IN THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Review Petition No.167/2016
In WP(C) No.5825/2012

The State of Assam
Represented by Secretary to the Government of Assam,
Education (Secondary) Department,
Dispur, Guwahati-6.

... Review Petitioner/Respondent.

Versus

1. Shri Bimal Kutum,
Bechamara High School,
PO-Subahi Pathar, Dist.-Dhemaji, Assam.

2. Mrs. Amiya Sonowal,
Joyrampur High School,
P.O.- Joyrampur, District-Dhemaji,
Assam, Pin-787057.

3. Miss Tulsha Devi,
Joyrampur High School,
P.O.- Joyrampur, District-Dhemaji,
Assam, Pin-787057.

4. Miss. Jarna Pegu,
Bechamara High School,
P.O. Subahi Pathar,
District-Dhemaji, Assam.

5. Shri Nilamoni Borgohain,
Pub-Bordoloni High School,
P.O. Holowdunga,
District-Dhemaji, Assam.

6. Mrs. Koushalay Boruah,
Minigmang Kamala Miri High School,
P.O. Mingmang,
District-Dhemaji, Assam.

....Respondents/Writ Petitioners.

For the Review Petitioner : Mr. D. Saikia, Addl. AG, Assam,
Mr. A. Deka,
Mr. N. Sarma, SC, Secondary Education.

BEFORE
THE HON'BLE MR. JUSTICE HRISHIKESH ROY
THE HON'BLE MR. JUSTICE PARAN KUMAR PHUKAN

Date of Hearing : 15th December, 2016

Date of Judgment : *2nd January, 2017*

JUDGMENT AND ORDER

[*Hrishikesh Roy, J.*]

This application is filed by the State to Review/modify the common judgment and order dated 23.09.2016 in the WP(C) No.5825/2012 and other cases to the extent that the services of the already provincialised employees of educational institutions of Assam, will not be impacted by the Court's verdict.

2. The issue to be considered here is whether the above verdict of 23.09.2016 will have prospective effect without any implication for the already provincialised category or alternately, on account of our declaration that *Assam Venture Educational Institutions (Provincialisation of Services) Act, 2011* (hereinafter referred to as "*the Provincialisation Act*") is unconstitutional and void, all things done under the repealed legislation since inception, is set at naught by the Court's declaration. For deciding the State's application, we may benefit by referring to the law laid down by the Supreme Court when the Court decided on the constitutionality of the laws challenged in certain cases.

EXTRACTS OF *GOLAK NATH*'S VERDICT

3.1 The Supreme Court in *Golak Nath Vs. State of Punjab* reported in *AIR 1967 SC 1643* was dealing with the question on whether the decision in that case should be given prospective or retrospective operation. In that context the Court referred to the two doctrines in American Jurisprudence, the *Blackstonian theory* and the other i.e. *prospective over-ruling* and observed that

> "…… Judge does not make law but only discovers or finds the true law. The law has always been the same. If a subsequent decision changes the earlier one, the latter decision does not make law but only discovers the correct principle of law. The result of this view is that it is necessarily retrospective in operation. But the eminent Jurists such as George F.

Canfield, Robert Hill Freeman, John Henry Wigmore and Cardozo, have expounded the doctrine of "prospective over-ruling" and suggested it as "a useful judicial tool". In the words of Canfield the said expression means:

> ".....a court should recognize a duty to announce a new and better rule for future transactions whenever the court has reached the conviction that an old rule (as established by the precedents) is unsound even though feeling compelled by stare decisis to apply the old and condemned rule to the instant case and to transactions which had already taken place."

3.2 Cardozo, before he became a Judge of the Supreme Court of the United States of America, when he was the Chief Justice of New York State addressing the Bar Association said thus:

> "The rule (the Blackstonian rule) that we are asked to apply is out of tune with the life about us. It has been made discordant by the forces that generate a living law. We apply it to this case because the repeal might work hardship to those who have trusted to its existence. We give notice however that any one trusting to it hereafter will do at his peril."

