution, appointment of Principal was effected on the basis of the direction of the State Government/ Higher Education Department. In course of argument, documents were placed to urge that in spite of availability of Christian candidates, Non-Christian Readers were appointed as Principal. It was further contended that the Governing Body of the College itself does not constitute of Christian members only. There are two teachers' representatives as well as nominees of Vice-Chancellor and Collector.

11. It was further argued that State Government has adopted contradictory and conflicting stands with regard to minority status of the College from time to time. Apart from W.P.(C) No. 7579 of 2008 in W.P.(C) NO.7762 of 2004 in counter affidavit filed on behalf of the Director, Higher Education, Orissa, it was specifically pleaded that the present management or Governing Body having not established the College, cannot claim the protection and administration as envisaged under Article 30 of the Constitution of India.

12. Further contention of the petitioners was that BMSC was registered under the English Companies Act and the corporation is, therefore, an eleemosynary corporation. Referring to Black's Law Dictionary it was argued that such corporations are instituted for the perpetual distribution of the alms or bounty of the founders and they do not perform ecclesiastical functions. Their functions are secular. Therefore, BMSC cannot be stated to have established the College out of any religious motive. It was also argued that neither BMSC nor CNI Trust Association, stated to be predecessors of the Management, being body corporates incorporated under Companies Act, cannot have minority status.

13. Separate counter affidavits have been filed in W.P.(C) No.2207 of 2012 on behalf of the State Government and the Director, Higher Education adopting identical stand that Stewart Science College,

Cuttack is an Aided Educational Institution established and administered by the religious minority of Christians under Article 30 (1) of the Constitution of India. Therefore, in view of Section 2 of the Act, provisions under the Act as well as Rules and guidelines made thereunder are not applicable to the College so as to infringe the independence of the Management to administer in the affairs of the College. Letters indicating manner of appointment of Principal in Aided Educational Institutions were clarificatory in nature and the general principle of appointment of senior most Reader as Principal in Aided Educational Institution has never been treated to be applicable to appointment of Principal in any minority institution. The clarification relates to all other Non-Government Aided Institutions. In the counter affidavit filed in W.P.(C) Nos. 7762 and 7763 of 2004 (supra) inadvertently a plea was taken that Stewart Science College was not protected under Article 30 of the Constitution of India or Section 2 of the Act. However, the College has been treated and recognized by the State Government to be an Aided Minority Educational Institution and protected under Article 30 (1) of the Constitution of India. It is categorically pleaded that the settled position is that freedom to choose the person to be appointed as Principal has always been recognized as a vital facet of the right to administer Minority Educational Institution and the right to choose the Principal is an important part of the right of

administration.

14. In the preliminary counteraffidavit and further counter affidavit filed by Diocese of Cuttack, CNI, the Management, it is asserted that this Court has declared that Stewart Science College, Cuttack is a Minority Educational Institution entitled to be protected under Article 30 (1) of the Constitution of India in the decision of **Governing Body of Stewart Science College and another –vrs.- State of Orissa and other** (supra). Therefore, the Management has absolute power over the administration of the institution. Constitution of the College registered under the Societies Registration Act expressly stipulates in Clause (III) of Article 6 that Principal of the College shall be Christians. Petitioner no.1 in W.P.(C) No.2207 of 2012 was a signatory to the memorandum of the Constitution in his capacity as Teachers' representative to the Governing Body. Placing reliance on the decisions of the Hon'ble Supreme Court in **T.M.A. Pai Foundation –vrs.- State of Karnataka** : AIR 2003 SC 355, in **P.A. Inamdar –vrs.- State of Maharastra** : AIR 2005 SC 3226 and in **Secretary, Malankara Syrian Catholic College –vrs.- T. Jose & Others** : AIR 2007 SC 570 it has been averred that right to choose Principal of the minority institution comes within the power and authority of the Management and it is part of the right of administration even if the institution is fully aided. In accordance with such settled legal principle the impugned resolutions

were passed laying down modalities for appointment of Principal on the basis of 'merit-cum-seniority' from among the Readers of the College. Accordingly, Readers of the College, including petitioner nos.1 to 3 in W.P.(C) No.2207 of 2012 were called to appear in the interview and the said petitioners having been found to be unsuccessful in the selection are prevented from assailing the impugned resolutions on the ground of acquiescence/estoppel. Under the Constitution of the College prescribed authorities have the power of recruitment of teaching and non-teaching staff. In the event there is no eligible Christian candidate available in the College, the said post is to be filled up from among the senior Readers on the basis of 'merit-cum-seniority'. There being an eligible Christian Reader, i.e., opposite party no.7 in W.P.(C) No.2207 of 2012, there is no basis for the petitioners to assail the impugned resolutions or appointment of said opposite party no.7 as Principal. In view of mandate of Article 30 (1) of Constitution of India, State Government or its functionaries have also no authority to encroach upon the Management. The Act is also not applicable to Minority Educational Institution in view of proviso under Section 2 of the Act. It is further contended that dispute in W.P.(C) No.7579 of 2008 relates to inter se seniority between two Readers not belonging to Christian Religion. As the petitioner as well as private opposite party no.7 in the said Writ Petition, who were contenders for seniority in the said Writ Petition,

have already retired, the Writ Petition has become infructuous. In view of mandate of Article 30 (1) of the Constitution of India and settled legal position, the Management of the College has laid down policy and modality of appointment of Principal by passing the impugned resolutions which were sent to the Director, Higher Education, Orissa for formal approval. A minority institution may on its own follow the principle or policy formulated by the State so long as the same does not contravene the institution's right to freedom of management. It is for a minority institution to voluntarily follow the principle or policy contained in any Statute or Rules. Decisions of the Management are sent to the State Government for formal approval only. General principles laying down modalities for appointment of Principal in Aided Educational Institutions prescribed by resolutions of the State Government are not binding on the College especially after a policy has been framed by the Management in that respect.

