REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL/ APPELLATE JURISDICTION

CIVIL APPEAL NO.2286 OF 2006

ALIGARH MUSLIM UNIVERSITY ... APPELLANT

VS.

NARESH AGARWAL & OTHERS ...RESPONDENTS

WITH

CIVIL APPEAL NO.2321 OF 2006

ALIGARH MUSLIM UNIVERSITY ... APPELLANT

VS.

ANUJ GUPTA & OTHERS ...RESPONDENTS

WITH

CIVIL APPEAL NO.2320 OF 2006

ALIGARH MUSLIM UNIVERSITY ... APPELLANT

VS.

VIVEK KASANA & OTHERS ...RESPONDENTS

WITH

CIVIL APPEAL NO.2318 OF 2006

UNION OF INDIA ... APPELLANT

VS.

MALAY SHUKLA & OTHERS ...RESPONDENTS

WITH

SPECIAL LEAVE PETITION (C) NO.32490 OF 2015

SYED ABRAR AHMAD ... APPELLANT

VS.

ALIGARH MUSLIM UNIVERSITY & OTHERS ...RESPONDENTS

WITH

WRIT PETITION (C) NO.272 OF 2016

ASHRAF MATEEN & OTHERS ... APPELLANT

VS.

ALIGARH MUSLIM UNIVERSITY & OTHERS ...RESPONDENTS

WITH

CIVIL APPEAL NO.2861 OF 2006

ALIGARH MUSLIM UNIVERSITY OLD BOYS' ALUMNI ASSOCIATION ... APPELLANT

VS.

NARESH AGGARWAL & OTHERS ...RESPONDENTS

WITH

CIVIL APPEAL NO.2316 OF 2006

HAJI MUQEET ALI QURESHI ... APPELLANT

VS.

MALAY SHUKLA & OTHERS ...RESPONDENTS

WITH

CIVIL APPEAL NO.2319 OF 2006

ALIGARH MUSLIM UNIVERSITY ... APPELLANT

VS.

MALAY SHUKLA & OTHERS ...RESPONDENTS

WITH

CIVIL APPEAL NO.2317 OF 2006

ALIGARH MUSLIM UNIVERSITY … APPELLANT

VS.

MANVENDRA SINGH & OTHERS …RESPONDENTS

AND

TRANSFER CASE (C) NO. 46 OF 2023

ANOOP PRABHAKAR & OTHERS … APPELLANTS

VS.

UNION OF INDIA & OTHERS …RESPONDENTS

J U D G M E N T

DIPANKAR DATTA J.

PROLOGUE

1. There is a saying, *"the past refuses to lie buried"*. Possibly, no other case would demonstrate the validity of this statement more poignantly.

2. A Constitution Bench of 5 (five) Judges of this Court delivered its verdict in the celebrated case of ***Union of India vs. Tulsiram Patel***[1] on 11th July, 1985, i.e., a little less than 40 (forty) years back. As the youngest member of the bench, Hon'ble M.P. Thakkar, J. (as His Lordship then was) expressed lament in the following words:

> "178. A benevolent and justice-oriented decision of a three-Judge Bench of this Court, rendered ten years back in a group of service matters, *[D.P.O., Southern Railway* v. *T.R. Challappan, (1976) 3 SCC 190]*, is sought to be overruled by the judgment proposed to be

[1] (1985) 3 SCC 398

delivered by my learned Brother Madon, J., with which, the majority appear to agree. *Challappan* having held the field for such a long time, it would have been appropriate if a meeting of the Judges constituting the Bench had been convened to seriously deliberate and evolve a consensus as to whether or not to overrule it. A 'give' and 'take' of ideas, with due respect for the holders of the opposite point of view (in a true democratic spirit of tolerance), with willingness to accord due consideration to the same, would not have impaired the search for the true solution. Or hurt the cause of justice. The holders of the rival view points could have, perhaps, successfully persuaded and converted the holders of the opposite point of view. Or got themselves persuaded and converted to the other point of view.

179. Brother Madon, J., to whom the judgment was assigned by the learned Chief Justice, also appears to suffer heart-ache on the same score, for, in his covering letter dated July 6, 1985 forwarding the first instalment of 142 pages he says:

> '...I regret to state that the draft judgment could not be sent to you earlier. The reason was that as we did not have a meeting to discuss this matter, I did not know what would be the view of my other Brothers on the large number of points which fall to be determined in these cases, except partly in the case of two of my Brothers with whom by chance I got an opportunity to discuss certain broad aspects....'

If only there had been a meeting in order to have a dialogue, there might have been a meeting of minds, and we might have spoken in one voice. Failing which, the holders of the dissenting view point could have prepared their dissenting opinions. That was not to be. On the other hand, it has so transpired, that, the full draft judgment running into 237 pages has come to be circulated in the morning of July 11, 1985, less than 3 hours before the deadline for pronouncing the judgment. There is a time compulsion to pronounce the judgment, on 11th July, 1985, as the learned Chief Justice who has presided over the Constitution Bench is due to retire on that day, and the judge-time invested by the five Judges would be wasted if it is not pronounced before his retirement. The judge-time would be so wasted because the entire exercise would have to be done afresh. The neck-to-neck race against time and circumstances is so keen that it is impossible to prepare an elaborate judgment presenting the other point of view within hours and circulate the same amongst all the Judges constituting the Bench in this important matter which was heard for months, months ago. I am, therefore, adopting the only course open to me in undertaking the present exercise.

180. '*Challappan'*, in my opinion, has been rightly decided. And there is no compulsion to overrule it— ***"

I regret to find myself in the same unenviable position Hon'ble M.P. Thakkar, J. was placed in ***Tulsiram Patel*** (supra).

3. Hearing of these appeals and petitions commenced on 9th January, 2024. Spread over 8 (eight) days of marathon hearing, learned senior counsel/counsel advanced erudite arguments in respect of a reference which this Bench of 7 (seven) Judges has been called upon to answer. Judgment was reserved on 1st February, 2024. The task of authoring the judgment had not been assigned to me, which obviously left me with no other option but to wait for the draft opinion to reach my residential office. While the wait continued, it is only on 17th October, 2024 that the draft opinion authored by the Hon'ble the Chief Justice of India[2], being the presiding Judge of the Bench, numbering 117 pages was placed on my desk. Aware of the deadline of 10th November, 2024 (the day the HCJI would demit office) within which the final judgment had to be pronounced, the task of reading the learned dissertation started right away squeezing out time from the long hours that had to be spent in getting ready for the matters on board for each day and in conducting proceedings in court. No sooner had I completed reading the draft opinion, came a revised draft opinion of the HCJI spread over almost the equal number of pages. It reached my residential office in the evening of 25th October, 2024, i.e., on the eve of the short Diwali break. *Inter alia*, there was one very significant change in the revised draft. While in the first draft "*the test laid down"* by a Constitution Bench of 5 (five) Judges of this

[2] HCJI, hereafter

Court in ***S. Azeez Basha and Anr. vs. Union of India***[3] *"to determine if an educational institution is entitled to the guarantee under Article 30(1)"* of the Constitution of India[4] was proposed to be overruled, in the revised draft the view taken in ***Azeez Basha*** (supra) *"that an educational institution is not established by a minority if it derives its legal character through a statute"* has been proposed to be overruled. The effect of the revised draft opinion of the HCJI is the defenestration of the view taken in ***Azeez Basha*** (supra) that Aligarh Muslim University[5] is not a minority institution. Such view has stood its ground for the last more than 50 (fifty) years. It is the only decision of this Court where Article 30(1) was considered and law laid down keeping establishment and administration of a pre-independence era university in perspective as distinguished from schools and colleges, which have been the subject matter of other Constitution Bench decisions. Utilising the short Diwali break, the draft opinions were read many times over together with perusal of the materials on record to decide whether the erudite opinion of the HCJI commended acceptance by me. On 2nd November, 2024, came another few pages from the office of the HCJI containing corrections effected in quite a few of the paragraphs of the revised draft opinion in track changing mode with paragraph 72 being altogether deleted.

[3] (1968) 1 SCR 833
[4] Constitution
[5] "AMU" or "University", hereafter, depending upon the context

4. Difficult though it is to disagree with any opinion penned by the HCJI, which has always been a product of thorough research and high intellect and is thoughtfully expressed, I could not persuade myself to completely agree with the opinion expressed in the revised drafts and the whole of the proposed conclusions recorded therein. This is when I had decided to pen my own opinion encapsulating my thoughts in brief having regard to the very short time at my disposal.

5. While on the task of preparing the draft opinion and completing it for circulation, arrived separate draft opinions of Hon'ble Surya Kant, J. and Hon'ble Satish Chandra Sharma, J. on 6th November, 2024. Rummaging through the draft opinions penned by Their Lordships, I felt inclined to substantially agree with the thoughts and conclusions expressed therein. However, in view of disagreements on a couple of points, coupled with my inability to be *ad idem* with the noteworthy progressive approach of the HCJI, writing a separate opinion (which was already in progress and was nearing completion) seemed all the more the better, the safer and the easier option.

6. I do not grudge getting very little time to express my views in the manner I would have wished to express. Had it not been a race against time to circulate the opinion by 6th November, 2024, the limit I had set for myself and assured to the HCJI, the opinion could have been much better articulated and more compact. But my pain is truly reflected in the passage from ***Tulsiram Patel*** (supra) quoted above and how, despite all the advancements in the justice delivery system

that we proudly boast of having introduced, in a way history seems to have repeated itself. Here, a Constitution Bench of 7 (seven) Judges had apparently embarked on a voyage to interpret Article 30(1) of the Constitution navigating through considerable weight of materials without any physical or virtual meeting of the members of the Bench post-reservation of judgment, not to speak of meeting of minds, either immediately after hearing was concluded or even 9 (nine) months thereafter (either collectively or even in small groups of four-five) to explore which acceptable direction should the outcome sail. A common venue for a purposeful and effective dialogue where members of the bench could freely express their points of view, an attempt to share thoughts and to exchange opinions, a 'give' and 'take' of ideas, in true democratic spirit to build up a consensus - all these seem to have taken a backseat, having regard to the immense pressure of work which we, the HCJI and the other Judges on the bench, have undertaken during the time ever since the judgment was reserved. Judicial and administrative works of varied nature, which I need not dilate here, also weighed me down to such an extent that sending a request to the HCJI for a meeting of all the colleagues at this stage would have been too late to make a difference (if at all it were to happen). Alas, without any insightful and constructive discussion of the rival contentions in the presence of all the members comprising this Bench of 7 (seven) Judges, it is

only individual opinions of 4 (four) Judges that could be crafted and circulated for perusal and approval.

7. That being said, after circulation of my draft opinion, all the Judges forming the quorum had the occasion to meet together for a little while on 7th November, 2024, when it emerged that the opinion of the HCJI, as circulated, had the concurrence of 3 (three) Judges[6] and I was part of the minority trio (3 out of 7) with a distinct perspective. As the narrative would reveal, my view diverges from the other 2 (two) Judges in the minority.

8. Since it was revealed in the aforesaid meeting that my view did not align with the majority, my draft opinion warranted certain changes and such changes have been incorporated in this final opinion without changing the core foundation thereof.

THE REFERENCE

9. This Constitution Bench of 7 (seven) Judges has been constituted by the HCJI pursuant to a reference made by a bench of 3 (three) Judges of this Court *vide* order dated 12th February, 2019[7] in ***Aligarh Muslim University vs. Naresh Agarwal and Ors.***[8]. Though the said order is ostensibly the referral order necessitating constitution of this Bench, in reality, the reference has its roots in an order dated 26th November, 1981 passed by a bench of 2 (two) Judges of this

[6] majority opinion, hereafter
[7] Civil Appeal No. 2286/2006
[8] (2020) 13 SCC 737

Court in ***Anjuman-e-Rahmania and Ors. vs. Distt. Inspector of School and Ors.***[9]. I am inclined to the view, based on my reading of the orders in ***Anjuman-e-Rahmania*** (supra) and ***Aligarh Muslim University*** (supra), that the former order could well qualify as the referral order for the reference and the latter the re-referral order for the re-reference (to be referred hereafter as such for clarity). The reasons, therefor, are not far to seek and would unfold as one proceeds to read this opinion.

10. At the outset, I find it significant to record that this Bench has been addressed by at least half a dozen senior counsel/counsel on why the decision in ***Azeez Basha*** (supra) ought to be reconsidered and overruled. In the context of the decision dated 5th January, 2006[10] rendered by the High Court of Judicature of Allahabad[11] in an intra-court appeal[12], the issue assumes some importance and it is indeed essential to consider whether ***Azeez Basha*** (supra) should at all be reconsidered merely because of the two referral orders coupled with the fact that the issues are before a Constitution Bench of 7 (seven) Judges of which the HCJI is the presiding Judge. If the orders of reference are found to be *ex facie* flawed and *non-est*, as the learned Solicitor General and other senior counsel who addressed the Bench

[9] Writ Petition (Civil) Nos. 54-57 of 1981
[10] 2006 SCC OnLine All 2207
[11] High Court, hereafter
[12] Special Appeal No. 1324/2005

on behalf of the respondents have urged us to hold, the re-reference would be plainly incompetent.

11. In the cacophony of dissonant notes, one ought not to forget that the hallmark of a judicial pronouncement is its stability and finality. I am reminded of what the HCJI speaking for the bench in ***Supertech Ltd. vs. Emerald Court Owner Residents Association***[13] said, - *"judicial verdicts are not like sand dunes which are subject to the vagaries of wind and weather"*. There cannot be any doubt that this Court has extensive powers to correct an error or to review its decision, but such correction / review ought not to be at the cost of the doctrine of finality. An issue of law can be overruled by a subsequent decision but a decision on questions of fact should not be reopened once it has been finally sealed in proceedings relating to the same subject matter.