3.3 The Supreme Court of the United States of America, in the year 1932, after Cardozo became an Associate Justice of that Court in *Great Northern Railway v. Sunburst Oil & Ref. Co.*[(1932) 287 US 358, 366=77 Law Ed 360], applied the said doctrine to the facts of that case. In that case the Montana Court had adhered to its previous construction of the statute in question but had announced that that interpretation would not be followed in the future. It was contended before the US Supreme Court that a decision of a court over- ruling earlier decision and not giving its ruling retroactive operation violated the due process clause of the 14th Amendment. Rejecting that plea, Cardozo said:

> "This is not a case where a Court in overruling an earlier decision has come to the new ruling of retroactive dealing and thereby has made invalid what was followed in the doing. Even that may often be done though litigants not infrequently have argued to the contrary .... This is a case where a Court has refused to make its ruling retroactive, and the novel stand is taken that the Constitution of the United States is infringed by the refusal. We think that the Federal Constitution has no voice upon the subject. A state in defining the elements of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may be so that the decision of the highest courts, though later over-ruled, was law nonetheless for intermediate transactions .... On the other hand, it may hold to the ancient dogma that the law declared by its Courts had a

> platonic or ideal existence before the act of declaration, in which event, the discredited declaration will be viewed as if it had never been and to reconsider declaration as law from the beginning... . The choice for any state may be determined by the juristic philosophy of the Judges of her Courts, their considerations of law, its origin and nature."

The opinion of Cardozo tried to harmonize the doctrine of prospective over-ruling with that of stare decisis.

3.4 In *Golak Nath*, in the context of the above proposition, our Apex Court referred to the following Speech of Hughes, C.J., in *Chicot County Drainage District v. Baxter State Bank* [(1940) 308 US 371]:-

> "The law prior to the determination of unconstitutionality is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration."

3.5 Reference was also made to *J. Griffin v. People of the State of Illionis* [(1956) 351 US 12, 20], where the Supreme Court of America reaffirmed the doctrine laid down in *Sunburst Oil & Ref. Co.*(supra). There, a statute required defendants to Submit bills of exceptions as a pre-requisite to an appeal from a conviction; the Act was held unconstitutional in that it provided no means whereby indigent defendants could secure a copy of the record for this purpose. Frankfurter, J., in that context observed:

> "..... in arriving at a new principle, the judicial process is not important to, define its scope and limits. Adjudication is not a mechanical exercise nor does it compel 'either/or' determination."

3.6 In *J.A. Wolf v. Peoples of the State of Colorado* [(1949) 338 US 25=93 Law Ed 1782] a majority of the US Supreme Court held that in a prosecution in a State Court for a state crime, the 14th Amendment did not forbid the admission of evidence obtained by an unreasonable search and seizure. But in *Mapp. v. Ohio* [(1961) 367 US 643=6 Law Ed 2nd Ed. 1081] the Supreme Court reversed that decision and held that all evidence obtained by searches and seizure in violation of the 4th Amendment of the Federal Constitution was, by virtue of the due process clause of the 14th Amendment guaranteeing the right to privacy free from unreasonable State intrusion, inadmissible in a State court. In *Linkletter v. Walker* (381 US 618) the question arose whether the exclusion of the rule

enunciated in *Mapp v. Ohio* (supra) did not apply to State Court convictions which had become final before the date of that judgment. Mr. Justice Clarke, speaking for the majority observed:

> "We believe that the existence of the Wolf doctrine prior to Mapp is 'an operative' fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration."
>
> …….
>
> "Mapp had as its prima purpose the enforcement of the Fourth Amendment through the inclusion of the exclusionary rule within its rights.....
>
> We cannot say that this purpose would be advanced by making the rule retrospective. The misconduct of the police prior to Mapp has already occurred and will not be corrected by releasing the prisoners involved.... On the other hand, the States relied on Wolf and followed its command. Final judgments of conviction were entered prior to Mapp. Again and again the Court refused to reconsider Wolf and gave its implicit approval to hundreds of cases in their application of its rule. In rejecting the Wolf doctrine as to, the exclusionary rule the purpose was to deter the lawless action of the police add to effectively enforce the Fourth Amendment. That purpose will not at this late date be served by the wholesale release of the guilty victims."
>
> "Finally, there are interests in the, administration of justice and the integrity of the judicial process to consider. To make the rule of Mapp retrospective would tax the administration of justice to the utmost. Hearings would have to be held on the excludability of evidence long since destroyed, misplaced or deteriorated. If it is excluded, the witness available at the time of the original trial will not be available or if located their memory will be dimmed. To thus legitimate such an extraordinary procedural weapon that has no bearing on guilt would seriously disrupt the administration of justice."

3.7 According to *Golak Nath*, the doctrine of prospective overruling is re-affirmed in the above extract and the US Supreme Court has taken a pragmatic approach in refusing to give it retroactivity. In short, in America the doctrine of prospective overruling is now accepted in all branches of law, including constitutional law. But the carving of the limits of retrospectivity of the new rule is left to courts to be done, having regard to the requirements of justice. Even in England the *Blackstonian theory* was criticized by Bentham and Austin. In *Austin's Jurisprudence, 4th Ed.*, at page 65, the learned author says:

> "What hindered Blackstone was 'the childish fiction' employed by our judges, that the judiciary or common law is not 'Made by them, but- is a miraculous something made, by nobody, existing, I suppose, from eternity, and merely declared from time to time by the Judges."

3.8 Though English Courts in the past accepted the *Blackstonian theory* and though the House of Lords strictly adhered to the doctrine of 'precedent' in the

earlier years, both the doctrines were practically given up by the *"Practice Statement (Judicial Precedent)"* issued by the House of Lords recorded in *(1966) 1 WLR 1234*. Lord Gardiner L.C., speaking for the House of Lords made the following observations:

> "Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so."

3.9 In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law.

> "This announcement is not intended to affect the use of precedent elsewhere than in this House."

3.10 It will be seen from this passage that the House of Lords hereafter in appropriate cases may depart from its previous decision when it appears right to do so and in so departing will bear in mind the danger of giving effect to the said decision retroactivity. We consider that what the House of Lords means by this statement is that in differing from the precedents it will do so only without interfering with the transactions that had taken place on the basis of earlier decisions. This decision, to a large extent, modifies the *Blackstonian theory* and accepts, though not expressly but by necessary implication the doctrine of "prospective overruling".

3.11 Following the above discussion the *Golak Nath* judgment then considered some of the objections to this doctrine. The objections are: (1) the doctrine involved legislation by courts; (2) it would not encourage parties to prefer appeals as they would not get any benefit therefrom; (3) the declaration for the future would only be obiter, (4) it is not a desirable change; and (5) the doctrine of retroactivity serves as a brake on court which otherwise might be tempted to be so fascile in overruling. But the Supreme Court found that these objections are not insurmountable. If a court can over-rule its earlier decision-there cannot be any

dispute now that the court can do so there cannot be any valid reason why it should not restrict its ruling to the future and not to the past. Even if the party filing an appeal may not be benefited by it, in similar appeals which he may file after the change in the law he will have the benefit. The decision cannot be obiter for what the court in effect does is to declare the law but on the basis of another doctrine restricts its scope. Stability in law does not mean that injustice shall be perpetuated.