15. It is further averred that all along since the inception of the College the Management has been appointing Principal from Christian Community from the year 1944 to 1971. However, due to non-availability of Reader belonging to Christian Community, Non-Christians were appointed as Principal thereafter. The Rules framed by the Management clearly speak that if no suitable Christian candidate is available, interview shall be conducted among the eligible Readers of

the College. Therefore, appointment of opposite party no.7 in W.P.(C) No.2207 of 2012 is in consonance with the Constitution of the College and the policy of the Management. Government of Orissa has also in several communications recognized minority status of the College. In the matter of appointment of Principal, the sole criteria of the Management is to appoint any Reader as Principal who according to Management is suitable to carry out the objective and the philosophy of the institution.

16. It is categorically pleaded by the management that the College was established by BMSC/ BCTA the predecessor of Diocese of Cuttack, CNI. Diocese of Cuttack, CNI being the successor of the College is managing the institution for more than last four decades. In the Constitution of the College it has been clarified that the College was established in 1944 by BMSC, working in Orissa and its legal successor is the Diocese of Cuttack, CNI with effect from 29th November, 1970 after unification of the Churches in India. The College having been established and maintained by persons from amongst the Minority Christian Community is a Minority Educational Institution within the meaning of Section 2 (g) of the 2004 Act. Section 12(b) of the 2004 Act empowers the Commission to decide on the minority status of an educational institution as an appellate authority against the order of State Government or other authorities. In the present case, the State

Government having recognized the College to be a Minority Educational Institution, there is no necessity for obtaining any certificate or clarification regarding minority status of the College from the Commission. It was further contended that at no point of time a Non-Christian Reader was appointed as Principal when a suitable Christian Reader was available for the post. Citing instances, it has been pleaded that Mr. Simon Bihari and Mr. Ashit Kumar Choudhury, who were Christians, were not appointed as Principal as they were not Readers at the time when Non-Christian Principals were appointed. Appointment of opposite party no.7 in W.P.(C) No. 2207 of 2012 as Principal cannot be questioned as not only he is a Christian but also he is a Reader and has been found to be eligible and suitable to be appointed by the Management. Decision of the Management in this regard has already received formal approval of the Government. State Government also has never encroached upon the autonomy of the College by not including the teachers of the institution in the common transfer cadre on the ground that the College is being managed by the Minority Community.

17. Upon reference to copies of voluminous documents obtained from archives, it is contended that the Diocese, the present Management of the College, is a successor of the founder of the College. It is averred that Stewart School is original institution out of which Stewart Science College came into existence as a branch. In the year

1881, in order to cater to the physical, social, intellectual and spiritual growth of the Christian children of resident Europeans and Eurasians in Cuttack, the Stewart School (Protestant European School) was founded by the enterprise and generosity of Dr. William Day Stewart, the then Civil Surgeon of Cuttack. He constructed the class rooms out of his own fund and developed the School with the help of native Christians of India. In the year 1910, the School was recognized as a higher elementary school, and in the year 1924 the School achieved the standard of Junior Secondary School upon which the Cambridge Syndicate sanctioned the opening of a centre for Cambridge examination in the School. The Higher School Certificate classes, equivalent to the I.Sc., were opened in January, 1943. In the year 1943, possibility of converting the School to an Inter-Science College was explored. After inspection of the School by the Director of Public Instruction of Orissa, the Secretary was authorized to move the Utkal University for affiliation. Ultimately, Stewart Science College was started on 1st July, 1944 when both the School and College were one integral unit. The Baptist Mission, Cuttack Station Committee was in charge of the management of the institutions. In the same year, Academic Council of the Utkal University approved the recognition of the Senior Cambridge Examination. The Baptist Mission, Cuttack Station Committee consisted of twelve members out of which six were resident

Indians of foreign origin and six were Indian natives. All the six resident Indian members were received by the English Baptist Church, Cuttack on transfer basis. The Rev.D.T.Roberts worked as Principal till his death on 15th September, 1945 and Mrs.Roberts performed her duties in hostel and the School. Rev. W.W.Winfield was the Secretary of Stewart Science College. The first Governing Body of the Stewart Science College was formed and met on 20th December, 1946 which consisted of both resident Indians and native Indians. Documents received from archives reveal that the Baptist Missionary Society was established in the year 1792 having its Head Office at 44. AJC Bose Road, Calcutta. The Baptist Mission, Cuttack Station Committee was managing the Baptist Mission Society institutions of Cuttack with the participation of native Indians and resident Indians. Thus, there is ample material to prove that Stewart Science College was established by a group of Minority Community of Christians with the local participation of Cuttack Station Committee and Utkal Baptist Central Church Council. The parent Stewart School having been declared by the Commission as a Minority Educational Institution and the Government of Orissa having recognized the Stewart Science College as a Minority Educational Institution, there is no necessity for obtaining any declaration or certificate from the Commission. In the year 2004, while petitioner no. 1 in W.P.(C) No.2207 of 2012 was functioning as a

member of the Governing Body of the College, Government superseded the Governing Body. Members of the Governing Body in their meeting held on 10.8.2004 unanimously decided to challenge the order of supersession and, accordingly, W.P. No. 7762 of 2004 was filed before this Court. In the said writ petition, it has been decided by this Court that the State Government has no authority to interfere with the administration of the College which is a Minority Educational Institution under the Act.