12. Also, the doctrine of *stare decisis* has to be given due credence. Hon'ble H.R. Khanna, J (as His Lordship then was) while being part of a Constitution Bench and agreeing with the majority opinion in ***Maganlal Chhaganlal (P) Ltd. vs. Municipal Corpn. of Greater Bombay***[14], made telling observations reading as follows:

> "22. I must also utter a note of caution against the tendency to lightly overrule the view expressed in previous decisions of the Court. It may be that there is a feeling entertained by certain schools of thought, to quote the words of Cardozo, that
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> '... the precedents have turned upon us and are engulfing and annihilating us — engulfing and annihilating the very devotees that

[13] (2023) 10 SCC 817
[14] (1974) 2 SCC 402

> worshipped at their shrine. So the air is full of new cults that disavow the ancient faiths. Some of them tell us that instead of seeking certainty in the word, the outward sign, we are to seek for something deeper, a certainty relative and temporary, a writing on the sands to be effaced by the advancing tides. Some of them even go so far as to adjure us to give over the vain quest, to purge ourselves of these yearnings for the unattainable ideal, and to be content with an empiricism that is untroubled by strivings for the absolute.' (*See page 9 Selected Writings of Benjamin Nathan Cardozo by Margaret E. Hall.*)
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> At the same time, it has to be borne in mind that certainty and continuity are essential ingredients of rule of law. Certainty in law would be considerably eroded and suffer a serious set back if the highest court of the land readily overrules the view expressed by it in earlier cases, even though that view has held the field for a number of years. In quite a number of cases which come up before this Court, two views are possible, and simply because the Court considers that the view not taken by the Court in the earlier case was a better view of the matter would not justify the overruling of the view. The law laid down by this Court is binding upon all courts in the country under Article 141 of the Constitution, and numerous cases all over the country are decided in accordance with the view taken by this Court. Many people arrange their affairs and large number of transactions also take place on the faith of the correctness of the view taken by this Court. It would create uncertainty, instability and confusion if the law propounded by this Court on the basis of which numerous cases have been decided and many transactions have taken place is held to be not the correct law. This Court may, no doubt, in appropriate cases overrule the view previously taken by it but that should only be for compelling reasons.
> ***"

(emphasis supplied)

Sadly, these are dicta which very few tend to remember not to speak of applying the same.

13. I have noted that as per the draft opinion of the HCJI, the question as to whether AMU *"is a minority educational institution must be decided based on the principles laid down in this judgment"*. In view of such proposed order, and since it is also the majority opinion now and thus final, it is a foregone conclusion that history would be rewritten and declaration of AMU by this Court as a minority educational institution is only a matter of time.

14. Not only is ***Azeez Basha*** (supra) a judicial verdict more than half a century old on the status of AMU vis-à-vis minority rights, but it has a strong foundational basis and is anchored in robust legal reasoning. It has withstood, so to say, the vagaries of wind and weather and stands tall as a pyramid in the desert. The decision was rendered by Judges of the pre-independence era who, apart from being no less knowledgeable than us, were people having grown up while India was struggling for independence and (must have) witnessed such struggle from close quarters. I cannot lay claim to match their wisdom and experience; but without being unduly overawed by the stature of the Judges on the bench and viewing the reasons assigned in ***Azeez Basha*** (supra) for not declaring AMU as a minority educational institution, a University which was established in 1920 and whose status from inception till the Constitution came into effect has remained unchanged, I consider it prudent to say that the view taken therein, in the given facts and circumstances, is indeed a plausible view which demands due deference rather than the view being overruled at this distance of time. A relook at it for recasting of the opinion cannot be resorted to, as I presently propose to demonstrate, without throwing asunder all the established doctrines in the wake of referral orders which themselves bear the mark of invalidity on their foreheads.

15. However, before I venture to consider the orders of reference/re-reference, a glance at what ***Azeez Basha*** (supra) decided would not be inapposite.

16. In ***Azeez Basha*** (supra), this Court considered the legal sustainability of the 1951 and 1965 amendments to the Aligarh Muslim University Act, 1920[15]. These amendments were challenged as violative of the Fundamental Rights enumerated, *inter alia*, under Articles 26 and 30 of the Constitution. In such decision, it was held by this Court both on facts as well as law that AMU cannot be declared a minority institution. It was held that AMU was not established by a minority community, as it was the creature of a statute. The right under Article 30(1) was interpreted so as to give the linguistic and religious minorities the right to administer the institutions which were established by the minority community. Building on this argument, the Court further stated that a minority would not enjoy the rights of administering the institution not established by it, merely because it might have been administering it before the Constitution came into force. The phrase "establish and administer" in Article 30 has to be read conjunctively and there is no precedent which holds that it can be read disjunctively. The Court further went on to hold that in 1920, there was nothing to stop the Muslim community from establishing a university if they so desired. The nucleus of AMU was Mohammedan

[15] AMU Act, hereafter

Anglo-Oriental College[16], an institution under the Allahabad University. The conversion of MAO College to AMU was not undertaken or effectuated by the Muslim community, but by the force of statute. Therefore, this Court declared that AMU was established by the Central Legislature of British India.

17. Through ***Azeez Basha*** (supra), this Court distinguished its earlier Constitution Bench decision in ***Re: Kerala Education Bill***[17]. An argument was raised therein that only minority institutions established post the commencement of the Constitution could be granted the protection under Article 30(1). This Court in ***Re: Kerala Education Bill*** (supra) held that any institution, whether established before or after the commencement of the Constitution, could be afforded the protection under Article 30(1) as Article 30(1) would lose much of its content if interpreted so narrowly. But it was pointed out that in ***Re: Kerala Education Bill*** (supra), this Court never held that the terms "administer" and "establish" can be read disjunctively.

18. The decision in ***Azeez Basha*** (supra) was doubted in ***Anjuman-e-Rahmania*** (supra), and was referred to a bench of 7 (seven) Judges for reconsideration. That proceeding germinated from an unconnected writ petition filed by an institution registered under the Societies Registration Act, 1860[18] and was hardly related to the issue of the minority character of AMU. In fact, the question of law arising

[16] MAO College, hereafter
[17] 1959 SCR 995
[18] Societies Act, hereafter

for decision in the writ petition under Article 32, briefly captured in the order dated 26th November, 1981, would show that there was no factual similarity with that in ***Azeez Basha*** (supra).

19. It is, therefore, considered proper to read the referral order in its entirety for facility of proper understanding of what the bench of 2 (two) Judges in ***Anjuman-e-Rahmania*** (supra) had in mind and what was the ultimate direction. The said order reads as follows:

> "After hearing counsel for the Parties, we are clearly of the opinion that this case involves two substantial questions regarding the interpretation of Article 30(1) of the Constitution of India. The present Institution was founded in the year 1938 and registered under the Societies Registration Act in the year 1940. The documents relating to the time when the institution was founded clearly shows that while the institution was established mainly by the Muslim community but there were members from the non-muslim community also who participated in the establishment process. The point that arises is as to whether Act. 30(1) of the Constitution envisages an institution which is established by minorities alone without the participation for the factum of establishment from any other community. On this point, there is no clear decision of this court. There are some observations in S. Azeez Basha & ors. Vs. Union of India 1968 (1) SCR 333, but these observations can be explained away. Another point that arises is whether soon after the establishment of the institution if it is registered as a Society under the Society Registration Act, its status as a minority institution changes in view of the broad principles laid down in S. Azeez Basha's case. Even as it is several jurists including Mr. Seervai have expressed about the correctness of the decision of this court in S. Azeez Basha's case. Since the point has arisen in this case we think that this is a proper occasion when a larger bench can consider the entire aspect fully. We, therefore, direct that this case may be placed before Hon. The Chief Justice for being heard by a bench of at least 7 judges so that S. Azeez Basha's case may also be considered and the points that arise in this case directly as to the essential conditions or ingredients of the minority institution may also be decided once for all. A large number of jurists including Mr. Seervai, learned counsel for the petitioners Mr. Garg and learned counsel for respondents and interveners Mr. Dikshit and Kaskar have stated that this case requires reconsideration. In view of the urgency it is necessary that the matter should be decided as early as possible we give liberty to the counsel for parties to mention the matter before Chief Justice."
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> (emphasis supplied)

20. Ever since the mid-fifties of the last century, the entire functional strength of Judges of the Supreme Court of India has never assembled to decide any case. The last time the entire strength of 8 (eight) Judges did assemble was in 1954, when the Constitution Bench decided two writ petitions under Article 32 of the Constitution in ***M. P. Sharma vs. Satish Chandra***[19]. It is well known that while discharging its judicial duties, owing to administrative exigency and practical expedience, the Supreme Court of India functions through separate benches. Although voices of the benches could be different on a common point of law, yet, the reasons and the ultimate conclusions are treated as the view-point of the Supreme Court. No matter the strength, all these voices bear the symbol of the Supreme Court. It is also well known that it is the power of the Chief Justice of India, on the administrative side, to determine appropriate numerical strength of the benches. However, the mere fact of this Bench having a numerical strength of 7 (seven) Judges and presided over by none other than the Chief Justice of India does not necessarily make it competent to decide the re-reference, if the orders of reference/re-reference are found to be seriously flawed and no such reference/re-reference should have or could have been made in the first place. I presently proceed to assign my view-point in support of my conclusion that the reference as well as the re-reference is incompetent.

[19] (1954) 1 SCC 385

21. The discussion on why the order in ***Anjuman-e-Rahmania*** (supra) is completely flawed and, thus, should not have any bearing on the re-reference must start with the decision in ***Lala Shri Bhagwan vs. Shri Ram Chand***[20]. Deprecating the approach of a Single Judge of the relevant high court, who had taken upon himself the task of deciding whether earlier decisions of Division Benches of the same high court ought to be reconsidered and revised based on his perception that such decisions stood impliedly overruled by a decision of this Court, Hon'ble P.B. Gajendragadkar, CJ. (as His Lordship then was) speaking for a bench of 3 (three) Judges observed:

> "18. *** It is hardly necessary to emphasise that considerations of judicial propriety and decorum require that if a learned Single Judge hearing a matter is inclined to take the view that the earlier decisions of the High Court, whether of a Division Bench or of a Single Judge, needed to be reconsidered, he should not embark upon that enquiry sitting as a Single Judge, but should refer the matter to a Division Bench or, in a proper case, place the relevant papers before the Chief Justice to enable him to constitute a larger Bench to examine the question. That is the proper and traditional way to deal with such matters and it is founded on healthy principles of judicial decorum and propriety. It is to be regretted that the learned Single Judge departed from this traditional way in the present case and chose to examine the question himself."

22. It is true that this Court had the occasion to make the above observations arising out of the concern that the healthy principles of judicial decorum and propriety had not been followed by a Single Judge of a high court who had departed from the traditional way. However, what is significant and follows from the above passage is that a Single Judge, even if he is not in agreement with the view of a

[20] [1965] 3 SCR 218

Division Bench which is binding on him, cannot refer the case straightaway to a larger bench; at the most, he may refer the case to a Division Bench or, in a proper case, direct placing of the papers before the Chief Justice to take a call on whether constitution of a larger bench is warranted or not. A Single Judge cannot decide the case himself by not following the binding decision of the Division Bench, with which he disagrees or has a doubt about its correctness. The position of law that emerges is that constitution of the bench, whether it be a combination of 2 (two), 3 (three) or more, must be left to the Chief Justice. However, there could be no valid reason as to why what was observed in the aforesaid excerpt by His Lordship would not *proprio vigore* apply to Judges of this Court too.

23. The principle is simple. Whether it be the Supreme Court, or the high courts, it is beyond any shadow of doubt that a decision of a bench of greater strength is binding on a bench of lesser strength. Our system of administration of justice aims at certainty in the law and that can be achieved only if Judges do not ignore decisions by courts of coordinate authority or of superior authority. This is not to say that the bench of lesser strength is denuded of the authority or competence to distinguish the decision of greater strength based on consideration of facts that are involved.

24. It has, however, been considered uniformly to be an act of breach of judicial propriety and discipline if a bench of lesser strength [of 2 (two) Judges] casts doubt in respect of a decision rendered by a

bench of greater strength [of 5 (five Judges] and a request is made to the Chief Justice of India to constitute a still larger Bench [of 7 (seven Judges]. This concept was extensively ratiocinated in ***Central Board of Dawoodi Bohra Community vs. State of Maharashtra***[21]. Hon'ble R.C. Lahoti, CJ. (as His Lordship then was), speaking for the Bench held:

> "12. Having carefully considered the submissions made by the learned Senior Counsel for the parties and having examined the law laid down by the Constitution Benches in the abovesaid decisions, we would like to sum up the legal position in the following terms:
> (*1*) The law laid down by this Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or coequal strength.
> (*2*) A Bench of lesser quorum cannot disagree or dissent from the view of the law taken by a Bench of larger quorum. In case of doubt all that the Bench of lesser quorum can do is to invite the attention of the Chief Justice and request for the matter being placed for hearing before a Bench of larger quorum than the Bench whose decision has come up for consideration. It will be open only for a Bench of coequal strength to express an opinion doubting the correctness of the view taken by the earlier Bench of coequal strength, whereupon the matter may be placed for hearing before a Bench consisting of a quorum larger than the one which pronounced the decision laying down the law the correctness of which is doubted.
> (*3*) The above rules are subject to two exceptions: (*i*) the abovesaid rules do not bind the discretion of the Chief Justice in whom vests the power of framing the roster and who can direct any particular matter to be placed for hearing before any particular Bench of any strength; and (*ii*) in spite of the rules laid down hereinabove, if the matter has already come up for hearing before a Bench of larger quorum and that Bench itself feels that the view of the law taken by a Bench of lesser quorum, which view is in doubt, needs correction or reconsideration then by way of exception (and not as a rule) and for reasons given by it, it may proceed to hear the case and examine the correctness of the previous decision in question dispensing with the need of a specific reference or the order of the Chief Justice constituting the Bench and such listing. Such was the situation in *Raghubir Singh*[22] and *Hansoli Devi*[23]."
>
> (emphasis supplied)

[21] (2005) 2 SCC 673
[22] (1989) 2 SCC 754
[23] (2002) 7 SCC 273

25. In ***Hansoli Devi*** (supra), the Constitution Bench of 5 (five) Judges followed the earlier decision of the Constitution Bench of 5 (five) Judges in ***Pradip Chandra Parija vs. Pramod Chandra Patnaik***[24]*.* It was held in ***Pradip Chandra Parija*** (supra) that judicial discipline and propriety demands that a bench of 2 (two) learned Judges should follow a decision of a bench of 3 (three) learned Judges. But if a bench of 2 (two) learned Judges concludes that an earlier judgment of a bench of 3 (three) learned Judges is so very incorrect that in no circumstances can it be followed, the proper course for it to adopt is to refer the matter before it to a bench of 3 (three) learned Judges setting out the reasons why it could not agree with the earlier judgment and if the bench of 3 (three) learned Judges also comes to the conclusion that the earlier judgment of a bench of 3 (three) learned Judges is incorrect, then a reference could be made to a bench of 5 (five) learned Judges. In view of such decision, the Constitution Bench in ***Hansoli Devi*** (supra) held the very reference itself made by 2 (two) learned Judges to be improper.

