
(2011) 05 AHC CK 0042

In the Allahabad High Court

Case No : Writ Petition No's. 1905 (MS) of 2011

Haji Ismail Degree College

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 18-05-2011

Acts Referred:

Constitution of India, 1950 — Article 142, 30, 30(1)
National Commission for Minority Educational Institutions Act, 2004 — Section 2
Uttar Pradesh Admission to Educational Institutions Reservation for Scheduled Castes,
Scheduled Tribes and other Backward Classes Act, 2006 — Section 2
Uttar Pradesh State Universities Act, 1973 — Section 28, 28(5)

Citation : (2011) 7 ADJ 23

Hon'ble Judges : Rajiv Sharma, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Rajiv Sharma, J.—Heard Counsel for the Petitioner, Counsel for the University and State Counsel.

2. Aggrieved by the arbitrary and unwarranted action of the authorities of Dr Ram Manohar Lohia Avadh University [in short referred to as the "University"] in not conducting the examination of B. Ed. Course for the session 2009-10 of the Petitioner institution and as such this writ petition has been preferred by the Institution.

3. Counsel for the Petitioner has pointed out that on 15.10.2009, by amending para 7 of the U.P. State Universities (Regulation of Admission to Courses of Instruction for Degree in Education in Affiliated Associated Colleges) Order, 1987 the State Government has declared 2009-10 session for B. Ed course as Zero Session. The said Government Order dated 15.10.2009 was assailed in writ petition bearing Nos. 11617 (MB) of 2009 by St. Andrews College, when the said order was being extended on the minority institution. A Division Bench of this Court passed an order on 21.12.2009 that the order will not come in the way in

getting the examination conducted for the Academic Session 2009-10 with regard to the minority institution. The Court further directed the State Counsel to provide details of other minority institutions, which may be entitled for same order, so that the multiplicity of the litigation be avoided. It has clearly been pointed out that the Petitioner is also one of the minority institutions and as such the Government Order dated 16.10, 2009, is not applicable.

4. Counsel for the Petitioner has submitted that the Petitioner institution is a minority institution and has admitted the candidates against the sanctioned seats for pursuing B. Ed course and had conducted the requisite classes for imparting education during the academic session 2009-10 as prescribed under the Rules and Regulations. After completing 180 days' teaching, the Petitioner institution has submitted an application to the Registrar of the University on 31.12.2010 requesting therein that for the Session 2009-10, the examinations forms be made available and the examinations be conducted. The grievance of the Petitioner is that inspite of specific order passed by this Court dated 21.12.2009 that the Government Order dated 15.10.2009 would not apply on the minority institutions, the University is not holding the examinations causing serious prejudice to the validly admitted students and amounts to an interference in the affairs of the minority institutions, which is not permissible under law.

5. It has been vehemently argued on behalf of the Petitioner that there being specific bar under the provisions of Section 2 of the Act of 2006 i.e. Uttar Pradesh Private Professional Educational Institution (Regulation of Admission and Fixation of Fee) Act 2006 and proviso to Section 28(5) of the State Universities Act, the State Government does not have any authority or power to regulate admissions and fee with regard to the minority institutions and despite number of pronouncements having been made by the Apex Court as also by this Court, the opposite parties are showing defiant attitude towards the minority institutions. Therefore, he summed up by saying that denial of conducting examination of the minority institution by the University for the academic session 2009-10, is wholly erroneous and unwarranted and smacks arbitrariness on the part of the University authorities. He also added that delay in conducting the examination will have adverse impact on the future career of the students.

6. Counsel for the University says that though the Petitioner is a minority institution but the B. Ed course which the institution is running, is pursuant to the recognition granted by the National Council for Teachers' Education (NCTE). Only thereafter, the institution has been granted affiliation by the University. Therefore NCTE is a necessary party, but the same has not been arrayed as one of the Respondents. As per Appendix-4, admission shall be made on merit on the basis of marks obtained in the qualifying examination and/or in the entrance examination or any other selection process as per policy of the State Government. Furthermore as per provisions of Section 28 of the State University Act, 1973, the University is vested with the power to regulate the process of admission in any course of the University and its affiliated colleges. Therefore,

the minority and non-minority institutions, both are covered by the admission procedure of the affiliating University

7. As regards issuance of Government Order dated 15.10.2009 whereby academic session 2009-10 was declared as Zero Session, it has been stated that it does not differentiate between the "minority" and "non-minority" institutions and is applicable on both types of institutions. However, he added that the said Government Order was quashed by this Court vide judgment and order dated 23.3.2010 and at present, the matter is pending before the Apex Court.