18. Learned Advocate General appearing for the State Government contended that the College has been recognized by the Government as a Minority Educational Institution. Therefore, the College is entitled to the protection of the fundamental right guaranteed under Article 30 (1) of the Constitution of India as well as the protection under Section 2 of the Act. Exercise of right under Article 30 (1) of the Constitution of India includes the freedom to choose Principal of the Institution. Proviso to Section 2 of the Act categorically provides that the State Government may regulate certain affairs of Minority Educational Institutions with the rider that such regulatory powers should not have the effect of infringing the right guaranteed under Article 30 of the Constitution of India. Therefore, even if Stewart Science College is an Aided College, State Government cannot interfere with the right of the Management to choose the Principal as the office of

Principal is pivotal to the administration, management and maintenance of the College.

19. Mr. Sanjit Mohanty, learned Senior Advocate and other learned counsel appearing for the Management contended that there is no dispute regarding management of the College by the Diocese of Cuttack which represents members of Minority Christian Community. Baptist Missionary Society, London which had registered Office at Calcutta had founded the Stewart Science College through the local Station Committee at Cuttack involving local participation and foreigner Christian Missionaries residing in India prior to independence. Therefore, it cannot be said that the College was founded by aliens. Placing reliance on the decisions of the Hon'ble Supreme Court in **The Right Rev. Bishop S.K. Patrao and others -vrs.- The State of Bihar and others** : 1969 (I) SCC 863 and in **St. Stephen's College -vrs.- University of Delhi** : (1992) 1 SCC 558, it was argued that even if an institution was founded by foreigners, but if they were residing in India, protection under Article 30(1) of the Constitution of India cannot be denied on the ground that they were not born in India. The College was not directly established by BMSC from England. Records from the archives establish that founder members of the College consisted of six foreigners who were resident Indians and six Indian natives. There was adequate local participation in the establishment of the College. The

first Governing Body of the College formed on 20th December, 1946 consisted of foreigners who were residing in India as well as Rev. B. Pradhan and Sri Harihara Mohapatra who were native Indians. Petitioners in this case have raised disputed questions of fact with regard to establishment of College. As held by the Hon'ble Supreme Court in **Manager, St. Thomas U.P. School Kerala and another vs. Commissioner & Secy. to General Education Deptt. and others :** (2002) 2 SCC 497, such disputed questions of fact cannot be effectively adjudicated by Courts in exercise of writ jurisdiction. Therefore, the petitioners, who have assailed the minority status of the College should approach the Commissioner for ventilating their grievances.

20. It is further argued that the Management of the College never abandoned the practice of appointing eligible Readers belonging to Christian Community as Principal whenever such eligible Readers were available. Mr. Simon Bihari and Mr. Ashit Kumar Chowdhury could not be appointed as Principal as they were not Readers during the period when Non-Christian Principals were appointed in the College.

21. It was further argued on behalf of the Management that initially, Stewart Science College was established as a branch of Stewart School, Cuttack. The Commission has recognized Stewart School as Minority Educational Institution. Government of Orissa also does not dispute the status of Stewart Science College as Minority Educational

Institution. Therefore, there is no need for the College to obtain any declaration or MSC from the Commission. BMSC, London which had its registered office at Calcutta with local participation of Cuttack Station Committee of the Baptist Missionary Society established the College. Cuttack Station Committee which was associated with establishment of the College merged with other Station Committees in Orissa. Subsequently, it was named as Orissa Central Council and finally it was renamed as Utkal Christian Church Central Council (UCCCC). UCCCC, which represented Orissa Churches of Baptist Missionary Society origin, merged with CNI in 1970 and became Diocese of Cuttack and Diocese of Sambalpur. Accordingly, they took over the management of the Churches and institutions under UCCCC/ BMSC/BCTA and became a provincial constituent body of the BCTA. Thus, it was argued, BMSC, London established the College through Cuttack Station Committee of BMSC. The Christian Missionaries of England residing in India and local Christian residents of Cuttack jointly started the College in 1944 as a branch of Stewart School, Cuttack. BMSC, London appointed BCTA as new Trustee of Churches including the College. The Diocese of Cuttack being a constituent body of the BCTA in Orissa is the sole successor of the Churches and Institutions i.e. BMSC/BMS under its jurisdiction. The claim of Diocese of Cuttack and Diocese of Sambalpur to be the representative bodies of

BCTA has been upheld by the Hon'ble Supreme Court of India in Civil Appeal No. 1898 of 1987 arising out of SLP(C) No. 8332 of 1987 and Civil Appeal No. 1899 of 1987 arising out of SLP (C) No. 8384 of 1987 on the basis of report of Justice R.M.Dutta (Retd.) who was appointed as Special Officer by the Supreme Court to scrutinize the matter. In the background of such factual assertions it was strenuously contended that right to freedom to choose the Principal of the College by the Diocese cannot be a questioned by the petitioners.