26. ***Campaign for Judicial Accountability and Reforms vs. Union of India***[25] is also a Constitution Bench decision of recent origin of 5 (five) Judges. In a somewhat different context, the bench ruled that *"there cannot be any kind of command or order directing the Chief Justice of India to constitute a particular Bench"*.

[24] (2002) 1 SCC 1
[25] (2018) 1 SCC 196

27. These decisions of high authority seek to reinforce the principles of judicial discipline, propriety and comity, which have been followed by the courts since time immemorial. Permitting a bench of lesser strength to doubt a decision given by a bench of greater strength and to refer a given issue to a still larger bench would be in the teeth of principles which are well-established and well-entrenched. Doctrines of precedents and *stare decisis* provide a level of certainty to individuals appearing before the court and bring a degree of objectivity in a largely subjective decision-making process. The litigant needs to have confidence that the legal position which has been chiselled on the tapestry of law by legal precedents will not be unceremoniously blown away through subsequent judicial commands, which could be ill-advised, like the vagaries of wind and weather. It would behove this Court to remember the legal maxim *interest republicae ut sit finis litium*, i.e., it is in the interest of the State that there be an end to litigation, and the importance of not disturbing legally sound precedents without following the procedure established by law.

28. Although ***Pradip Chandra Parija*** (supra), ***Hansoli Devi*** (supra) and ***Central Board of Dawoodi Bohra Community*** (supra) are later decisions and were not in existence when the order in ***Anjuman-e-Rahmania*** (supra) was made by the bench of 2 (two) Judges, it matters little. The principle flowing from ***Lala Shri Bhagwan*** (supra) bound the bench of 2 (two) Judges in ***Anjuman-e-Rahmania***

(supra). The law laid down, in the decisions post ***Anjuman-e-Rahmania*** (supra), is neither expressly nor even impliedly made to operate prospectively. Besides, it seems elementary though it requires to be restated that a bench sitting in a combination of 2 (two) Judges is bound by what is laid down by a Constitution Bench of 5 (five) Judges and should the bench of lesser strength have valid reasons to disagree with the view expressed by the latter bench of 5 (five), the former bench of 2 (two) cannot straightway make a reference for being placed before a Constitution Bench of greater numerical strength. I am left to wonder how the bench of 2 (two) Judges in ***Anjuman-e-Rahmania*** (supra) could at all request that the case be placed before a bench of at least 7 (seven) Judges. Without a doubt, what the bench in ***Anjuman-e-Rahmania*** (supra) did was not only plainly impermissible in law but the referral order answers the test for holding a judgment *per incuriam*. If *"doubting the correctness of the opinion in* ***Azeez Basha*** *(supra), without disagreeing with it"* could permit the bench in ***Anjuman-e-Rahmania*** (supra) to request the Chief Justice of India to place the matter for being heard by a bench of 7 (seven) Judges and such a course of action were held to be permissible and within the limits of ***Central Board of Dawoodi Bohra Community*** (supra), as proposed in the majority opinion (paragraph 39 of the revised draft) - I am afraid, tomorrow, a bench of 2 (two) Judges, referring to opinions of jurists [as in ***Anjuman-e-Rahmania*** (supra)] could well

doubt the 'basic structure' doctrine and request the Chief Justice of India to constitute a bench of 15 (fifteen) Judges. The reasoning in the majority opinion, with due respect, appears to be based on an incomplete reading of paragraph 12(2) of ***Central Board of Dawoodi Bohra Community*** (supra), extracted supra. Though the second sentence of the said paragraph is a bit ambiguous, but the same - read harmoniously with the other sentences - would lead to the inevitable conclusion that even in case of a doubt being expressed by a bench of 2 (two) Judges in respect of the ratio laid down by a bench of 5 (five) Judges, the case on a reference being made (with sufficient reasons) ought to be first placed before a bench of 3 (three) Judges, and not to a bench of either 5 (five) or 7 (seven) Judges. If, indeed, the proposed view in the majority opinion were accepted, all the precedents referred to above would stand overruled and a legal principle, which hitherto no bench of this Court did, would be laid down and, in the process, the floodgates for unmeritorious references opened. In my humble view, that would be an incorrect and improper approach. Hence, for the foregoing reasons and for all intents and purposes, the order of reference in ***Anjuman-e-Rahmania*** (supra) must be regarded as completely flawed and *non-est*.

29. One other interesting feature draws attention. The bench in ***Anjuman-e-Rahmania*** (supra), perceiving the matter to be urgent, granted liberty to the counsel for the parties to mention the matter before the Chief Justice of India for an early decision but the file

seems to have gathered dust ever since. There is hardly any material on record to suggest that either the incumbent Chief Justice of India or any of the successive Chief Justices of India for the next 20 (twenty) years, thought it fit to direct the office to dust the dust for a bench of 7 (seven) Judges to be constituted to decide the issue that was referred, assuming that question 3(a) formulated for an answer by the Constitution Bench of 11 (eleven) Judges in ***T.M.A. Pai Foundation and ors. vs. State of Karnataka and ors.***[26] was inspired by the order in ***Anjuman-e-Rahmania*** (supra). *Res ipsa loquitur!*

30. The contention that the said order in ***Anjuman-e-Rahmania*** (supra) was acted upon and the bench in ***T.M.A. Pai Foundation*** (supra) being called upon to address question 3(a) could be traced to the order in ***Anjuman-e-Rahmania*** (supra), apart from being incorrect, pales into insignificance for primarily two reasons. In ***T.M.A. Pai Foundation*** (supra), initially 9 (nine) questions were framed[27], later 10 (ten) questions were framed[28] and finally 11 (eleven) questions were framed by the bench of 11 (eleven) Judges. Neither does one find reference in the said orders framing questions to any decision/order of this Court including ***Anjuman-e-Rahmania*** (supra) nor is the order in ***Anjuman-e-Rahmania*** (supra) referred to in the entire judgment in ***T.M.A. Pai Foundation*** (supra). To say

[26] (2002) 8 SCC 481
[27] (2002) 8 SCC 713
[28] (2002) 8 SCC 712

that question no. 3(a) was framed because of ***Anjuman-e-Rahmania*** (supra) appears to be thoroughly misconceived. While ***T.M.A. Pai Foundation*** (supra) did not answer question 3(a), the Regular Bench too was not persuaded to decide the same as it appears from its order dated 11th March, 2003 in ***Shahal H. Musaliar and Anr. vs. Union of India and Ors.***[29]. The proceedings in ***Anjuman-e-Rahmania vs. District Inspector*** effectively stood closed by the order of this Court dated 11th March 2003.

31. Significantly, ***T.M.A. Pai Foundation*** (supra) came to be considered by two more Constitution Bench decisions of this Court, viz. ***Islamic Academy of Education vs. State of Karnataka***[30] and ***P.A. Inamdar vs. State of Maharashtra***[31] not too long thereafter. The former decision does record that the Constitution Bench of 5 (five) Judges was constituted to clarify doubts/anomalies, if any, arising from varied interpretation of the majority view in ***T.M.A. Pai Foundation*** (supra) by the parties. The Constitution Bench of 7 (seven) Judges in the latter decision has also recorded that post ***T.M.A. Pai Foundation*** (supra), petitions flooded the high courts as well as this Court to resolve issues which were not answered by the bench of 11 (eleven) Judges. Relevance of ***Islamic Academy of Education*** (supra) and ***P.A. Inamdar*** (supra) lies in the fact that these decisions attempted to iron out creases arising from the

[29] Writ Petition (C) No.331 of 2005
[30] (2003) 6 SCC 697
[31] (2005) 6 SCC 537

decision in ***T.M.A. Pai Foundation*** (supra). If indeed question 3(a) required an answer, I would be persuaded to think that either ***Islamic Academy of Education*** (supra) or ***P.A. Inamdar*** (supra) would have answered it. That the Constitution Benches did not attempt to answer question 3(a) should leave none in doubt that the said question did not merit an answer.

32. After the order dated 11th March 2003 of disposal in ***Shahal H. Musaliar*** (supra), the matter lay dormant for a period of time; it was resuscitated when AMU, through its Executive Council, passed a resolution dated 19th May 2005, reserving 50% seats in postgraduate programmes for Indian Muslims. This resolution was challenged before the High Court invoking its writ jurisdiction. Both the Single Judge and the Division Bench of the High Court held that the reservation, sought to be made, could not be enforced. The Division Bench, relying on ***Azeez Basha*** (supra), went even further than the Single Judge and set aside the 1981 amendment to the AMU Act. The Division Bench observed that the 1981 amendment sought to side step ***Azeez Basha*** (supra) without removing the basis on which ***Azeez Basha*** (supra) was rendered. The judgment of the Division Bench was carried in appeal before this Court by AMU and it is on such appeal that the re-referral order was passed by the bench of 3 (three) Judges, which I propose to note now.

33. On 12th February, 2019, the bench of 3 (three) Judges in ***Aligarh Muslim University*** (supra), after noticing the aforesaid

developments, proceeded to hold that *"the correctness of the question arising from the decision of this Court in S. Azeez Basha (supra) has remained undetermined"*. The order that followed such observation reads as under:

> "9. That apart, the decision of this Court in Prof. Yashpal and another vs. State of Chhattisgarh and others and the amendment of the National Commission for Minority Educational Institutions Act, 2004 made in the year 2010 would also require an authoritative pronouncement on the aforesaid question formulated, as set out above, besides the correctness of the view expressed in the judgment of this Court in S. Azeez Basha (supra) which has been extracted above.
> 10. Ordinarily and in the normal course the judicial discipline would require the Bench to seek a reference of this matter by a Five Judges Bench. However, having regard to the background, as stated above, when the precise question was already referred to a Seven Judges Bench and was, however, not answered, we are of the view that the present question, set out above, should be referred to a Bench of Hon'ble Seven Judges.
> 11. Consequently and in the light of the above, place these matters before the Hon'ble the Chief Justice of India on the administrative side for appropriate orders."

34. Why I perceive the re-referral order to suffer from the same invalidity and to be untenable is this. Apart from ***Anjuman-e-Rahmania*** (supra) being *non-est* for the reason adverted to above, neither the bench of 11 (eleven) Judges in ***T.M.A. Pai Foundation*** (supra) nor the Regular Bench of 2 (two) Judges considered it necessary to answer question 3(a). The order dated 11th March, 2003 observing that the question could be answered should a problem arise in future did put a quietus, for the time being, to question 3(a), as formulated, as well as provided finality *qua* what was said about ***Azeez Basha*** (supra) in ***Anjuman-e-Rahmania*** (supra). Once the issue attained finality, in my respectful opinion, the bench of 3 (three) Judges could

not have reopened the same issue. It could be revisited in exceptional circumstances and that too, in a manner known to law. No intra-court appeal being available in the Supreme Court and in the absence of any allegation of fraud having vitiated the process of decision making, and there being no occasion for exercise of the inherent powers of the Court, it would have been most appropriate for the bench of 3 (three) Judges on 12th February, 2019 not to refer to ***Azeez Basha*** (supra) at all. What the bench of 3 (three) Judges did, so to say, was sort of making an order as if it were exercising appellate jurisdiction over the decision in ***T.M.A. Pai Foundation*** (supra), the order dated 11th March 2003, ***Islamic Academy of Education*** (supra) and ***P.A. Inamdar*** (supra) [last two without being noticed]. Significantly, the re-reference was made citing the necessity to consider the decision in ***Prof. Yashpal vs. State of Chhattisgarh***[32] and the amendment of the National Commission for Minority Educational Institutions Act, 2004[33] which, as per the majority opinion, have no real bearing with regard to the issue under consideration. Indeed, even if the decision in ***Prof. Yashpal*** (supra) and the 2004 Act were to make any difference to the legal position, hitherto settled, reference to that limited extent only could be justified with a call to answer question 3(a), extracted supra, independently and without referring to ***Azeez Basha*** (supra).

[32] (2005) 5 SCC 420
[33] NCMEI Act, hereafter

35. An issue which has some bearing on the correctness or otherwise of the decision in ***Azeez Basha*** (supra) [assuming that the order in ***Anjuman-e-Rahmania*** (supra) was valid and did form the ground for framing question 3(a)], if consciously has not been decided in course of a previous round of litigation, would it give rise to an occasion for a subsequent bench to hold that the issue should be decided because it has not been decided? Exercise of jurisdiction by a bench of lesser strength would not permit such an approach. That the bench of 3 (three) Judges was presided over by none other than the then Chief Justice of India did not make things better and ameliorate the circumstances. With due respect and utmost humility at my command, although the Chief Justice of India is *primus inter pares* and on the administrative side has powers and authority which no puisne Judge has, the Chief Justice of India while discharging judicial functions on the bench with a puisne judge or judges may not enjoy any power greater than what the puisne judge or judges forming the quorum has/have in authoring judgments/ passing orders. Therefore, the re-referral order merely by reason of the presence of the Chief Justice on the bench did not get sanctified. It was not that the bench of 3 (three) Judges were not alive to the settled law and the principles of judicial propriety, discipline and comity; yet, any doubt touching upon the correctness or otherwise of the view expressed in ***Azeez Basha*** (supra), if at all, should not have been sought to be resolved by referring the matter directly to a bench

of 7 (seven) Judges. Such an order of reference, apart from being in the teeth of ***Pradip Chandra Parija*** (supra), ***Hansoli Devi*** (supra) and ***Central Board of Dawoodi Bohra Community*** (supra), could not have been justified by reasoning that earlier, the issue had been referred to a bench of 7 (seven) Judges. It was incumbent on the bench while hearing ***Aligarh Muslim University*** (supra) to examine whether the referral order made in ***Anjuman-e-Rahmania*** (supra) was legal and valid. Answering the said question could have obviated the need for a further referral. Nothing much turns on the fact that all of us are now sitting in a combination of 7 (seven) Judges. The ***Anjuman-e-Rahmania*** (supra) referral order being *non-est*, to my mind, any order premised thereon is also *non-est*. At best, the bench of 3 (three) Judges in ***Aligarh Muslim University*** (supra) could have required a bench of 5 (five) Judges to reconsider whether question 3(a), which fell for consideration in ***T.M.A. Pai Foundation*** (supra), does at all require an answer [not in the light of whatever ***Azeez Basha*** (supra) had held while interpreting Article 30(1)] and only upon formation of an opinion that it does, should the further referral been made to a bench of 7 (seven) Judges to maintain judicial propriety, discipline and comity. The course of action adopted in ***Aligarh Muslim University*** (supra), thus, does not commend to me to be in accordance with established principles of law and should have well been avoided, being unnecessary. However, I repeat, any issue arising out of the law laid down in ***Azeez Basha*** (supra) was not

open to be referred once again even after noticing that the earlier endeavours to overturn ***Azeez Basha*** (supra) had proved abortive.