3.12 An illuminating article on the subject is found in *Pennsylvania Law Review*, [Vol. I 10 p. 650].

> It is a modem doctrine suitable for a fast moving society. It does not do away with the doctrine of stare decisis, but confines it to past transactions. It is true that in one sense the court only declares the law, either customary or statutory or personal law. While in strict theory it may be said that the doctrine involves making of law, what the court really does is to declare the law but refuses to give retroactivity to it. It is really a pragmatic solution reconciling the two conflicting doctrines, namely, that a court finds law and that it does make law. It finds law but restricts its operation to the future. It enables the court to bring about a smooth transition by correcting its errors without disturbing the impact of those errors on the past transactions. It is left to the discretion of the court to prescribe the limits of the retroactivity and thereby it enables it to would the relief to meet the ends of justice.

3.13 After referring to the development of the law elsewhere as extracted above, our Supreme Court in the *Golaknath* (supra) then observed that in India, there is no statutory prohibition against the court refusing to give retroactivity to the law declared by it. Indeed, the doctrine of res judicata precludes any scope for retroactivity in respect of a subject-matter that has been finally decided between the parties. Further, Indian court by interpretation reject retroactivity to statutory provisions though couched in general terms on the ground that they affect vested rights. The present case only attempts a further extension of the said rule against retroactivity. Our Constitution does not expressly or by necessary implication speak against the doctrine of prospective overruling. Indeed, *Articles 32, 141* and *142* are couched in such wide and elastic terms as to enable this Court to formulate legal doctrines to meet the ends of justice. The only limitation thereon is reason, restraint and injustice. Under *Article 32*, for the enforcement of the

fundamental rights the Supreme Court has the power to issue suitable directions or orders or writs. *Article 141* says that the law declared by the Supreme Court shall be binding on all courts; and *Article 142* enables it in the exercise of its jurisdiction to pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it. These articles are designedly made comprehensive to enable the Supreme Court to declare law and to give such directions or pass such orders as are necessary to do complete justice. The expression "declared" is wider than the words "found or made". To declare is to announce opinion. Indeed, the latter involves the process, while the former expresses result. Interpretation, ascertainment and evolution are parts of the process, while that interpreted, ascertained or evolved is declared as law. The law declared by the Supreme Court is the law of the land. If so, we do not see any acceptable reason why it, in declaring the law in supersession of the law declared by it earlier, could not restrict the operation of the law as declared to future and save the transactions, whether statutory or otherwise that were effected on the basis of the earlier law. To deny this power to the Supreme Court on the basis of some outmoded theory that the Court only finds law but does not make it is to make ineffective the powerful instrument of justice placed in the hands of the highest judiciary of this country.

3.14 As the Indian Supreme Court was called upon for the first time in *Golaknath* (supra) to embark upon such an exercise, the Court observed that since the doctrine evolved in a different country under different circumstances, they would like to move warily in the beginning. Then the Court laid down the following propositions:

> "……
> (1) The doctrine of prospective over-ruling, can be invoked only in matters arising under our Constitution;
> (2) it an be applied only by the highest court of the country, i.e., the Supreme Court as it has the constitutional jurisdiction to declare an binding on all the courts in India;
> (3) the scope of the retroactive operation of the law declared by the Supreme Court superseding its earlier decisions is left to its discretion to be moulded in accordance with the justice of the cause or matter before it.
> ……."

POST *GOLAK NATH* RATIO

4. The 11 Judges' decision in *Golak Nath* (supra) was followed subsequently by the Constitutional Bench in *Managing Director, ECIL, Hyderabad Vs. B. Karunakar* reported in *(1993)4 SCC 727*, where the Apex Court analysed the ratio of *Golak Nath* (supra) in the following manner:

> "……
>
> **35.** In *Golak Nath* v. *State of Punjab* dealing with the question as to whether the decision in that case should be given prospective or retrospective operation, the Court took into consideration the fact that between 1950 and 1967, as many as twenty amendments were made in the Constitution and the legislatures of various States had made laws bringing about an agrarian revolution in the country. These amendments and legislations were made on the basis of the correctness of the decisions in *Sri Sankari Prasad Singh Deo* v. *Union of India and State of Bihar* and *Sajjan Singh* v. *State of Rajasthan* viz., that the Parliament had the power to amend the fundamental rights and that Acts in regard to estates were outside the judicial scrutiny on the ground they infringed the said rights. The Court then stated that as the highest Court in the land, it must evolve some reasonable principle to meet the said extraordinary situation. The Court pointed out that there was an essential distinction between the Constitution and the statutes. The Courts are expected to and they should interpret the terms of the Constitution without doing violence to the language to suit the expanding needs of the society. In this process and in a real sense, they make laws. Though it is not admitted, such role of this Court is effective and cannot be ignored. Even in the realm of ordinary statutes, the subtle working of the process is apparent though the approach is more conservative and inhibitive. To meet the then extraordinary situation that may be caused by the said decision, the Court felt that it must evolve some doctrine which had roots in reason and precedents so that the past may be preserved and the future protected. The Court then referred to two doctrines familiar to American Jurisprudence, viz., Blackstonian view that the Court was not to pronounce a new rule but to maintain and expound the old one and, therefore, the Judge did not make law but only discovered or found the true law. That view would necessarily make the law laid down by the Courts retrospective in operation. The Court, therefore, preferred the opinion of Justice Cardozo which tried to harmonise the doctrine of prospective over-ruling with that of *stare decisis* expressed in *Great Northern Railway Co.* v. *Sunburst Oil & Refining Co.* The Court also referred to the decisions subsequent to *Sunburst* and to the "Practice Statement (Judicial Precedent)" issued by the House of Lords recorded in (1966) 1 WLR 1234 and pointed out that the modern doctrine as opposed to the Blackstonian theory was suitable for a fast moving society. It was a pragmatic solution reconciling the two doctrines. The Court found law but restricted its operation to the future thus enabling it to bring about a smooth transition by correcting its errors without disturbing the impact of those errors on the past transactions. It was left to the discretion of the Court to prescribe the limits of the retroactivity. Thereby, it enabled the Court to mould the reliefs to meet the ends of justice. The Court then pointed out that there was no statutory prohibition against the Court refusing to give retroactivity to the law declared by it. The doctrine of *res judicata* precluded any scope for retroactivity in respect of a subject-matter that had been finally decided between the parties. The Court pointed out that the courts in this land also, by interpretation, reject retroactivity of statutory provisions though couched in

general terms on the ground that they affect vested rights. The Court then referred to Articles 141 and 142 to point out that they are couched in such wide and elastic terms as to enable this Court to formulate legal doctrines to meet the ends of justice. The only limitation therein is reason, restraint and injustice. These Articles are designedly made comprehensive to enable the Supreme Court to declare law and to give such direction or pass such order as is necessary to do complete justice. The Court then held that in the circumstances to deny the power to the Supreme Court to declare the operation of law prospectively on the basis of some outmoded theory that the Court only finds law but does not make it is to make ineffective a powerful instrument of justice placed in the hands of the highest judiciary of this land. The Court then observing that it was for the first time called upon to apply the doctrine of prospective overruling evolved in a different country under different circumstances, stated that it would like to move warily in the beginning. Proceeding further, the Court laid down the following propositions:

> "(1) The doctrine of prospective overruling can be invoked only in matters arising under our Constitution; (2) it can be applied only by the highest court of the country, i.e., the Supreme Court as it has the constitutional jurisdiction to declare law binding on all the courts in India; (3) the scope of the retroactive operation of the law declared by the Supreme Court superseding its earlier decisions is left to its discretion to be moulded in accordance with the justice of the cause or matter before it."

The Court then declared that the said decision will not affect the validity of the Constitution (Seventeenth Amendment) Act, 1964 or other amendments made to the Constitution taking away or abridging the fundamental rights. The Court also declared that in future Parliament will have no power to amend Part III of the Constitution so as to take away or abridge the fundamental rights.

36. Accepting the lead given in the above decision, this Court has since extended the doctrine to the interpretation of ordinary statutes as well."
....."

Thus in *Managing Director, ECIL* (supra) the doctrine of prospective over-ruling was also extended to ordinary statutes in India.