22. In support of legal propositions canvassed by them learned counsel appearing for the parties placed reliance on a number of authoritative judicial decisions rendered by Hon'ble Supreme Court and some High Courts. It is well settled that under Article 30 (1), all minorities whether based on religion or language have been guaranteed the right to establish and administer educational institutions of their choice. As has been observed by the Hon'ble Supreme Court in **Manager, St.Thomas U.P.School Kerala and another vs. Commissioner & Secy. to General Education Deptt. and others** (supra), it is not in dispute that Christians form a minority in this country. The right of minorities under Article 30 (1) to establish and administer educational institutions has been judicially construed as defining minority institutions. What is expressed in terms of a right under Article 30(1) in fact describes the institution in respect of which

the protection of Article 30(1) can be claimed. It has, therefore, been held that unless the educational institution has been established by a minority, it cannot claim the right to administer it under Article 30(1).

23. Article 30(1) of the Constitution of India has since long been the subject matter of scrutiny and exposition in a number of decisions of the Hon'ble Supreme Court. In **Azeez Basha –vrs. Union of India** : AIR 1968 SC 662, it has been held:

“(19) xx xx xx xx xx It is to our mind quite clear that Article 30 (1) postulates that the religious community will have the right to establish and administer educational institutions of their choice meaning thereby that where a religious minority establishes an educational institution, it will have the right to administer that. An argument has been raised to the effect that even though the religious minority may not have established the educational institution, it will have the right to administer it, if by some process it had been administering the same before the Constitution came into force. We are not prepared to accept this argument. The Article in our opinion clearly shows that the minority will have the right to administer educational institutions of their choice provided they have established them, but not otherwise. The Article cannot be read to mean that even if the educational institution has been established by somebody else, any religious minority would have the right to administer it because, for some reason or other, it might have been administering it before the Constitution came into force. The words “establish and administer” in the Article must be read conjunctively and so read it gives the right to the minority to administer an educational institution provided it has been established by it. In this connection our attention was drawn to In re; The Kerala Education Bill, 1957, 1957 SCR 995: (AIR 1958 SC 956) where, it is argued, this Court had held that the minority can administer an educational institution even though it might not have established it. In that case an argument was raised that under Article 30(1) protection was given only to educational institutions established after the Constitution came into force. That argument was turned down by this Court for the obvious reason that if that interpretation was given to Article 30 (1) it would be

robbed of much of its content. But that case in our opinion did not lay down that the words “establish and administer” in Article 30 (1) should be read disjunctively so that though a minority might not have established an educational institution it had the right to administer it. It is true the Court spoke of Article 30 (1) giving two rights to a minority i.e. (i) to establish and (ii) to administer. But that was said only in the context of meeting the argument that educational institutions established by minorities before the Constitution came into force did not have the protection of Article 30 (1). We are of opinion that nothing in that case justifies the contention raised on behalf of the petitioners that the minorities would have the right to administer an educational institution even though the institution may not have been established by them. The two words in Article 30 (1) must be read together and so read the Article gives the right to the minority to administer institutions established by it. If the educational institution has not been established by a minority it cannot claim the right to administer it under Article 30 (1). We have therefore to consider whether the Aligarh University was established by the Muslim minority; and if it was so established, the minority would certainly have the right to administer it (*sic*).”

It has also been pointed out:

“(25). What does the word “established” in Article 30 (1) mean? In Bouvier’s Law Dictionary, Third Edition, Vol.I, it has been said that the word “establish” occurs frequently in the Constitution of the United States and it is there used in different meanings; and five such meanings have been given, namely- (1) to settle firmly, to fix unalterably, as to establish justice; (2) to make or form: as, to establish a uniform rule of naturalization; (3) to found, to create, to regulate: as, Congress shall have power to establish post offices; (4) to found, recognize, confirm or admit as, Congress shall make no law respecting an establishment of religion; (5) to create, to ratify, or confirm, as We, the people, etc., do ordain and establish this constitution. Thus it cannot be said that the only meaning of the word “establish” is to be found in the sense in which an eleemosynary institution is founded and we shall have to see in what sense the word has been used in our Constitution in this Article. In Shorter Oxford English Dictionary, Third Edition the word “establish” has a number of meanings i.e., to ratify, confirm, settle, to found, to create. Here again founding is not the only meaning of

the word “establish” and it includes creation also. In Webster’s Third New International Dictionary, the word “establish” has been given a number of meanings, namely, to found or base squarely, to make firm or stable, to bring into existence, create, make start, originate. It will be seen that here also founding is not the only meaning; and the word also means “to bring into existence”. We are of opinion that for the purpose of Article 30 (1) the word means “to bring into existence”, and so the right given by Article 30 (1) to the minority is to bring into existence an educational institution, and if they do so, to administer it. We have therefore to see what happened in 1920 and who brought the Aligarh University into existence.”

In the above cited decision issue before the Hon’ble Supreme Court was as to whether Aligarh Muslim University was established by the Muslim minority.