36. More often than not, this Court treats procedure as a hindrance towards attaining justice rather than treating it as a guardrail to ensure fairness and non-arbitrariness while conducting judicial proceedings. It must be remembered that at times, leaving aside the urge to render substantive justice without following the laid down procedure, it is perhaps advisable to follow the procedure as the means towards the end.

37. Thus, I have no hesitation in holding that the referral orders of this Court are *ex-facie* not in accordance with law and the re-reference in itself is equally incompetent and unnecessary as well.

38. Notwithstanding what I have opined above in support of my viewpoint that the referral orders are invalid and the references incompetent, *albeit* for technical reasons, there is a weightier reason for declaring the referral orders fragile. That is on the merits and I would immediately proceed to say why.

39. ***Anjuman-e-Rahmania*** (supra) talked of two substantial questions that arose before it. The first was, whether Article 30(1) of the Constitution envisages an institution which is established by minorities alone without the participation for the factum of establishment from any other community. This question was formulated recording that there was no clear decision of this Court. Secondly, whether the status of an institution as a minority

institution, which soon after its establishment is registered as a society under the Societies Act, would change in view of the broad principles laid down in ***S. Azeez Basha*** (supra). ***Aligarh Muslim University*** (supra) had the occasion to observe that question 3(a) which was formulated for an answer in ***T.M.A. Pai Foundation*** (supra) coincidentally reflected the questions referred by ***Anjuman-e-Rahmania*** (supra).

40. In ***TMA Pai Foundation*** (supra), question 3(a) was:

> *"3(a) What are the indicia for treating an educational institution as a minority educational institution? Would an institution be regarded as a minority educational institution because it was established by a person(s) belonging to a religious or linguistic minority or its being administered by a person(s) belonging to a religious or linguistic minority?"*

41. To recount, the reference order duly took note of question 3(a) and the fact that ***TMA Pai Foundation*** (supra) did not decide it. Now, two questions arise: (i) whether there is any decision prior to ***Anjuman-e-Rahmania*** (supra) which had directly decided the first point? And (ii) whether the point touching the Societies Act, i.e., a minority educational institution being registered under the Societies Act could have any bearing on the question decided by ***Azeez Basha*** (supra) by equating the former with a case where a university is established by an enactment?

42. Insofar as the first question is concerned, ***State of Kerala vs. Very Rev. Mother Provincial***[34], which is of course another decision of the Constitution Bench of 6 (six) Judges of this Court rendered more than half a century back, and has never been doubted by any subsequent bench, provides the answer. The essence of the law laid down therein is that the minority institution should have been established for the benefit of a minority community by a member of that community. Attention of the bench of 2 (two) Judges in ***Anjuman-e-Rahmania*** (supra) was not invited to this direct answer to the question it posed and one is left to wonder whether the reference would have at all been made if ***Very Rev. Mother Provincial*** (supra) was cited. There being no reference in ***Anjuman-e-Rahmania*** (supra) of ***Very Rev. Mother Provincial*** (supra), a binding decision, certainly the said decision of the Constitution Bench had not been placed before the bench of 2 (two) Judges by the set of very learned senior counsel appearing before it who agreed with the bench on the question of (in)correctness of ***Azeez Basha*** (supra). Regarding the second question, there cannot be any comparison of chalk and cheese. I have no hesitation to hold that the case dealt with by ***Azeez Basha*** (supra) and the one arising for decision in ***Anjuman-e-Rahmania*** (supra) were fundamentally different and in stark contrast with each other. Therefore, even on merits, there was no good reason to make a

[34] (1970) 2 SCC 417

reference for being placed before a bench of 7 (seven) Judges which ***Anjuman-e-Rahmania*** (supra) ordered.

43. Now turning to ***Aligarh Muslim University*** (supra), I have been unable to comprehend as to how question 3(a) could be said to coincidentally reflect the questions referred by ***Anjuman-e-Rahmania*** (supra). As evident from a bare reading of question 3(a), it had two parts: the first is, what is the indicia for treating an educational institution as a minority educational institution? Secondly, would an institution be regarded as a minority educational institution because it was established by a person(s) belonging to a religious/linguistic minority or its being administered by a person(s) belonging to a religious/linguistic minority?

44. In any event, *qua* question 3(a), why did the bench of 11 (eleven) Judges in ***TMA Pai Foundation*** (supra) not consider necessary to even attempt to answer it and relegate the same to the Regular Bench of 2 (two) Judges? Was it too trivial a question not meriting an answer or was there some other reason? Though the answer is not too obvious, the answer to the second part of question 3(a) seems to be firm and clear that the conjunction 'and' between 'establish' and 'administer' in Article 30(1) cannot be read as 'or' for the reasons that I seek to highlight a little later.

45. If one were to form the opinion that the question as to indicia for treating an educational institution as a minority educational institution was traceable to ***Anjuman-e-Rahmania*** (supra), that can

only happen if the said order were misread or some additional words were read into it.

46. It is one thing to identify indicia, i.e., indicia that are already existing. However, if indicia have to be formulated, i.e., created, by us in course of these proceedings, are we not discrediting the earlier Constitution Bench decisions on minority status vis-à-vis rights under Article 30(1) premised on an implicit indicia, though not expressly declared as such? It is considered most inappropriate that the first part of question 3(a) has engaged our attention in the present discussions and deliberations.

47. I am firm in my conviction that the reference and the re-reference, for all the reasons discussed above, do not require a decision.

TREATING THE REFERENCE TO BE VALID

48. Since the issue of correctness of the decision in ***Azeez Basha*** (supra) has been argued before us and carries immense significance for the future, I deem it proper to give due consideration to it treating the reference to be valid and legal. The minority character of AMU as well as the contours of rights under Article 30(1), assuming the same to be under a cloud of uncertainty, needs to be cleared. Hence, in my own way, I seek to bring clarity and finality to the issue through this opinion.

49. The majority opinion has sought to lay down the indicia and left it for an appropriate bench to be constituted by the Chief Justice of India

for deciding whether AMU is a minority or not. Hon'ble Surya Kant and Hon'ble Satish Chandra Sharma, JJ. also seem to have proceeded to dispense with the factual inquiry of whether or not AMU is a minority educational institution and focussed on the indicia to determine the applicability of Article 30(1).

50. Respectfully, I cannot bring myself to traverse the same path. After almost 9 (nine) months the judgment came to be reserved, it pricks my conscience to send the matter back once again to an appropriate bench; more so, after both sides have exhaustively addressed us on the very issue as to whether AMU answers the characteristics of a minority institution. In present times, when there is a lot of emphasis on pendency of cases and expeditious disposal thereof, precious judicial time would be wasted if the same issue has to be agitated yet again when such time could be well utilised in answering other pressing questions of law. I feel the urge to decide here and now, based on whatever indicia we identify or formulate, as well as the circumstances - antecedent, attending and surrounding – of the relevant time, as to whether AMU is a minority educational institution or not. I feel equipped to do so on account of extensive evidence having already been led by both sides.

THE INDICIA

51. In the majority opinion, the indicia for treating an educational institution as a minority educational institution are these:

I. Ideation of establishment: The brain behind the establishment of the institution, as gauged from, *inter alia*, correspondence and government resolutions, should be a member of the minority community.

II. Purpose: The institution should have been established predominantly for the benefit of the minority community, as opposed to solely for their benefit.

III. Implementation: The implementation of the idea to establish the institution, with respect to raising of funds, acquisition of land, etc. has to be examined. State aid in the same, would not adversely affect the minority status of the institution.

IV. Administration: The right to administer flows as a consequence of the institution having been established by the minority. Thus, it is not required that the institution be administered by the minority, but what is essential is that the administrative structure reflects the minority character of the institution.

52. Hon'ble Surya Kant, J. has, however, identified the indicia as follows:

I. Article 30(1) provides for a twin fold test – establishment and administration.

II. Establishment is to be understood as coming into existence of the institution, which is to be holistically gauged from examination of factors, *inter alia*, who is responsible for the genesis of the idea, accumulation of funds, framing of charter documents of the

educational institution, procuring of government approvals. In such acts, the minority community must play a decisive role.

III. Incorporation of a university under a statute would not necessarily mean that the institution is a creature of statute, unless it is the Government which has played the decisive role in ideation, funding, implementation and operationalising the institution.

IV. Establishment has to be for the benefit of the minority community.

V. Administration, at its core, has to vest with the minority community. This would include within its fold long term administrative roles and day to day sundry decisions. The minority community should thus be vested with both, *de jure* and *de facto* control.

53. Hon'ble Satish Chandra Sharma, J. has in His Lordship's draft opinion laid out a threefold indicia:

I. The minority community must play a predominant role, almost to the point of exclusion of all other forces, in tangibly bringing about the entirety of the institution into existence.

II. The purpose of the institution must be to predominantly serve the interests of the minority community, irrespective of the form of education provided.

III. The actual functional, executive, and policy administration should rest with the minority community. The real decision making authority of the institution should be the minority community.

54. While the majority opinion seems to have identified establishment as the sole indicium, Hon'ble Surya Kant and Hon'ble Satish Chandra Sharma, JJ. have laid equal stress on administration apart from establishment as the indicia. Inasmuch as the broad criteria which can be used to assess the status of an educational institution is concerned, I express my agreement with the indicia laid out by Their Lordships.

55. Taking a cue from the above indicia, what comes to mind is that a seed, by itself, cannot germinate into a plant without being sown in the soil. It is the farmer's endeavours of watering, nourishing and caring for the seed, not the sheer existence of the seed itself, which results in the emergence of the tree. Similarly, mere ideation by itself amounts to little if it is not backed by action or implementation. Ideation and conceiving of an idea are mere seeds, while the work of gathering resources, acquiring land, establishing an administrative structure, recruiting teachers, and admitting students are akin to the planting and nurturing required for those seeds to grow into a flourishing tree. Educational institutions, like all other institutions, are an outcome of the coalescence of resources, actions, and meticulous planning by the people "establishing" it.

56. Indicia is a term often used in various disciplines including law to describe signs or symptoms that suggest the presence of something. When we say that 'x' is the indicia of 'y', it could be so that 'x' could be the definite indicium of 'y' (implying a comprehensive or exclusive

indicator); at the same time, it may not necessarily imply that 'x' is the only indicator of 'y' (exhaustiveness) or that 'x' guarantees the presence of 'y' (certainty) or 'x' is unique to 'y' (specificity). However, to suggest that, 'x' is the definite indicum of 'y', it may not be appropriate in the present context where I can identify multiple indicia for concluding whether AMU answers the characteristics of a minority educational institution.

57. Certain broad indicia, which are universally applicable, may be applied prospectively to facilitate identification of minority institutions. However, any indicium or the indicia, as identified or formulated, for treating an institution as a minority institution may not be exhaustive so as to cater to all situations. Previous decisions of this Court, as earlier discussed, have also determined the minority character of educational institutions vis-à-vis Article 30, as per indicia tailored to the specific factual matrices. It could be well-nigh difficult, if not impossible, to fix indicia without regard to a whole lot of relevant facts and circumstances, which might have escaped notice or may not have been visualized. In my humble opinion, a flexible framework rather than a rigid one-size-fits-all model is always desirable and essential for accurately assessing minority institution status. Having regard to special features that each minority institution is most likely to have, a nuanced approach would be required to identify minority institutions by balancing the general guidelines with unique institutional circumstances. The indicia, which

have been proposed, could partly inform classification of minority institutions but a tailored evaluation is all the more necessary to account for distinct characteristics which each such institution is associated with; more so, when AMU is unique in itself and its status is under consideration as a standalone institution.

58. Having clarified my stance on the general indicia which should prospectively govern the evaluation of minority educational institutions, I shall now endeavour to be punctilious in assessing the status of AMU bearing in mind its unique institutional characteristics.

59. However, my consideration of the indicia must be preceded by this philosophical musing. If, indeed, indicia for treating an educational institution as a minority educational institution have not been either identified or formulated by any previous decision of this Court and this is the first time an attempt to so identify/formulate is being made, can the tests laid down in ***Azeez Basha*** (supra) which are facts specific be held invalid? My answer would be in the negative.

60. Nonetheless, the search for the truth must continue appreciating all the relevant factors.

ESTABLISHMENT OF AMU

61. AMU traces its origins to its institutional predecessor, MAO College which was established on 08th January, 1877. The establishment of MAO College was spearheaded by late Sir Syed Ahmed Khan[35], a national leader who envisioned the idea of a modern and Western

[35] Sir Syed, hereafter

educational institution for the Muslim community, distinct from the traditional madrasas, which otherwise prevailed. There is no contest to the fact that that MAO College was established specifically for the educational advancement of the Muslims; it is what comes thereafter which is the point of contention and calls for being noticed, to the extent relevant, and addressed.