5. But noticing the conflicting situation that may emerge by the High Courts exercising the power of prospective over-ruling, in *Sarwan Kumar vs. Madal Lal Agarwal* reported in *(2003)4 SCC 147,* the Supreme Court declared that the invocation of the doctrine of prospective over-ruling should be left to the discretion of the Court or to mould it with the justice of the cause of the case.

6. In *M.A. Murthy vs. State of Karnataka* reported in *(2003)7 SCC 517,* the court's decision enunciated that the principle of law is applicable to all cases irrespective of its stage of pendency, because it is assumed that what is enunciated by the Supreme Court is, in fact, the law from the inception. Thus the doctrine of prospective over-ruling as a feature borrowed from the American jurisprudence, is declared to be an exception to the normal principle of law. But

what is of great significance for this discussion is the declared ratio to the effect that the power of prospective over-ruling can be exercised only by the Supreme Court while superseding the law declared by it earlier.

STATE'S CONTENTION

7. The State in their application submits that under the repealed *provincialization Act,* many employees and institutions were provincialized. Some of the beneficiaries have since retired and if the government tries now to apply the judgment in letter and spirit, it would lead to a chaotic situation on account of resultant disruption of service for the already provincialized teachers and staff. Moreover the Government does not want disturb this group as it is proposing to bring forth a fresh legislation or rectify the already repealed defective Act, by curing it of the legal deficiencies.

8. Mr. D. Saikia, the learned Addl. Advocate General submits that if the judgment is applied retrospectively from the date of inception of the *Provincialisation Act,* it will impact nearly 41,634 provincialised teachers and staff. Moreover if the Act is to be treated as invalid since inception, all the benefits which have accrued to the beneficiaries, will have to be recovered and the status of the provincialized category will turn into private employees. The impact on those beneficiaries who have already superannuated from service will be harsh as their pension payment will have to be stopped. Similarly, wages for the provincialized staff cannot be paid from the Government coffer and the question of recovery of the already paid sum may have to be considered.

9. The learned Addl. Advocate General submits that the Government is already working on a fresh legislation after repeal of the *Provincialisation Act* and hence the status of the already provincialized group should not be impacted and this can be achieved by declaring that the Court's verdict will apply prospectively and will not impact those, who have already benefited under the repealed legislation.

10. Bearing in mind the ratio of *Golak Nath* (supra), *B. Karunakar* (supra), *M.A. Murthy* (supra), which had declared that the doctrine of prospective over-ruling can be applied only by the Supreme Court, the State's lawyer cites *Raymond Ltd. vs. M.P. Electricity Board* reported in *(2001)1 SCC 534* to contend that the

jurisdiction conferred upon the High Court under Article 226 of the Constitution is not restrictive in the quality and content of such powers and therefore in appropriate cases, the High Court can invoke the doctrine of prospective over-ruling.

11. Next the learned Addl. Advocate General cites *P.V. George vs. State of Kerala* reported in *(2007)3 SCC 557* to submit that while the law declared to be void by the Court will normally have retrospective effect if not otherwise stated to be so specifically, the High Court in exercise of the jurisdiction under Article 226 of the Constitution, even without recourse to the doctrine of prospective over-ruling, may grant limited relief in exercise of their equity jurisdiction.

DISCUSSION & DECISION

12. In order to appreciate the submission made by the State's lawyer in the context of the two decisions *Raymond Ltd.* (supra) and *P.V. George* (supra), we need to refer again to the ratio on prospective over-ruling, enunciated by the Supreme Court. The analysis of the jurisprudential history was most extensive in *Golak Nath* (supra), where from paragraphs 60 to 76, the Court traced back the genesis of the doctrine and its applicability and the concerned passages of the court verdict are substantially extracted here in the sub-paras of paragraph 3. Undoubtedly this is the most authoritative analysis and pronouncement on the doctrine.