24. Admittedly, Stewart Science College was established prior to the enactment of the Constitution of India when there was no settled concept of Indian citizenship. In similar circumstances, in the decision of **St. Stephen’s College –vrs.- University of Delhi** (supra), upon reference to the decision of **The Right Rev. Bishop S.K. Patrao and others –vrs.- The State of Bihar and others** (supra) and other earlier decisions, Hon’ble Supreme Court held:

“28. There is by now, fairly abundant case law on the questions as to “minority”; the minority’s right to “establish”, and their right to “administer” educational institutions. These questions have arisen in regard to a variety of institutions all over the country. They have arisen in regard to Christians, Muslims and in regard to certain sects of Hindus and linguistic groups. The courts in certain cases have accepted without much scrutiny the version of the claimant that the institution in question was founded by a minority community while in some cases the courts have examined very minutely the proof of the establishment of the institution. It should be borne in mind

that the words “establish” and “administer” used in Article 30 (1) are to be read conjunctively. The right claimed by a minority community to administer the educational institution depends upon the proof of establishment of the institution. The proof of establishment of the institution, is thus a condition precedent for claiming the right to administer the institution. Prior to the commencement of the Constitution of India, there was no settled concept of Indian citizenship. This Court, however, did reiterate that the minority competent to claim the protection of Article 30 (1) of the Constitution, and on that account the privilege of establishing and maintaining educational institutions of its choice, must be a minority of persons residing in India. They must have formed a well defined religious or linguistic minority. It does not envisage the rights of the foreign missionary or institution, however, laudable their objects might be. After the Constitution, the minority under Article 30 must necessarily mean those who form a distinct and identifiable group of citizens of India. Whether it is “old stuff” or “new product”, the object of the institute should be genuine, and not devious or dubious. There should be nexus between the means employed and the ends desired. As pointed out in *A.P. Christian Educational Society* case ((1986) 2 SCC 667) there must exist some positive index to enable the educational institution to be identified with religious or linguistic minorities. Article 30 (1) is a protective measure only for the benefit of religious and linguistic minorities and it is essential, to make it absolutely clear that no ill-fit or camouflaged institution should get away with the constitutional protection.”

25. In **The Right Rev. Bishop S.K. Patro and others –vrs.–**

The State of Bihar and others : AIR 1970 SC 259, it was held by the

Hon’ble Supreme Court:

“19. It is unnecessary to enter upon an enquiry whether all the persons who took part in establishing the School in 1854 were “Indian citizens”. Prior to the enactment of the Constitution there was no settled concept of Indian citizenship, and it cannot be said that Christian Missionaries who had settled in India and the local Christian residents of Bhagalpur did not form a minority

community. It is true that the minority competent to claim the protection of Article 30(1) and on that account the privilege of establishing and maintaining educational institutions of its choice must be a minority of persons residing in India. It does not confer upon foreigners not resident in India the right to set up educational institutions of their choice. Persons setting up educational institutions must be resident in India and they must form a well-defined religious or linguistic minority. It is not however predicated that protection of the right guaranteed under Article 30 may be availed only in respect of an institution established before the Constitution by persons born and resident in British India.

20. xx xx xx xx xx Art.30 guarantees the right of minorities to establish and administer educational institutions: the article does not expressly refer to citizenship as a qualification for the members of the minorities. xx xx xx xx.

21. We are also unable to agree with the High Court that before any protection can be claimed under Article 30 (1) in respect of the Church Missionary Society Higher Secondary School it was required to be proved that all persons or a majority of them who established the institution were "Indian citizens" in the year 1854. There being no Indian citizenship in the year 1854 independently of the citizenship of the British Empire, to incorporate in the interpretation of Article 30 in respect of an institution established by a minority the condition that it must in addition be proved to have been established by persons who would, if the institution had been set up after the Constitution, have claimed Indian citizenship, is to whittle down the protection of Article 30 in a manner not warranted by the provisions of the Constitution."

26. Circumstance of receipt of grant-in-aid by the Stewart Science College has been canvassed by the petitioners as a ground to reject the claim of minority status. However, provision under Article 30(2) itself contemplates grant-in-aid to Minority Educational Institution. Also, it is now well settled that receipt of aid does not alter the nature or character of the Minority Educational Institution. In

Secy., Malankara Syrian Catholic –vrs.- T. Jose and others : (2007)

1 SCC 386, it has been observed and held by Hon’ble Supreme Court at paragraph-17:

“In T.M.A. Pai ((2002) 8 SCC 481) this Court made it clear that a minority institution does not cease to be so, merely on receipt of aid from the State or its agencies. In other words, receipt of aid does not alter the nature or character of the minority educational institution receiving aid. Article 30 (1) clearly 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 minorities to establish and administer educational institutions. But all conditions that have relevance to the proper utilization of the aid by an educational institution can be imposed. xx xx xx xx xx.”

In the decisions in **T.M.A. Pai Foundation –vrs.- State of Karnataka** (supra) and **P.A. Inamdar –vrs.- State of Maharashtra** (supra) also, nature of regulatory control that may be exercised on Aided Minority Educational Institutions by the Government has been pointed out.

27. It has also now been authoritatively well settled that fundamental right guaranteed under Article 30 includes autonomy and independence of a Minority Educational Institution to choose and appoint the Principal. In **Secy., Malankara Syrian Catholic –vrs.- T. Jose and others** (supra), it has been held by Hon’ble Supreme Court:

“27. It is thus clear that the freedom to choose the person to be appointed as Principal has always been recognized as a vital facet of the right to administer the educational institution. This has not been, in any way, diluted or altered by T.M.A. Pai ((2002) 8 SCC 481). Having regard to the key role played by the Principal in the management and administration of the educational institution, there can be no doubt that the right to choose the Principal is an

important part of the right of administration and even if the institution is aided, there can be no interference with the said right. The fact that the post of the Principal/Headmaster is also covered by State aid will make no difference.”