62. Upon Sir Syed's death in 1898, the Muslim community in his honour started collecting funds with the goal to raise a sum of Rs 1,00,000/- (Rupees one lakh only) so that MAO College could evolve into a university. It is the appellants' submission that over a period of 22 (twenty-two) years, the Muslim community, through the Muslim University Association, collected a staggering sum of Rs 30,00,000/- (Rupees thirty lakh only) which finally led the British Government to agree with the demands for a university, leading to the establishment of AMU in 1920.

63. Travelling down memory lane, one is bound to trace the emergence of the movement for a Hindu university which, over a period of time, took shape with the establishment of the Banaras Hindu University[36] through a similar statute, viz. the Banaras Hindu University Act, 1915[37]. Despite all the efforts of Sir Syed, who did not consider Muslims to be in any way inferior, and the later endeavours to have a university established with full control being exercised by the

[36] BHU, hereafter
[37] BHU Act, hereafter

Muslim community, refusal of the imperial government to succumb to the demand was a blow to the aspirations that many of the leaders of the Aligarh movement harboured. There emerged two disputing factions within the Aligarh movement – that of the Loyalists headed by Aftab Ahmad Khan and the other by Maulana Mohammad Ali, the latter being vexed with the increasing control of the imperial government over the proposed AMU. Once the BHU Act had been passed leading to establishment of the BHU, the Loyalists realised that they were caught between the devil and the deep sea, i.e., they either accede to the British envisioning of AMU, which was under overwhelming government control, or they stick to their demands and lose out on the proposed university altogether. Writ large was the fact that since BHU had not been granted the right of affiliation, it seemed to be inevitable that the proposed Muslim university will also be governed by similar such provisions governing BHU. In a decisive meeting of the Muslim University Association, the decision was put to a vote and the Loyalists emerged the winner, leading to the eventual walkout of the dissenting faction headed by Maulana Mohammad Ali, who would go on to establish Jamia Milia Islamia. A salient feature of Jamia was that it was independently funded and thrived without any aid from the imperial government. Registered in 1939 as Jamia Milia Islamia Society, the institution was deemed to

be a University under section 3 of the University Grants Commission Act, 1956[38] in 1962.

64. Much would turn on this piece of historical evidence while appreciating whether AMU was an institution established by the Muslim community.

65. Further, in British India, the legislative framework governing educational institutions was such that schools and colleges, such as MAO College, could be established by private persons, but universities in particular were exclusively within the domain of the Governor General-in-Council[39]. Though there existed no legal bar to the establishment of universities by private individuals or societies, the British Government granted recognition only to degrees issued by universities which were creatures of statute. It is the appellants' submission that in such a context, the appellants had no recourse but to obtain the concurrence of the British Government, if Sir Syed's dream was ever to be realised. It is pressed that the British Government enacted the AMU Act only upon furnishing of adequate funds by the Muslim community, and hence, though AMU was a statutory institution, it was argued to be established by the Muslims, for the Muslims.

66. Article 30(1) of the Constitution guarantees to minorities, religious and linguistic, the right to establish and administer educational

[38] UGC Act, hereafter
[39] GGIC, hereafter

institutions of their choice. The provision, at a glance, has the following three components:

(i) Existence of a minority community – either religious or linguistic,

(ii) the minority community has the right to establish an educational institution; and

(iii) the minority community has the right to administer an educational institution.

67. It is no longer *res integra* that even institutions established prior to the Constitution would be eligible to seek the protection of Article 30(1), as was expressed by this Court in ***Re: The Kerala Education Bill, 1957*** (supra) at p. 1051:

> "There is no reason why the benefit of Article 30(1) should be limited only to educational institutions established after the commencement of the Constitution. The language employed in Article 30(1) is wide enough to cover both pre-constitution and post-constitution institutions. It must not be overlooked that Article 30(1) gives the minorities two rights, namely, (a) to establish, and (b) to administer, educational institutions of their choice. The second right clearly covers pre-constitution schools just as Article 26 covers the right to maintain pre-constitution religious institutions."
>
> (emphasis supplied)

AMU, though established during pre-Constitution days, it was contended that it is thus eligible to seek the protection of Article 30(1).

68. Having regard to such contention, it is necessary to examine the aspect of establishment. To understand how and why AMU came to be established, a perusal of the Statement of Objects and Reasons to the Act, and its Preamble, is necessitated:

"An Act to establish and incorporate a teaching and residential Muslim University at Aligarh."

"WHEREAS it is expedient to establish and incorporate a teaching and residential Muslim University at Aligarh, and to dissolve the Societies registered under the Societies' Registration Act, 1860, which are respectively known as the Muhammadan Anglo-Oriental College, Aligarh, and the Muslim University Association, and to transfer to and rest in the said University all properties and rights of the said Societies and of the Muslim University Foundation Committee."

69. While on the subject, a study of contrasts would be of profit, if one were to examine the founding Acts of one contemporary university, i.e., the Annamalai University Act, 1928[40]. It would also be of profit to examine the Visva Bharati Act, 1951[41], which came to be enacted immediately after India attained independence.

70. The 1928 Act records as follows:

"AND WHEREAS the Hon'ble Diwan Bahadur Sir S.R.M. Annamalai Chettiyar has established and is maintaining colleges at and near Chidambaram in which higher instruction is imparted in English, Tamil and Sanskrit studies;
AND WHEREAS the said Sir Annamalai Chettiyar has agreed with the Local Government to hand over the said institutions together with all the properties attached thereto and further to give a sum of twenty lakhs of rupees for the purposes of establishing and maintaining at Annamalainagar a Teaching and Residential University wherein he and his heirs shall be entitled to certain powers and privileges;"

(emphasis supplied)

71. The 1951 Act, similarly, pays homage and specifically recognises its founder, 'Kabiguru' to millions of his ardent followers in his state of birth and beyond, as follows:

"2. Declaration of Visva-Bharati as an institution of national importance.—Whereas the late Rabindranath Tagore (Thakur) founded an institution known as Visva-Bharati at Santiniketan in the district of Birbhum in West Bengal the objects of which are such as to make the

[40] 1928 Act, hereafter
[41] 1951 Act, hereafter

institution one of national importance, it is hereby declared that the institution known as 'Visva-Bharati' aforesaid is an institution of national importance and is as such hereby constituted as a University."
(emphasis supplied)

72. It is evident upon bare perusal of the above extracts that while establishing the respective universities, which are obviously statutory creations, the 1928 Act and the 1951 Act categorically recognise establishment of the respective predecessor institution by its founder. Annamalai University and Visva Bharati University are synonymous with Sir Annamalai Chettiar and Gurudeb Rabindra Nath Thakur, respectively; however, the AMU Act is woefully bereft of the same or similar recognition. The AMU Act is conspicuously silent on two major elements which the appellants argue was what brought AMU into existence – the contributions of Sir Syed and that of the donations collected *en masse* from the Muslim community in order to establish the erstwhile MAO College. If the institution was truly founded by the minority community, as contended by the appellants, there is no reason why the Preamble would not have been drafted in a similar manner so as to highlight the same. I am unable to subscribe to the majority opinion of recognition of the respective founders in the 1928 Act and the 1951 Act being of no relevance.

73. It would be further apposite to examine the enactments establishing two other minority universities. Firstly, the Sam Higginbottom University of Agriculture, Technology and Sciences, Uttar Pradesh Act,

2016, whose Preamble decisively recognises the establishment of the said university by the minority Christian community, as follows:

> "An Act to establish and incorporate a Teaching, Research and Extension University with a view to upgrade and reconstitute the existing Sam Higginbottom Institute of Agriculture, Technology and Sciences (Deemed-to-be- University), Allahabad, established and administered by the Ecumenical Minority Christian Society namely the Sam Higginbottom Educational and Charitable Society, Higginbottom House, 4- Agricultural Institute, Allahabad-211007, Registered under the Society Registration Act, 1860 in the State of Uttar Pradesh, and to provide for natters connected therewith or incidental thereto."

74. Secondly, the preamble of Era University, Lucknow, Uttar Pradesh Act, 2016, unambiguously recognises the minority character of the institution by stating that:

> *"Preamble*
> *An Act to establish and incorporate a teaching University sponsored by Era Educational Trust duly established and administered by the members of Muslim Minority community,*
> ***
> *2. Definitions—In this Act, unless the context otherwise requires*
> ***
> *(t) 'Trust' means the Era Educational Trust, established and administered by the members of Muslim Minority community, in the year 1995 for imparting education, having its office at 88, Victoria Street (Tulsi Das Marg), Lucknow a 'not for profit' Trust registered in the office of Sub-Registrar-I Lucknow under the Indian Trust Act, 1882."*
>
> (emphasis supplied)

75. Thus, these enactments are in stark contrast to the AMU Act, insofar as they categorically recognise the factum of establishment and administration of the universities by the respective minority community.

76. Proceeding further, section 7 of the AMU Act states that:

> *"The University shall invest and keep invested in securities in which trust funds may be invested in accordance with the law for the time being in force relating to trusts in British India a sum of thirty lakhs of rupees as a permanent endowment to meet the recurring charges of the University other than charges in respect of Fellowships, Scholarships, Prizes and rewards…"*
>
> (emphasis supplied)

Therefore, the sum of Rs 30,00,000/- (Rupees Thirty lakh only) collected by donations across the country was not spent in the establishment of AMU; rather, it was to be used as a fund to meet recurring expenditure. The appellants have repeatedly underscored the contribution made by the Muslim community, motivated to do the same by a systematic and sustained effort on the part of Sir Syed, in the setting up of AMU. The impact of such a monetary contribution cannot be gainsaid, but can the same be equated to establishment of AMU? I think not. The efforts of the Muslim community in leading to the establishment of AMU were no doubt monumental in spearheading the movement, and perhaps without such efforts AMU would never have become a reality, but this cannot by any stretch of imagination mean that the community itself established AMU.

77. There is no contest that MAO College was a minority institution, but AMU would not be endowed with the same characteristic solely on account of tracing its lineage from MAO College. The same is evidenced by section 4 of the AMU Act, which is reproduced hereinbelow:

> *"4. From the commencement of this Act-*
> *(i) The Societies known as the Muhammadan Anglo-Oriental College, Aligarh, and the Muslim University Association shall be dissolved, and all property, moveable and immoveable, and all rights powers and*

privileges of the said Societies and all property, moveable and immoveable, and all rights, powers and privileges of the Muslim University Foundation Committee shall be transferred to and vest in the University and shall be applied to the objects and purposes for which the University is incorporated;
(ii) All debts, liabilities and obligations of the said Societies and Committees shall be transferred to the University and shall thereafter be discharged and satisfied by it;
(iii) all references in any enactment to either of the said Societies and Committee shall be construed as references to the University;
(iv) any will, deed or other document, whether made or executed before or after the commencement of this Act, which contains any bequest, gift or trust in favour either of the said Societies or of the said committee shall, on the commencement of this Act, be construed as if the University was therein named instead of such Society or Committee;
(v) subject to any order which the Court may make, the buildings which belonged to the Muhammadan Anglo Oriental College, Aligarh, shall continue to be known and designated immediately before the commencement of this Act;
(vi) Subject to the provision of this Act, every person employed immediately before the commencement of this Act in the Muhammadan Anglo-Oriental College, Aligarh, shall hold employment in the University by the same tenure and upon the same terms and conditions and with the same rights and privileges as to pension and gratuity as he would have held the same under the Muhammadan Anglo-Oriental College, Aligarh, if this Act had not been passed;"

(emphasis supplied)

Thus, the societies, from which the appellants contend AMU inherited its minority character, stood dissolved upon the AMU Act coming into force. AMU was, thus, an institution unto itself, distinct from MAO College. There was a clear and statutory break from the antecedent history, and the character of AMU as it were, has to be examined on its own merit.

78. The appellants have relied on a number of decisions to contend that a university could also be a minority institution, foremost of which was ***St. Stephen's College vs. University of Delhi***[42]*.* However, all the

[42] (1992) 1 SCC 558

precedents relied on, have as their focus of discussion colleges and not universities. Though both are educational institutions which come under the ambit of Article 30(1), they are not synonymous with each other and are markedly different, particularly in one aspect, i.e., universities only can confer degrees while colleges cannot unless, as in present days, a college is also deemed to be a university and can award degrees. MAO College when it existed, established by Muslim individuals, could not confer degrees and it was only Allahabad University, of which MAO College was an affiliated college, that could award degrees.

79. As rightly contended by the learned Attorney General, the private individuals who had set up MAO College were not legislatively competent to establish a university in the first place. Being devoid of the authority to establish, the power to do which was the sole preserve of the British Government, the establishment of AMU could not possibly be owed to the Muslim community. An example of this is section 6 of the AMU Act, which stated that degrees conferred by AMU would be recognised by the Government. The provision states:

> *"6. Recognition of degrees. – The degrees, diplomas and other academic distinctions granted or conferred to or on persons by the University shall be recognised by the Central and State Governments as are the corresponding degrees, diplomas and other academic distinctions granted by any other University incorporated under any enactment."*

As has been discussed, the only universities whose degrees were recognised by the Government were those established by statute.

Degrees issued by private universities were not recognised by the British Government. The degrees issued by AMU being officially recognised, it could not, as a logical corollary, be said that AMU was established by the Muslim community. The university being brought into existence solely by virtue of the statute, its establishment could not be owed to anything other than the statute.

80. Provisions of the AMU Act have been highlighted to show that bodies such as the Court were to be comprised entirely of Muslim members. However, such bodies could not be said to have *established* AMU.

81. Black's Law Dictionary[43] defines 'establish' as:

> "**establish**, vb. (14c) 1. To settle, make, or fix firmly; to enact permanently <one object of the Constitution was to establish justice>. **2. To make or form; to bring about or into existence** <Congress has the power to establish Article III courts>. **3.** To prove; to convince <the House managers tried to establish the President's guilt>."
>
> (emphasis supplied)

82. The appellants advocated for the verb "to establish" to be interpreted widely so as to mean "to found". While this Court has time and again interpreted words of statutes in a liberal manner so as to align them with legislative intent, the interpretation canvassed by the appellants, insofar as "to establish" is to be equated with "to found", demands an implausibly expansive reading of Article 30(1). It is a primary rule of interpretation that statutes must be interpreted as they are, and auxiliary connotations must not be read into the provision, unless

[43] 9th Edition

there is reason established for doing so. The two words are very distinct in their purport and understanding. The Constituent Assembly, in its legislative wisdom, chose specifically to use the words 'to establish" in Article 30(1); interpreting it in a manner so wide as to change its meaning altogether would be doing the Constitution and its framers a disservice. A perusal of the decisions of this Court, which shall be discussed henceforth, categorically evinces that this contention is untenable in law.