13. In *Golak Nath* (supra), the invocation of prospective over-ruling in exercise of constitutional power was permitted in India but a rider was attached that, it can be applied only by the Supreme Court. While the decision in *Golak Nath* was subsequently overruled in *Kesavananda Bharati vs. State of Kerala* reported in *AIR 1973 SC 1461,* the over-ruling was not on the application of the doctrine of prospective over-ruling and therefore the declaration of the law made in *Golak Nath* (supra) on the doctrine under consideration, is left undisturbed by the ruling in *Kesavananda Bharati* (supra).

14. The scope of retroactive operation of the law by the Supreme Court was extended to ordinary statutes of the country in *Managing Director, ECIL* (supra). While analysing the earlier ratio on prospective over-ruling, in *M.A. Murthy* (supra), the Supreme Court declared that prospective over-ruling is a part of the

principles of constitutional cannon of interpretation but it can only be resorted to by the Supreme Court while superseding the law declared by it earlier. It was however made clear by the Court that unless it is so specifically declared, the decision in particular case will not be prospective in its application.

15. The ratio in the above decisions clearly suggest that the jurisdiction to invoke the doctrine of prospective over-ruling vests only on the Supreme Court and not on the High Courts. But then we need to see whether a different perspective is possible on account of the two decisions cited by the learned Addl. Advocate General. On careful reading on permissibility of the High Court to declare a judgment repealing a law, to be prospective in its application, we find that the remarks in *P.V. George* (supra) is nothing but passing observation of the learned Judge, as it was specifically stated that the Court was not concerned with situation of prospective over-ruling of a statute in that case.

16. While the power of the High Court conferred under Article 226 of the constitution is not restrictive, as was declared in *Raymond Ltd.* (supra), the ratio does not categorically provide that the doctrine of prospective over-ruling can be invoked by the High Court. But it only said that appropriate order on the principles of equity can be passed, even without invocation of the principle of prospective over-ruling, by the High Courts.

17. In the backdrop of the above discussion, let us now examine whether equitable consideration should be applied in the present context. Because of the legal deficiencies in the *Provincialization Act 2011* the legislation was declared as constitutionally invalid. The State conceded to the legal defects and has decided to bring in a fresh Act to deal with the teachers and staff of the venture educational institutions of Assam. Therefore, provincialization of more persons under the proposed legislation, is expected in due course. If that be the future scenario, those whose services were regularized through due process under the recently repealed legislation, deserve to be protected in the interregnum (since the new Act can legitimately address this contingency) as the litigants who challenged the *vires* of the *Provincialisation Act*, never desired disruption of the concluded rights of those, who benefited under the repealed Act.

18. The State in their application have stated that the group they are concerned with are those who have retired and are drawing pension, another

category who are now govt. employees and are receiving regular scale of pay and people of same class, who have moved on in their careers and in life. There are around 41,634 employees for whom vested rights are already created under the 2011 enactment but through retrospective application of our 23rd September, 2016 judgment, they may not only lose their govt. jobs but will also be disentitled to pension and salary. Moreover, the question of recovery of the already disbursed salary and pension may emerge. The harsh impact of the retrospective application will be crippling for the already provincialized group and their livelihood and in turn life itself, will be adversely impacted. All such debilitating consequences will occur without any opportunity or hearing to this category. Many families, dependant on the earnings of the provincialised staff are enjoying a measure of social and economic security, and they all will be thrown to the streets, without any fault on their part.

19. In the above circumstances, we are of the considered view that the rights of the employees who have been benefited under the struck down statute can be taken care of by giving retrospective effect to the proposed legislation, if the legislature so decides. Till then it is ordered that the services of the provincialised category and their status as govt. employees shall not be disturbed and they will continue to receive all the benefits which they are getting under the *Provincialisation Act, 2011*, since struck down by the judgment under Review. With this observation and direction, the matter stands disposed of.

JUDGE **JUDGE**

Roy/Datta