28. In the present case, it is not in dispute that the present Management of the Stewart Science College comprising of the Diocese and Governing Body represent a group of Minority Christians. However, petitioners contend that the Management has long since abdicated and abandoned the practice of appointing Christian only as Principal in spite of availability of eligible Christians. It was argued that provision incorporated under Article 6 (III) of the College Constitution for appointment of Christians as Principal has not been followed for about four decades. Therefore, by long disuse of practice the Management has lost the right to freedom of appointing Christians only as Principal. The Management is bound to follow the guidelines prescribed by the State for appointment of senior most approved Reader as Principal of the College as is being done for a considerably long period. It was argued that in view of doctrine of desuetude even statutory provisions become a dead letter and cannot be followed if the same is not followed for a long period of time. In this context, petitioners placed reliance on the decision of Hon’ble Supreme Court in **Municipal Corporation for City of Pune and Another -vrs.- Bharat Forge Co. Ltd. and others :** (1995) 3 SCC 434 wherein it has been held:

“34. Though in India the doctrine of desuetude does not appear to have been used so far to hold that any statute has stood repealed because of this process, we find no objection in principle to apply this doctrine to our statutes as well. This is for the reason that a citizen should know whether, despite a statute having been in disuse for long duration and instead a contrary practice being in use, he is still required to act as per the “dead letter”. We would think it would advance the cause of justice to accept the application of doctrine of desuetude in our country also. Our soil is ready to accept this principle; indeed, there is need for its implantation, because persons residing in *free* India, who have assured fundamental rights including what has been stated in Article 21, must be protected from their being, say, prosecuted and punished for violation of a law which has become “dead letter”. A new path is, therefore, required to be laid and trodden.”

29. It is not disputed by the Management of the College that Non-Christians were appointed as Principal from the year 1971 to 2012. However, it was urged that appointment of Non-Christians as Principal in the College was necessitated because of non-availability of eligible Readers belonging to Christian Community. Thus, the Management has raised a controversy which requires adjudication of a disputed questions of fact with regard to availability or non-availability for about 40 years of teachers belonging to Christian Community in the College who could have been appointed as Principal.

30. Moreover, the most controversial issue between the parties in the present case is with regard to establishment of the College. The College was established in the year 1944. As has already been pointed out it has been well settled that the words “establish and administer” in Article 30 (1) must be read conjunctively. Therefore, the Article gives

the right to the minority to administer an educational institution established by it. Parties are in agreement that the College was established by BMSC, London. Petitioners' case is that BMSC, London was a body incorporated under the English Companies Act, 1867 having its registered office at Gloucester, London. BMSC appointed BCTA as a trustee and thereafter BCTA executed another deed of transfer styled as transfer deed from trustee to trustee in favour of CNI Trust Association. According to petitioners BMSC was an eleemosynary corporation not dedicated to ecclesiastical or religious affairs but to secular matters. It is also the case of the petitioners that right of management of the College cannot be claimed by way of succession by body corporates. Moreover, BMSC was an alien corporation/ overseas society. Management does not dispute establishment of the College by BMSC. BMSC, BCTA and CNI are stated to be predecessors of the Diocese of Cuttack. Diocese of Cuttack is managing the College by way of succession for more than last four decades. According to the Management Stewart Science College, Cuttack is an extended branch of Stewart School, Cuttack which was founded by Dr. William Day Stewart. Also, according to the Management BMSC having its Head Office in Culcutta was established in the year 1792. Diocese of Cuttack came to take over management of the College from BMSC, London through the local Station Committee at Cuttack involving local participation, Orissa

Central Council, UCCCC, BCTA and CNI. BMSC, London appointed BCTA as a new trustee of Churches including the College. Diocese of Cuttack being a constituent body of the BCTA in Orissa is the sole successor of the Churches and Institutions i.e. BMSC/BMS under its jurisdiction. Thus, parties have raised disputed questions of fact with regard to religious nature of BMSC, London; with regard to origin, genesis and succession of the College and with regard to the claim of the Management to have established the College through its predecessors. Voluminous documents including documents from archives are being relied upon. Therefore, obviously, the claim of the present Management to have established the College as a Minority Educational Institution also requires adjudication of disputed questions of fact.

31. In **Manager, St.Thomas U.P.School Kerala and another vs. Commissioner & Secy. to General Education Deptt. and others** (supra) in which the critical issue to be determined was as to whether the appellant School was established by a minority, Hon'ble Supreme Court has categorically disapproved adjudication of similar disputed questions of facts by Courts in exercise of writ jurisdiction. It has been held:

“6. At the outset, we record our disapproval of the High Court entertaining the writ application at all. Both the Single Judge and the Division Bench have determined what

were clearly disputed questions of fact without the benefit of a full-scale trial. The appellants have drawn our attention to evidence which, according to them, conclusively proves that the School was a minority institution and which was not considered by the High Court. We do not propose to commit the same mistake as the High Court. Given the nature of the dispute, the issue of the status of the School should have been left to the fact-finding authorities whether executive or judicial for determination in jurisdictions equipped for the purpose. xx xx xx”

Thus, in view of dictum of the Hon’ble Supreme Court it would not be proper on our part to commit error by venturing into deciding disputed questions of fact involving issues like the nature of BMSC, the succession of College by Diocese, the availability or non-availability of eligible Christian Teachers to be appointed as Principal for a long period of about 40 years, etc.