83. In ***Very Rev. Mother Provincial*** (supra), this Court explained 'establishment' by categorically holding that it refers to the factum of bringing into existence of the university, and not the founding of the institution:

> *"8. Article 30(1) has been construed before by this Court. Without referring to those cases it is sufficient to say that the clause contemplates two rights which are separated in point of time. The first right is the initial right to establish institutions of the minority's choice. Establishment here means the bringing into being of an institution and it must be by a minority community. It matters not if a single philanthropic individual with his own means, founds the institution or the community at large contributes the funds. The position in law is the same and the intention in either case must be to found an institution for the benefit of a minority community by a member of that community. It is equally irrelevant that in addition to the minority community others from other minority communities or even from the majority community can take advantage of these institutions. Such other communities bring in income and they do not have to be turned away to enjoy the protection."*
>
> (emphasis supplied)

84. Hon'ble V.N. Khare, J. (as His Lordship then was) in ***T.M.A. Pai Foundation*** (supra) observed as follows:

> *"**254.** The expression 'to establish' means to set up on permanent basis. The expression 'to administer' means to manage or to attend to the running of the affairs…"*

(emphasis supplied)

85. This Court, in ***A.P. Christian Medical Educational Society vs. Govt. of A.P.***[44], emphasized the importance of piercing the veil to gauge whether an institution is truly a minority educational institution, by stating as follows:

> *"8. It was seriously contended before us that any minority, even a single individual belonging to a minority, could found a minority institution and had the right so to do under the Constitution and neither the government nor the University could deny the society's right to establish a minority institution, at the very threshold as it were, howsoever, they may impose regulatory measures in the interests of uniformity, efficiency and excellence of education. The fallacy of the argument insofar as the instant case is concerned lies in thinking that neither the government nor the University has the right to go behind the claim that the institution is a minority institution and to investigate and satisfy itself whether the claim is well-founded or ill-founded. The government, the University and ultimately the court have the undoubted right to pierce the 'minority veil' — with due apologies to the corporate lawyers — and discover whether there is lurking behind it no minority at all and in any case, no minority Institution. The object of Article 30(1) is not to allow bogies to be raised by pretenders but to give the minorities 'a sense of security and a feeling of confidence' not merely by guaranteeing the right to profess, practise and propagate religion to religious minorities and the right to conserve their language, script and culture to linguistic minorities, but also to enable all minorities, religious or linguistic, to establish and administer educational institutions of their choice. These institutions must be educational institutions of the minorities in truth and reality and not mere masked phantoms. They may be institutions intended to give the children of the minorities the best general and professional education, to make them complete men and women of the country and to enable them to go out into the world fully prepared and equipped. They may be institutions where special provision is made to the advantage and for the advancement of the minority children. <u>They may be institutions where the parents of the children of the minority community may expect that education in accordance with the basic tenets of their religion would be imparted by or under the guidance of teachers, learned and steeped in the faith. They may be institutions where the parents expect their children to grow in a pervasive atmosphere which is in harmony with their religion or conducive to the pursuit of it. What is important and what is imperative is that there must exist some real positive index to enable the institution to be identified as an educational institution of the minorities. We have already said that in the present case apart from the*

[44] (1986) 2 SCC 667

half a dozen words 'as a Christian minorities' institution' occurring in one of the objects recited in the memorandum of association, there is nothing whatever, in the memorandum or the articles of association or in the actions of the society to indicate that the institution was intended to be a minority educational institution. As already found by us these half a dozen words were introduced merely to found a claim on Article 30(1). They were a smoke-screen."

(emphasis supplied)

86. It is thus evident that establishment is a question of fact and has to be proved as such. The factum of establishment cannot, thus, be solely determined by intention of the minority community alone; rather, it has to be factually established in words and deeds and functioning of the university.

87. ***Azeez Basha*** (supra) categorically dealt with the factum of AMU's establishment to conclude that AMU was not established by the Muslim community, in the following manner:

"It is true, as is clear from the 1920-Act, that the nucleus of the Aligarh University was the M.A.O. College, which was till then a teaching institution under the Allahabad' University. The conversion of that college (if we may use that expression) into a university was however not by the Muslim minority; it took place by virtue of the 1920-Act which was passed by the Central legislature. There was no Aligarh University existing till the 1920- Act was passed. It was brought into being by the 1920-Act and must therefore be held to have been established by the Central Legislature which by passing the 1920-Act incorporated it. The fact that it was based on the M.A.O. College, would make no difference to the question as to who established the Aligarh University. The answer to our mind as to who established the Aligarh University is clear and that is that it was the Central Legislature by enacting the 1920-Act that established the said University."

(emphasis supplied)

88. This Court in ***Azeez Basha*** (supra) having held, upon an exhaustive analysis of the facts and circumstances presented before it, that AMU

was brought into existence by the Central Legislature by virtue of the AMU Act, I see no infirmity warranting the view taken therein to be overruled. And, this being the settled position for more than half-a-century by now, it is not worthwhile to interfere with the same at this distance of time notwithstanding the attempts to have it removed.

ADMINISTRATION OF AMU

89. The other element enumerated under Article 30(1) is 'administer'. Administration, like establishment, is a question of fact. The minority community needs to prove, through material evidence, the fact of administration by the community.

90. Before delving into the factual scenario, it is necessary to grasp what are the elements of administration. To fully appreciate what administration entails, it would be opportune to go through treatises and the previous articulations of this Court on the topic.

91. The eleventh edition of Black's Law Dictionary defines the term "administration" as:

> administration, n. (14c) 1. The management or performance of the executive duties of a government, institution, or business; collectively, all the actions that are involved in managing the work of an organization. 2. In public law, the practical management and direction of the executive department and its agencies…."
>
> (emphasis supplied)

92. This Court in ***Ahmedabad St. Xavier's College Society vs. State of Gujarat***[45] has provided an unambiguous rubric to understand what the "right to administer" entails:

[45] (1974) 1 SCC 717

> *"19. The entire controversy centres round the extent of the right of the religious and linguistic minorities to administer their educational institutions. The right to administer is said to consist of four principal matters. First is the right to choose its managing or governing body. It is said that the founders of the minority institution have faith and confidence in their own committee or body consisting of persons elected by them. Second is the right to choose its teachers. It is said that minority institutions want teachers to have compatibility with the ideals, aims and aspirations of the institution. Third is the right not to be compelled to refuse admission to students. In other words, the minority institutions want to have the right to admit students of their choice subject to reasonable regulations about academic qualifications. Fourth is the right to use its properties and assets for the benefit of its own institution."*
>
> (emphasis supplied)

93. The articulation of 'right to administer' provided by this Court in the abovementioned decision is supplemented by the decision in ***TMA Pai Foundation*** (supra), where this Court outlined what rights constitute the right to administer and establish:

> *"50. The right to establish and administer broadly comprises the following rights:*
> *(a) to admit students;*
> *(b) to set up a reasonable fee structure;*
> *(c) to constitute a governing body;*
> *(d) to appoint staff (teaching and non-teaching); and*
> *(e) to take action if there is dereliction of duty on the part of any employees."*

94. What can be culled out from the above discussion is that administration means carrying out all the functions, which are essential for functioning of an institute. Even if some regulatory interference by the State does exist, it cannot be said that the community is not administering the institute merely because there is some superficial interference in the working of the institution by the State. Only when the State enjoys a

deep and pervasive control over the functioning of an institution, it can be said that the State is administering the institution.

95. However, to substantiate the argument that a certain community has been administering an institute, it has to be illustrated that the overall governance of the institute is under the control of the community. Administration vis-à-vis a university consists of making decisions with regard to hiring of faculty, admitting and subjecting students to take lessons and examinations, fee structures, disciplinary proceedings for the teaching and non-teaching staff and other miscellaneous day-to-day operations which are needed to keep the university operating optimally.

96. The test which needs to be satisfied in order to establish that a university is administered by a minority community is the test of ultimate control.

97. The administrative functions of AMU are broadly carried out by five bodies:

a) Visitor (erstwhile Lord Rector);

b) Visiting Board;

c) Executive Council;

d) Academic Council; and

e) Court of AMU.

98. AMU Act, as it stood in 1920, prior to the amendments, did not provide for a mechanism for Muslims to administer the University. Section 13 of the AMU Act provided for the Governor General of British India to be

the Lord Rector (now Visitor). The Lord Rector had been bestowed with the ultimate control and superintendence of the University. Section 14 provided for the Visiting Board, which was responsible for ensuring that the University is functioning in accordance with the act, ordinances, and rules. The composition of the Visiting Board did not reflect any special dispensation being made for Muslim control over the board.

99. There have been extensive submissions on the nature of the Court of AMU, and much reliance has been placed by the appellants on section 23(2) of the AMU Act. According to the appellants, the Court of AMU is the supreme governing body of the university. At first blush, this submission by the appellants seems reasonable; however, on closer examination of the statute, this submission cannot be accepted. Section 23(2) gives only residuary powers to the Court of AMU over matters not explicitly provided for in the AMU Act and rules of the University. If sections 13 and 23 are read jointly, the clear picture which emerges is that the Court of AMU is subservient to the Lord Rector; as the Lord Rector had been given the power to overrule the Court of AMU under section 13(5) of the Act.

100. Deep involvement of the State is demonstrated through the Governor-General/Governor in all major activities of the University, such as establishing colleges, promulgating ordinances, and superintendence over the Executive and the Academic Councils.

101. The governing structure of AMU gives me compelling indications to hold that there is a deep and pervasive control of the State over the

administration of the University. The governance structure, funding, admissions, and appointments in the University demonstrates an involvement of the State which goes way beyond mere regulatory oversight and into its absolute control over the administration of the University.

102. Hence, I find myself being drawn to the irresistible conclusion that AMU has not been administered by a minority community at any point in time. The Act places the ultimate control of the University with the Central Government and the Central Government and its predecessor have been administering AMU since 1920.

CONJUNCTIVE INTERPRETATION OF ESTABLISH AND ADMINISTER

103. Now that the two aspects of establishment and administration have been examined individually, it is apposite to investigate whether the two rights, as guaranteed by the Constitution, have to be read as disjunctive or conjunctive rights. In view of the consensus on the point that 'and' between 'establish' and 'administer' has to be read and understood as 'and' and not 'or', the discussion is rendered practically academic. However, some discussion on the topic is considered worthwhile having regard to the re-referral order in ***Aligarh Muslim University*** (supra).

104. The Constitutional Debates on the drafting of Article 30 have been brought to the fore by the respondents, and while the provision underwent multiple revisions, what remained constant was the use of the word "and" in the phrase "establish and administer". This is

also evident from the Hindi version of Article 30(1) in Devnagari script, reading as follows:

शिक्षा संस्थाओं की स्थापना और प्रशासन करने का अल्पसंख्यक-वर्गों का अधिकार।	**30.** (1) धर्म या भाषा पर आधारित सभी अल्पसंख्यक-वर्गों को अपनी रुचि की शिक्षा संस्थाओं की स्थापना और प्रशासन का अधिकार होगा।

A perusal of Article 30(1) in Hindi reveals that the conjunction used to connect establish (स्थापना) and administer (प्रशासन) is "और", i.e., "and" as opposed to the word "या" which means "or". It is well settled that the word "and" connotes a conjunctive nature whereas the word "or" connotes a disjunctive meaning. Though the terms can be, in exceptional circumstances, interchangeably interpreted with the aim of fulfilling the legislative intent, there is nothing in the provision, which impels us to read and understand the word other than what is conveyed by its ordinary meaning. Therefore, this Court in multiple decisions has interpreted the right to establish and administer as conjunctive rights rather than disjunctive.

105. The perusal of the Hindi version also buttresses the position that establishment has to only be read as so, rather than being expansively interpreted as founding. This is evident from the use of the word "स्थापना" by the Constitution framers, which means 'to establish' rather than the use of the word "उद्भावना" which means 'to conceive' or 'to found'. As discussed above, words have to be

interpreted literally, unless the context requires otherwise, which in this case, it does not.

106. This Court, in ***Dayanand Anglo Vedic (DAV) College Trust and Management Society vs. State of Maharashtra***[46], held that:

> "34. After giving our anxious consideration to the matter and in the light of the law settled by this Court, we have no hesitation in holding that in order to claim minority/linguistic status for an institution in any State, the authorities must be satisfied firstly that the institution has been established by the persons who are minority in such State; and, secondly, the right of administration of the said minority linguistic institution is also vested in those persons who are minority in such State. The right conferred by Article 30 of the Constitution cannot be interpreted as if irrespective of the persons who established the institution in the State for the benefit of persons who are minority, any person, be it non-minority in other place, can administer and run such institution."
>
> (emphasis supplied)

107. A similar view was echoed by this Court in ***St. Stephen's*** (supra), wherein it was held that:

> "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."
>
> (emphasis supplied)

[46] (2013) 4 SCC 14

108. Finally, reference to ***Azeez Basha*** (supra) again, is considered relevant. The argument raised before the Court was a bit different in the sense that right to administer AMU was claimed by almost abandoning the claim that AMU was established by the minority community. It was held that:

> "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 religions (sic, religious) minority may not have established the educational institution, it will have the right to administer it, if by some process it has 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 [(159) SCR 995] 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 that at p. 1062 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 of 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 this 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).”

(emphasis supplied)

109. The above passage has been quoted by the bench of 3 (three) Judges in ***Aligarh Muslim University*** (supra). Having read the said passage in between the lines, I have utterly failed to find any infirmity in the process of reasoning by the Constitution bench while dealing with the arguments that were raised before it.

110. In any event, leaving aside ***Azeez Basha*** (supra), it is amply clear that this Court has consistently read Article 30(1) to provide conjunctive, rather than separate and disjunctive, rights. The interpretation of Article 30 in the manner sought to be projected in the majority opinion, would mean that even an institution, though established by the minority, but has never been administered by it would reap the protection granted by Article 30(1). Such a result is exactly what was warned against by this Court in ***A.P. Christian Medical Educational Society*** (supra). The right to ‘administer’ accruing to the minority community only upon the factum of ‘establish’ having first been proven leaves but one with the

unescapable conclusion, that the right to establish and the right to administer are twin rights, and cannot be read in isolation from one another. Any other interpretation would lead to consequences that were far from what the Constituent Assembly did intend.

111. The majority opinion, though extensive, seems to have created an existential impasse, akin to the Chakravyuh orchestrated by Dronacharya. While it is mentioned in paragraph 73 of the revised draft opinion that *"Article 30(1) cannot extend to a situation where the minority community which establishes an educational institution has no intention to administer it"*, it has been opined at paragraph 156 (could also be 155) that *"In the preceding sections we have held that establishment by a minority is the only indicia for a minority educational institution"*. To my mind, these two positions create an inherent contradiction which is as perplexing to solve as the Chakravyuh was for Abhimanyu, inasmuch as it lays out mutually exclusive positions of law which cannot possibly co-exist. In view thereof, a question comes to my mind that if a minority community establishes an educational institution and thereafter abandons its administration to rank outsiders, can such an institution be said to merit protection under Article 30(1), if establishment is the only indicium, as held in the majority opinion? From the paradoxical legal test laid out above, the answer remains elusive.

ENTRY 63 OF LIST I

112. There is yet another issue that demands attention: what is the impact of including AMU in List I, Entry 63[47] of the Seventh Schedule of the Constitution, and what are the implications of its designation as 'institution of national importance'?

113. Apart from AMU, BHU also finds pride of place in Entry 63. Respect and honour, in equal measure, as well as equal status as institutions of national importance were bestowed on these two universities (having religious imprint in their respective titular description), which were established by the end of the second decade of the century in which India attained independence from colonial rule, mandating that it is Parliament which can exercise its legislative authority over them without any constraints or qualifications.

114. When the Constitution was being drafted, AMU was not remotely relatable to being considered as a minority institution. The framers of the Constitution proceeded on that basis and included AMU in Entry 63 of List I not only as an institution in respect whereof laws could be framed by the Parliament but also, by necessary implication, designated AMU as an institution of national importance.

115. A brief reference to the Constituent Assembly Debates would be apt at this stage. While deliberating on Entry 63 (originally Entry 40, List

[47] 63. The institutions known at the commencement of this Constitution as the Banaras Hindu University, the Aligarh Muslim University and the Delhi University, and any other institution declared by Parliament by law to be an institution of national importance.

I of the Seventh Schedule to the Draft Constitution of India), Mr. Naziruddin Ahmad remarked:

> "I have slightly altered my amendment to suit the change introduced by Dr. Ambedkar in his own amendment. I submit that Dr. Ambedkar's amendment would unduly enlarge the jurisdiction of the Centre and many things which would be otherwise cognizable by the Provinces would now, by virtue of the words which I seek to delete, be included within the jurisdiction of the Centre. The Banares Hindu University and the Aligarh Muslim University have been regarded from their very inception as institutions of a national character and importance and therefore they have been rightly regarded so far as national institutions and they have been rightly placed under the jurisdiction of the Union."[48]

116. The foresight of the Constituent Assembly is, thus, evident in that the Assembly aimed to preserve and reinforce the national and secular character of AMU. By incorporating AMU within Entry 63 of List I in the Seventh Schedule, the Assembly decisively entrenched its secular and national identity through constitutional enactment. Consequently, any remnants of affiliation to a specific community were deliberately eliminated.

117. *"Aligarh Muslim University is not a theological convent. It is a university, and a university cannot function as a communal institution"*, observed Mr. M.C. Chagla [one of the most (if not the most) reputed and respected Chief Justices of the High Court of Bombay] serving as the Minister of Education, Government of India

[48] *Constituent Assembly Debates*, Volume 9, 30th August 1949 (9.127.209)

at the time, while addressing Parliament during the debate on the AMU (Amendment) Bill, 1965—a bill that was ultimately enacted by Parliament[49]. Excerpts from Mr. Chagla's speech in the Parliament[50] read as under:

> *"In my opinion, the Aligarh Muslim University is a national institution, an institution of national importance. There are four Central universities: there is the Banaras Hindu University; there is the Aligarh Muslim University; there is the Delhi University; and there is the Visvabharati University. All these institutions are institutions of national importance. If you look at the Seventh Schedule entry 63 therein is very significant; entry 63 of List I of the Seventh Schedule gives the power to the Parliament to legislate […]*
>
> *My submission to this House is that Aligarh University has neither been established nor is being administered by the Muslim Community. […] You had first the Muslim college which was founded by Sir Syed Ahmed. Sir Syed Ahmed has asked the British Government of those days to establish a university and the British Government established the University. Therefore, the establishment of the institution was by the legislature and not by the community […] Now I cannot understand how it can be said that the administration is in the hands of the minorities. The administration of the University depends upon the law. During the British times it depended upon this Act. After independence it depends upon the Act, as had been amended by the Parliament. Does Mr. Anthony suggest that it is open to the Aligarh University or the Muslim community to change the administration of the university even to the slightest degree and go contrary to what the Parliament has laid down? If the minority had the right to administer the Aligarh University, then it can have any administration it liked; it can change the administration and it can close down the University; it can change the constitution of the court or the Executive Council. Can it do so? Even the constitution of the court, of the executive council and of the academic council is regulated and not by the minority committee but by the Parliament. There is another aspect of the matter which Mr. Anthony has completely forgotten. He has attached great importance to the fact that under the Act of 1920, the British Government, as a concession, said that the court shall consist wholly of Muslims. Now everybody know that the University is administered by the executive council and not by the court. The court of course is the supreme authority and it is like a show-piece. It meets once a year; lots of people come there and make speeches and pass resolutions. But the day-to day administration, selection, appointments, and so on are carried on by the executive council and it is significant that even in the British days it was not provided that the executive council shall consist only of Muslims. That clearly shows that the British*

[49] *Lok Sabha Debates*, Twelfth Session, Third Series Vol. XLIV – No. 9, 27th August 1965
[50] *Lok Sabha Debates*, Twelfth Session, Third Series Vol. XLIV – No. 9, 27th August 1965

Government did not concede the argument. Although there is no Constitution then the arguments is now advanced by Mr. Anthony that the minority has a right to administer a particular institution. I say that this institution was not established by the minority; nor is it being administered by the minority community. That is the legal position as far as Article 30 is concerned."[51]

(emphasis supplied)

118. Prof. Nurul Hasan, a reputed historian, followed in the footsteps of Mr. M.C. Chagla as the Minister of Education. This is what Prof. Hasan had to say in Parliament:

> *"**Regards the third objection that as a minority institution it is only Muslims who should be on the Court and on the Executive Council and they should have an exclusive hand in the management of the University, hon Members are aware of the writ which had been filed in the Supreme Court. It has since been withdrawn. Mr. Chagla has expressed his opinion on the legal aspect of the matter. He thinks that this University was not established by the minorities, but by Parliament and, therefore, this objection is not right. As far as interpretation of the Constitution is concerned, I see no reason to differ from the interpretation given by him. I do feel, however, that the spirit underlying the Constitution should not be lost sight of. As far as the objection that there should be only Muslims, who should manage the affairs of the University, is concerned, I know that one of our learned colleagues, Shri P. N. Sapru, has been on the Executive Council of the University for quite a number of years."*

119. The inclusion of AMU in Entry 63 of List I conferred upon it a distinct status of being an "institution of national importance". The Constitution itself did not categorize AMU as either a minority institution or otherwise. Following the adoption of the Constitution in 1950, amendments were promptly enacted to the AMU Act in 1951 and again in 1965. These amendments were designed to align with

[51] *Lok Sabha Debates,* Twelfth Session, Third Series Vol. XLV- No. 13, 2nd September 1965

constitutional provisions and to reflect the status of AMU as an "institution of national importance".

120. Entry 63 grants exclusive legislative authority over the specified universities therein to Parliament, and to any other institution declared by Parliament by law to be an institution of national importance. The scheme of Entry 63, which constitutionally designates AMU, BHU and Delhi University as institutions of national importance, is sufficient to indicate that AMU is not a minority institution. Absence of specific names of universities other than the ones in Entry 63 or anywhere else in the Constitution cements AMU's distinctive status as an institution of national importance, with its national and non-minority character at the forefront. There could be other institutions of national importance, even institutions which have minority character, but such institutions being designated by ordinary laws would never reach the elevated status of AMU.

121. As clearly distinguishable from other entries in the three lists forming part of Schedule VII, which only provide the vast field of subjects pertaining to which laws could be enacted by the Centre/the States, it is essential to interpret Entry 63 of List I not merely as a field over which Parliament has the authority to make a law but also as a Constitutional provision of recognition of certain institutions as 'institutions of national importance'. The language of the Entry explicitly designates these institutions with a unique status, thereby affirming their designation as universities of national importance.

Thus, it would be inappropriate to construe this Entry solely as a legislative subject without acknowledging its broader implications.

122. In light of the above, an institution having secular traits which was designated as one of national importance by the framers of the Constitution and enshrined in the Constitution adopted in 1950, cannot be retroactively reclassified as a minority Muslim institution in 2024 without violating the secular principles that underpin our Constitution. Such a reclassification would fundamentally conflict with the secular ethos embedded in our Constitutional framework, which upholds the equal status of all institutions irrespective of religious affiliation. The original intent was to recognize these institutions for their national significance, and altering this status now would undermine the foundational values of secularism and equality that guide our Constitutional order.

123. Moreover, universities of national importance, such as AMU, cannot be subordinated to the control of any minority community or particular group. Their national character necessitates that they remain under the jurisdiction of the Central Government to ensure that their operations and management align with their designated national significance. This is crucial as the Central Government provides full funding for these institutions, which is vital for their continued existence. The control of the Central Government and the Parliament's jurisdiction to legislate on AMU could in a way be terminated if the minority community is conceded the right to close

down AMU even. A 'right to administer' (although may not include the 'right to maladminister') could include the 'right not to administer' and, thus, bring about a closure of AMU. This would not be in the greater national interest.

124. AMU's status having been firmly established upon the adoption of the Constitution through its inclusion in Entry 63 of List I, any alteration of AMU's status—particularly as executed by the Amendment of 1981— is untenable. Any such modification must be effected through an appropriate Constitutional amendment under Entry 63 of List I, adhering to the procedure set forth in Article 368 of the Constitution and such changes cannot be made merely by amending the relevant statute, i.e., the AMU Act. Under these circumstances, the intention of the framers of the Constitution to affirm the national and secular character of AMU may not be altered, particularly not in the manner proposed by the appellants.

125. None of us on the bench was born within a decade of India attaining independence. What was the pre-independence scenario is, thus, not known to any one of us. Whatever we know is through our ancestors or books and treatises on the subject. We have not been trained to decide any issue based on our personal knowledge. However, judicial notice can of course be taken of facts specified in section 57 of the Evidence Act, 1872 (currently, section 52 of the Bharatiya Sakshya Adhiniyam, 2023) which would include matters of public history based on appropriate books or documents of reference but the court,

if it is called upon by a person, may refuse to take judicial notice of any fact unless and until such person produces any such book or document as it may consider necessary to enable it do so. There is, however, no such tether insofar as debates of the Constituent Assembly or proceedings of Parliament are concerned. Judicial notice thereof can be taken without any reservation and what have been debated, as seen from documented records, are assumed to be correct. Does that mean that the courts are bound to accept the contents of the debates as portrayal of the correct position on facts? The answer may not be in the affirmative in all cases. But, although courts are not bound to accept the speeches of members of the Constituent Assembly or the members of the Parliament including ministers, made on the floor of the Parliament, as unvarnished and unimpeachable truth, the speeches are of sufficient persuasive value and if, the factual accuracy of the contents of such speeches are not shown to be questionable or incorrect, there is no reason as to why the court should feel shy to rely on them. Mr. M.C. Chagla, followed by Prof. Nurul Hasan, was emphatic on the floor of the Parliament that AMU was not a minority institution. I have not been impressed upon to hold, with reference to any credible material shown by the appellants, that what the ministers said was factually incorrect, they were nowhere near the truth or their speeches were 'a long shot from reality'. Based on post-independence events like these speeches as well as other evidence that is available, which provide sufficient

ground to hold that AMU is not a minority institution, the voyage to change history through a judicial pronouncement may not be continued further.

126. The discussion on this topic ought to end by quoting Sahibzada Aftab Ahmad Khan, former Vice Chancellor of AMU[52]:

> "It is only fair to observe that no other national institution in India has shown such a liberal and catholic spirit in actual practice as has been the consistent policy of this institution from its start up to the present time. We have always had a good number of Hindu students, and the first graduate, in the late M.A.O. College, was a Hindu who took his degree in 1880.Thus if there is any institution in India, which can truly be called national and all-India in character, it is this University which deserves the sympathy and support not only of the Muslim community but of the people of India as a whole."

APPLICABILITY OF *PROF YASHPAL* (SUPRA) AND THE NCMEI ACT

127. In the revised draft opinion, it has been proposed to be held that the decision in ***Prof Yashpal*** (supra) will not have a bearing on the question referred herein, since the decision was rendered in the context of universities existing only on paper, and thus, mandated that institutions be established and incorporated so as to ensure their material existence. It has been opined by the HCJI that the decision does not efface the distinction between the words "established" and "incorporated", with Article 30's only indicia being that of establishment.

[52] *History of the Aligarh Muslim University, Khaliq Ahmad Nizami, p. 110, Idarah-i-Adbiyat-i-Delli, Delhi, 1995.*

128. With respect to the NCMEI Act, upon consideration of the original and the post-amendment definition of a minority educational institution, it has been proposed to be held that a statutory amendment cannot determine the interpretation of Article 30(1). In other words, the issue referred need not be decided on the basis of the amended definition of minority educational institution.