32. Much reliance was placed by the opposite parties on the common judgment of this Court in W.P. (C) Nos. 7762 and 7763 of 2004 (**Governing Body of Stewart Science College, Cuttack and another and Governing Body of Christ College, Cuttack and another –vrs.- State of Orissa and others**) (supra) passed by learned Single Judge, to urge that minority status of the College has been judicially settled. In the said decision it has been held by the learned Single Judge as follows:-

“10. The main ground on which the State resists the rights of the petitioners to manage the Stewart Science College, Cuttack is that the said College was established in

the year 1944 by the Baptist Church Trust Association and its management was handed over to the Diocese of Cuttack, a creature of the Church of North India. Thus according to the opposite parties, the Diocese having not established this College has no right to manage the same. But then according to learned counsel for the petitioners, the Baptist Church Trust Association is the Apex Body of which Diocese of Cuttack is a branch. Be that as it may, the dispute as to whether the Stewart Science College and Christ College are Minority Institutions or not is no longer in dispute, as would be evident from the letter bearing number 4010/83- 16179 dated 18.3.1983 (Annexure-II) issued by the Director of Public Instruction (Higher Education), Orissa, as it then was, addressed to the Secretary to Government of Orissa, Education Department wherein it was clearly mentioned that the Stewart Science College, Cuttack and Christ College, Cuttack being Minority Institutions are not governed under the Orissa Education Act, 1969 and the Rules framed there-under as those two institutions had been established and were being administered by Christian Minority. In spite of the said decision, it appears, the dispute as to whether the aforesaid two Colleges were Minority Institutions or not cropped up now and then, and the same was referred to the National Commission for Minority Educational Institutions, Government of India. After receiving the said reference notices were issued by the National Commission and after due consideration of the matter, the National Commission, headed by Justice M.S.A. Siddiqui as its Chairman with B.S. Ramoowalia as Member, on 11.9.2007 ordered as follows:-

“It is stated in Col.9(d) of the Petition that the petitioner-institution has been recognized by the State Government as a Minority Educational Institution. Reliance has been placed on order dated 18.3.83 issued by the Directorate of Public Instruction (H.E.), Orissa. Since the State Government has already recognized the petitioner-institution as a Minority Educational Institution, there is no need to issue another certificate by this Commission in this regard. The petition is disposed of accordingly. Copy of the order be sent to the parties.”

33. It is apparent from the above that the very same question of the Diocese to have not established the College was raised before the learned Single Judge. However, learned Single Judge arrived at the

decision basing solely on the letter of the Director, of Public Instruction (Higher Education), Orissa bearing No.4010/83-16179 dated 18.3.1983 and the order of the Commission dated 11.9.2007. So far as order of the Commission is concerned, Annexure-9 to W.P.(C) No.2207 of 2012 fortifies the contention of the petitioners that order of the Commission related to Christ College, Cuttack only. Opposite parties have not placed any material to indicate that the order of the Commission dated 11.9.2007 related to Stewart Science College, Cuttack. So far as the letter dated 18.3.1983 of Director of Public Instruction (Higher Education), Orissa is concerned, the first para of the letter addressed to the Secretary to Government of Orissa in the Education Department reads:

“I am directed to say that the Stewart Science College, Cuttack and Christ College, Cuttack being Minority Institutions are not governed and or Orissa Education Act, 1969 and rules framed there under as those the Institutions have been established and being administered by the Christian Minority. They are making the appointments of Lecturers by their own selection without taking candidates from the Adhoc merit panel prepared by this Directorate as well as from the Selection Board on the grounds that they are Minority Institutions. Although these two Institutions are being managed and administered by the Minority Community, the Staff of the Institutions are receiving direct payment since the date of its introduction in the aided Colleges. In this connection it may be mentioned here that previously Government in their letter No.22369/EYS, dated 27.08.79 had decided that the payment of salaries to the Staff of these two Institutions through direct payment system should be stopped, a copy of the order based on this decision was communicated to both the Institutions in this Directorate Memo No.32484 dtd.25.07.79. But subsequently Government in their

No.27085/EYS, dated 03.08.79 have kept the said orders in abeyance and decided that pending finalization of the matter, the existing arrangement for making payment of salaries to the staff directly may continue Govt. order in the matter is awaited.”

In the last paragraph request has been made that Government order in the matter may be communicated at an early date. It is also worthwhile to observe that State Government have taken conflicting and contradictory stands with regard to the status of the Stewart Science College in different Writ Petitions. In W.P.(C) No.2207 of 2012 stand of the Government is that Stewart Science College is a Minority Educational Institution entitled to protection under Article 30. However, in W.P.(C) No.7762 of 2004 stand of the Government was that the present Management or Governing Body having not established the College cannot claim the protection of administration of the College as envisaged under Article 30 of the Constitution. In fact, learned Single Judge has categorically observed in the decision extracted above that the main ground on which the State resisted the rights of the Management was that the said College was established by BCTA and its management was handed over to the Diocese and as such the Diocese having not established the College has no rights to manage the institution. Also, in the counter affidavit filed on behalf of Director, Higher Education in W.P.(C) No.7579 of 2008 it has been pleaded that the impugned resolution passed by the Management in contravention of

Government Resolution dated 9.3.1999 issued under the Act prescribing that Principals of Non-Government Aided Colleges may be appointed from among Readers/Lecturers (Selection Grade) is to be ignored as the same is illegal and the Management is estopped from deviation from the prescribed Rule framed by the Government since the College is receiving grant-in-aid on direct payment scheme. Vascillating stands of the State Government make the situation worse. Thus, learned Single Judge has not only placed reliance on the order of the Commission which did not relate to Stewart Science College, but also has not taken note of conflicting and contradictory stands of the State Government. Therefore, judgment passed by the learned Single Judge in **Governing Body of Stewart Science College, Cuttack and another** (W.P.(C) No.7762 of 2004) (supra) cannot be held to have finally determined the status of Stewart Science College as a Minority Educational Institution. Instead of entertaining the writ application, the learned Single Judge ought to have directed to get the dispute adjudicated by competent fact finding authorities in accordance with the mandate of Hon'ble Supreme Court in **Manager, St.Thomas U.P.School Kerala and another vs. Commissioner & Secy. to General Education Deptt. and others** (supra).

34. Law is well-settled that nobody should suffer owing to mistake or erroneous act of the Court. In **South Eastern Coalfields Ltd. -vrs.- State of M.P. and others** : AIR 2003 SC 4482 it has been held by the Hon'ble Supreme Court:

“26. That no one shall suffer by an act of the Court is not a rule confined to an erroneous act of the court: the ‘act of the court’ embraces within its sweep all such acts as to which the court may form an opinion in any legal proceedings that the Court would not have so acted had it been correctly apprised of the facts and the law. The factor attracting applicability of restitution is not the act of the Court being wrongful or a mistake or error committed by the court: the test is whether on account of an act of the party persuading the Court to pass an order held at the end as not sustainable, has resulted in one party gaining an advantage which it would not have otherwise earned, or the other party has suffered an impoverishment which it would not have suffered but for the order of the Court and the act of such party. xx xx xx xx xx.”

Also, in **Haryana State Electricity Board and another -vrs.- Gulshan Lal and others** : (2009) 12 SCC 231 it has been held by the Hon'ble Supreme Court:

“47. It is a well-settled principle of law that nobody should suffer owing to the mistake on the part of the court in view of the maxim *actus curiae neminem gravabit*. xx xx xx xx xx.”

35. In fact the Management asserts to have obtained Minority Status Certificate in respect of Stewart School, of which the College is stated to be a branch, from the Commission which is the competent fact finding authority under the 2004 Act. The declaration brought to the notice of the Court reads:

“ GOVERNMENT OF INDIA
NATIONAL COMMISSION FOR MINORITY EDUCATIONAL
INSTITUTIONS

F.NO. 1568 OF 2008-3415/-

ON CONSIDERATION OF THE
DOCUMENTARY EVIDENCE PRODUCED BEFORE THE
COMMISSION, THE COMMISSION IS SATISFIED THAT
STEWART SCHOOL, MISSION ROAD, P.O. BUXIBUZAR,
P.S. LALBAG, DIST. CUTTACK, ORISSA MANAGED BY THE
STEWART SCHOOL, CUTTACK, ORISSA, IS A MINORITY
EDUCATION INSTITUTION WITHIN THE MEANING OF
SECTION 2 (g) OF THE NATIONAL COMMISSION FOR
MINORITY EDUCATIONAL INSTITUTIONS ACT 2004.
CONSEQUENTLY, IT IS HEREBY DECLARED THAT THE
AFORESAID SCHOOL IS A MINORITY EDUCATION
INSTITUTION COVERED UNDER ARTICLE 30 OF THE
CONSTITUTION OF INDIA.

GIVEN UNDER MY HAND AND THE SEAL OF
THE COMMISSION ON THIS 26TH DAY OF FEBRUARY
2009.

(R.RENGANATH)
SECRETARY”

We fail to understand why the Management of the College has not obtained a similar certificate in respect of the Stewart Science College despite clouds created by litigations from time to time, especially in view of vascillating stands taken by the State Government.

36. Under the 2004 Act the Commission has been established to resolve disputes regarding status of institution claiming to be a Minority Educational Institution within the meaning of Section 2 (g). Functions of the Commission as provided under Section 11 (f) of the Act includes deciding all questions relating to the status of any institution as Minority Educational Institution and declare its status as such. The Commission has been conferred with powers of Civil Court as

enumerated under Section 12 (2) and (3) of the Act. Therefore, in view of circumstances narrated above, it is found appropriate that the status of the College as Minority Education Institution ought to be decided by the Commission.

37. Accordingly, we dispose of all the four writ petitions directing the Management to approach the Commission for obtaining declaration regarding Minority Status of Stewart Science College within a period of two months impleading the State Government and petitioners as parties. In case application seeking Minority Status of Stewart Science College as directed is filed before the Commission, we request the Commission to decide the matter on merit expeditiously without being in any manner influenced by any observation made in the decision of learned Single Judge in W.P.(C) Nos.7762 of 2004; **Governing Body of Stewart Science College, Cuttack and another** (supra) or by us in this judgment.

Status quo as on today be maintained till a declaration is made by the Commission provided the Management of Stewart Science College submits the required application within the time granted. In the event of failure on the part of the Management *status quo ante* in the matter of appointment of Principal of the College as was prevailing prior to the passing of the impugned resolutions shall be maintained till the decision of the Commission.

.....
B.K. Patel, J.

L. Mohapatra, J. I agree.

.....
L. Mohapatra, J.

*Orissa High Court, Cuttack,
Dated 26th June, 2012/B. Jhankar/A.Sethy*