129. The opinion on the applicability or relevance of the decision in ***Prof Yashpal*** (supra) is accepted. However, the opinion on how the NCMEI Act has to be read, in particular section 2(g), in the light of the opinion earlier expressed that establishment is the only indicia and not coupled with administration is difficult to accept for reasons elaborated before.

130. However, since ***Prof Yashpal*** (supra) and the NCMEI Act are not relevant for deciding the reference, it is an indicium that reference to the same by the bench of 3 (three) Judges in ***Aligarh Muslim University*** (supra) was redundant and constitutes another reason for the re-reference to be held invalid.

131. Hon'ble Surya Kant J. has extensively dealt with the interplay among the reference, NCMEI Act amendment, UGC Act, and the holding in ***Prof Yashpal*** (supra). ***Azeez Basha*** (supra) holds that a university established by the legislature cannot have the character of a minority institution, however, the NCMEI Act provides for establishment of minority universities; to compound matters, as per the UGC Act degrees can only be conferred by universities that are established "by

or under" a statute. In ***Prof Yashpal*** (supra), this Court held that a statute would not give legal sanction to a university unless certain infrastructural facilities were already in place. To resolve this apparent contradiction, His Lordship has clarified and modified ***Azeez Basha*** (supra) to the extent that in the new legal regime a university established "by or under" a statute can have a minority character as long as it fulfils the requirements under the UGC Act. According to His Lordship, a university could either be (i) recognised by statute, (ii) brought into existence by statute, (iii) created by statute. It is only if the university falls into the third category that it is prevented from assuming the character of a minority educational institution due to it being a creature of statute. With this reasoning, His Lordship has harmonised the amended portions of the NCMEI Act, the UGC Act, and the holding of ***Prof. Yashpal*** (supra) while simultaneously modifying ***Azeez Basha*** (supra) to that extent. Resultantly, a minority community can establish a university under Article 30, if it complies with the rigours of the UGC Act.

132. When ***Azeez Basha*** (supra) was decided, the UGC Act and the NCMEI Act were not on the statute-book. Hence, the decision therein was based on the facts and circumstances before the Court. The test that was laid may not apply to present day facts and circumstances, which are governed by the UGC Act and the NCMEI Act.

CONCLUDING REMARKS

133. Judges of the Supreme Court of India are no doubt the final arbiters in resolving disputes and differences between the parties; however, the recent judicial trend of eschewing all that is old, for the sake of progress and constitutional dynamism, is disturbing. We, the Judges, at times tend to forget the confines of our own jurisdiction and that we too, like every other human, are fallible. We are meant to be guided in our approach by Constitutional morality and the words of the architects of the Constitution. Facilitating history to be re-written, more than a century later by a judicial opinion, is not what we, as Judges, are supposed to do. Additionally, in matters such as the one under consideration, there is no warrant for the thought process to gain ground that Judges of this Court who had authored opinions in the relevant past were wrong and that the present generation of Judges are correct. Judicial deference, in my view, ought to have leaned towards the interpretation of Article 30(1) that has stood the test of time for almost 75 (seventy-five) years since the Constitution has been in existence.

134. It is doubtful whether any of us, as Judges, would lay a claim to be omniscient. The limitations of a Judge's expertise would negate any assertion of authority in extra-legal areas as well as to claim special knowledge of what the canvas was prior to 1920 when AMU came to be established. Conscious as I am of my limitations, it would be a misadventure on my part to agree with the majority opinion and

command the appropriate bench to determine whether AMU was established by the minority community based on the indicium proposed therein, post-independence decisions of this Court and liberal ideas of present times, without there being credible material of proof that AMU, all along, was perceived as an educational institution established 'by the Muslim community', as distinguished from 'for the Muslim community', even during the pre-Constitution days. Whether or not an educational institution has been established by a particular community has to be judged bearing in mind all antecedent, attending and surrounding circumstances of the relevant time. No one can claim with certainty that the entirety of the dialogue/correspondence/incidents/events, which did precede the establishment of AMU, have been placed before us and that too with cent percent accuracy. Such being the state of affairs, we ought not to substitute historical facts by our appreciation of half-baked evidence. Notwithstanding the knowledge, erudition and eminence that some of us have been gifted with, I am sceptical as to whether any of us can claim to be more learned than those who played significant roles in framing of the Constitution. It is not as if they were wholly unaware of the circumstances of the yesteryears. If 'establish' were to be read as 'found', there is no reason as to why the framers did not express themselves differently by using 'to found' instead of 'to establish' or, in the alternative, both - but one after the other.

135. Tinkering with understanding of a Constitutional provision, which has been consistent and has stood the test of time since its inception, in the name of interpretation and overruling of longstanding precedents is too frequent an occurrence which judicial activism has brought about, sometimes unnecessarily, in the past couple of decades. It is time that we refrain from such an approach, unless absolutely required, and allow the people's will to prevail and the Constitution to reign supreme.

136. Turning to the point of indicia, the tests employed for identifying post-Constitution minority educational institutions cannot be the same as for identification of pre-Constitution institutions, more so when a college established by the minority is elevated to the status of a university upon establishment and incorporation through statute. There can be no dispute that an educational institution undoubtedly established prior to the Constitution coming into force by a minority community, either based on religion or language, and administered as well by such community would be entitled to the protection envisaged in Article 30(1). However, if there is a serious doubt as to who established the educational institution and how it was established, question of piercing of the minority veil does not arise in the absence of any concept of minority when the institution came to be established. One has to understand, in this regard, the purpose for which the minority community is sought to be extended protection post-Constitution era. The dominant purpose is to protect the

minority from the domination of the majority. Until independence of India was achieved, irrespective of whether a 'native' so called was a Hindu or a Sikh or a Muslim or a Christian or a Jain or a Buddhist or a Zoroastrian, each individual irrespective of his faith was the subject of colonial rule with little freedom. The concept of minority being totally absent in those days, extending the protective umbrella of Article 30 to AMU by proposing to hold that establishment by a minority is the only indicia for a minority educational institution without any indicia as to administration of such institution would be inherently contradictory to the terms of such article and susceptible to invalidity. Formulating indicia now without there being a holistic consideration of all relevant factors ought not to be embarked upon by the Court as a task particularly when earlier benches, including benches larger than this one, have jettisoned the issue.

137. Though schools, colleges and universities are all known to be educational institutions, their purposes and direction are different. Depending upon the areas of focus and emphasis, they vary in importance too. Education remains largely incomplete without a basic bachelor's degree, which a student obtains by qualifying in the relevant examination conducted by the university to which the college, where he studied, is affiliated. One other major distinguishing feature is the way each institution is created. In the days with which we are concerned, a school or college could be privately created but not a university. To 'found' an institution such

as a school or a college or a university cannot be equated with its 'establishment'. Conscious of such limitation, the argument of construing Article 30(1) in a manner such that the verb 'to establish' does not call for being read in a narrow and formalistic sense and in its expansive reading ought to take within its fold 'to found' would only beg the question that AMU was not established but, at best, found by the Muslim community.

138. The parties having agreed that the words 'establish' and 'administer' must be read conjunctively, there can be little doubt that administration has to necessarily follow establishment. It is axiomatic that to enjoy the protection that Article 30(1) guarantees, the right of the minority community to administer an educational institution can be claimed only if the educational institution is established by it. Also, Article 30(1) cannot extend to a situation where the minority community which establishes an educational institution shows no or little intention to administer it. This being the unequivocal position in law, it would be an indicium as to whether the educational institution, apart from being established by the minority, was or is being administered by the minority.

139. For the purposes of Article 30, the right to establish and the right to administer must go hand in hand. Once established, administration of the institution begins. In order to attract the protection guaranteed by Article 30, it would not be sufficient for the minority community to say that though it might have established the institution, whether to

administer it or not is a choice given by the article itself so much so that the administration can be wholly left to even a non-minority community. Only those institutions which are established by the minority community and are being administered by such community may exercise their choice of whether to establish a school or a college or a university as well as the manner and mode of management of such institution. These are of course tests which need to be applied to specific institutions which have not been brought into existence through a statute. If any institution is a creature of a statute, various other circumstances need to be holistically considered. Whether or not AMU is a minority institution presents a unique case bearing no similarity with any other pre-independence university.

140. Having regard to the state of affairs existing in India during the last quarter of the nineteenth century and the first two decades of the twentieth century, there can be no disagreement that both the Hindus and the Muslims were aspiring to have universities to cater to the needs of their respective communities. The imperial government, however, was not prepared to give up an inch and hand over control of the proposed universities to either community. The Hindus relented and BHU came to be established in 1915. The Muslims too wished to have a university but the degree of control sought to be exercised by the imperial government brought about the rift, referred to earlier. What followed was sort of a compromise. The Muslim community relented in the same manner the Hindus had relented to

get BHU established, leading to the process for establishment of AMU. The Loyalists mixed priority with pragmatism. Prioritisation meant focus on the most essential thing, i.e., establishment of AMU, and by being pragmatic, they recognised their limitations of being unable to administer a university. Once AMU came to be established through statute and became a body corporate, there was a total relinquishment of all claims. The land used for AMU was a public land; the funds for AMU were sourced to public money; the person at the helm of administration was the Rector, who was none other than the Governor General; and the sum of Rs. 30 lakh that belonged to the Muslim community and which they were prepared to spend for AMU was kept as the reserve fund, etc.

141. Assuming that the verb 'to establish' could be read as 'to found', although I found no warrant to so read, it is clear that the Muslim community had no intention to administer AMU which was left to be worked out as per the AMU Act.

142. There are a couple of other aspects, which must not escape notice.

143. First, AMU is a creature of a statute and is engaged in discharging public duties. By passage of time, AMU happens to be one of the foremost Central Universities in the country. It is, however, entirely dependent on finances allocated by the Central Government. It is mandatorily required to function as per the AMU Act as well as provisions of other enactments. There can, thus, be no doubt that AMU is an Article 12 authority. Being an Article 12 authority, it is

bound by all the articles in Part III of the Constitution which impose duty upon it *inter alia* to ensure equality and fairness in all its actions including Article 29(2). In the present context, Article 30(1) cannot be divorced from Article 29(2). The scope of 'choice' of the minority as in Article 30(1), if at all it has established AMU, could diminish for an institution such as AMU, for, it is always subject to the Constitutional provisions and the enactment that has created it. Whatever the Constitution as well as the AMU Act now provides or could provide in future, would represent the will of the people of India, and not the will of the minority. It, therefore, admits of no doubt that in administrative, functional and financial matters, the control of AMU vests in assigned entities not designated by the minority community. This being the status of AMU, it would be an indicium of not being an educational institution over which and in respect whereof the minority has a choice to administer it in the manner the minority prefers.

144. Secondly, regard must be had to how ***TMA Pai Foundation*** (supra) answered questions 5(a), 5(b) and 5(c). The declaration of law seems to be clear that the minority community administering an aided minority educational institution does not enjoy full liberty to act as per its choice in matters relating to admission of students. Admission has to be on the basis of merit and it will also be permissible for the Government to provide that consideration should be shown to the weaker sections of the society.

145. Reservation is an element of substantive justice, and to deny it to the SC/ST community, does not bode well for the compliance of Article 15. We should be careful not to abridge the rights enumerated in Article 15 in our quest to expand and solidify the rights provided in Article 30. The architects of the Constitution were acutely aware of the stratified nature of our society. To minimise this stratification, the framers made a concerted effort towards integrating various communal identities into a composite national identity of "Indians". The immediacy of this exercise can be garnered from the preamble to the Constitution, where we find the idea of fraternity, a brotherhood of Indians.

146. The idea of substantive equality, which arose as a remedy to the historical injustices suffered by the members of the SC/ST community, was central to this new national identity. This national identity is manifested in institutions such as AMU, which has pioneered the idea that India and its institutions, belong, and are open to all Indians, irrespective of caste, creed, religion, or sex. To remove an institution like AMU from this national project would hurt India's integrity and the idea of fraternity among its citizens.

147. The appellants have argued that the Constitution is a living document which needs to evolve with time and this Court has not only the power but also the duty to read and interpret the Constitution to reflect the aspirations of the people of this county. The doctrine of progressive realisation of rights has been this Court's north star for over several

decades. This Court has "found" rights which were not explicitly set forth in Part III of the Constitution. For better or for worse, the Constitution in the present form is substantially different than the Constitution which was adopted by the Constituent Assembly. Hence, there are no inherent or constitutional limitations before us to expand the scope of Part III of the Constitution in suitably appropriate cases.

148. However, that is quite different than what the appellants are asking us to do in the present case. Acceptance of their arguments will result in this Court engaging in historical revisionism. Anyone claiming that historical facts can be changed by judicial fiat, is sorely mistaken. Courts are the custodian of the "truth" and cannot create an alternative version of the "truth", which are not supported by historical facts. To do so would be thoroughly unjust, arbitrary, and unreasonable. Allowing Courts to create alternative facts in support of a pre-determined conclusion would obliterate the creditability of this Court among the citizenry. Facts cannot be created by the stroke of a pen, and to attempt to do that, 100 years later, would be a misguided endeavour.

CONCLUSION

149. In the light of the above discussion, the claim of the appellants cannot stand. AMU was neither established by any religious community, nor is it administered by a religious community which is regarded as a minority community; hence, AMU does not qualify as a minority institution. Protection under Article 30(1) of the Constitution is, thus,

not available. This submission of the appellants has no historic, legal, factual, or logical basis.

150. In terms of clause (5) of Article 145 of the Constitution, it is my firm opinion that not only do the references not require an answer, it is also declared that AMU is not a minority educational institution and that the appeals seeking minority status for it should fail.

ACKNOWLEDGEMENT

151. Before parting, I express my sincere appreciation for the members of the bar who addressed this bench. Listening to their erudite arguments was indeed enriching. Further, I express gratefulness to my research assistants who worked tirelessly and burned the midnight oil, in tandem with me, to help me win the race against time. The scholarly contributions in books and treatises which were consulted and the artificial intelligence systems now available, which have opened up a whole new world, did provide me with valuable guidance and inputs. The assistance and cooperation received from this Court's library also significantly enhanced this work and has made my opinion richer. I, however, regret my inability to acknowledge the contributors individually.

..... **J.**
(DIPANKAR DATTA)

New Delhi;
8th November, 2024.