8. On the strength of the decisions rendered in *P.A. Inamdar v. State of Maharashtra* 2005 (6) SCC 537 : 2005 (3) ESC 373 (SC); *Tuples Educational Society v. State of U.P.* 2008 (4) ADJ 112 (FB): 2008 (3) ESC 1521 (AII)(FB) and *Veer Bahadur Singh Purvanchal University v. Bimala Rama Shanker Mahavidyalaya*, Counsel for the University has argued that though being a minority institution, it has no power to adopt its own admission procedure. Thus, institution is not permitted to take a single admission beyond the Common Entrance Test.

9. Counsel for the University also clarified that earlier the minority institutions were admitting students against entire seats allocated to them but this Court modified the same by and ad-interim order dated 1.2.2010 passed in writ petition Nos. 806 (MB) of 2010 whereby the minority institutions permitted to admit only 50% seats on their own and 50% candidates are to be allocated through Counselling.

10. Before adverting to the merits of the case, it would be useful to refer various pronouncements of the Supreme Court with regard to the rights of minorities to establish and administer educational institutions of their choice. In *T.M.A. Pai Foundation and Others Vs. State of Karnataka and Others*, the Supreme Court was considering the scope of right of minorities to establish and administer educational institutions and formulated 11 questions. Question Nos. 5 (a) and 5(c) with their answers, which are relevant in the present context are reproduced herein:

5 (a) Whether the minorities's rights to establish and administer educational institutions of their choice will include the procedure and method of admission and selection of students?

A. A minority institution may have its own procedure and method of admission as well as selection of students, but such a procedure must be fair and transparent, and the selection of students in professional and higher education colleges should be on the basis of merit. The procedure adopted or selection made should not be tantamount to maladministration. Even an unaided minority institution ought not to ignore the merit of the students for admission, while exercising its right to admit students to the colleges aforesaid, as in that event, the institution will fail to achieve excellence.

5 (c) Whether the statutory provisions which regulate the facets of administration like control over educational agencies, control over governing bodies, conditions of affiliation including recognition/withdrawal thereof, and appointment of staff, employees, teachers and principals including their service conditions and Regulation of fees, etc. would interfere with the right of administration of minorities?

A. So far as the statutory provisions regulating the facets of administration are concerned, in case of an unaided minority educational institution, the regulatory measure of control should be minimal and the conditions of recognition as well as the conditions of affiliation to a university or board have to be complied with, but in the matter of day-to-day management, like the appointment of staff, teaching and non-teaching, and administrative control over them, the management should have the freedom and there should not be any external controlling agency. However, a rational procedure for the selection of teaching staff and for taking disciplinary action has to be evolved by the management itself.

For redressing the grievances of employees of aided and unaided institutions who are subjected to punishment or termination from service, a mechanism will have to be evolved, and in our opinion, appropriate tribunals could be constituted, and till then, such tribunals could be presided over by a judicial officer of the rank of District Judge.

The State or other controlling authorities, however, can always prescribe the minimum qualification, experience and other conditions bearing on the merit of an individual for being appointed as a teacher or a principal of any educational institution.

Regulations can be framed governing serving conditions for teaching and other staff for whom aid is provided by the State, without interfering with the overall administrative control of the management over the staff.

Fees to be charged by unaided institutions cannot be regulated but no institution should charge capitation fee.

11. In *Islamic Academy of Education and Another Vs. State of Karnataka and Others*, the Hon^{ble} Supreme Court directed the respective State Government to appoint Committee. The relevant paragraph reads as under:

... For each State a separate Committee shall be formed. The Committee would be headed by a retired Judge of the High Court. The Judge is to be nominated by the Chief Justice of that State. The other member, to be nominated by the Judge, would be a doctor or an engineer of eminence (depending on whether the institution is medical or engineering/technical). The Secretary of the State in charge of Medical or Technical Education, as the case may be, shall also be a member and act as the Secretary of the Committee. The Committee will be free to nominate/co-opt an independent person of repute in the field of education as well as one of the Vice-Chancellors of the University in that State so that the

total number of persons on the Committee do not exceed five. The Committee shall have powers to oversee the tests to be conducted by the association. This would include the power to call for the proposed question paper(s), to know the names of the paper-setters and examiners and to check the method adopted to ensure papers are not leaked. The Committee shall supervise and ensure that the test is conducted in a fair and transparent manner. The Committee shall have the power to permit an institution, which has been established and which has been permitted to adopt its own admission procedure for the last, at least, 25 years, to adopt its own admission procedure and if the Committee feels that the needs of such an institute are genuine, to admit students of their community, in excess of the quota allotted to them by the state Government. Before exempting any institute or varying in percentage of quota fixed by the State, the State Government must be heard before the Committee. It is clarified that different percentage of quota for students to be admitted by the management in each minority or non-minority unaided professional college(s) shall be separately fixed on the basis of their need by the respective State Governments and in case of any dispute as regards fixation of percentage of quota, it will be open to the management to approach the Committee. It is also clarified that no institute, which has not been established and which has not followed its own admission procedure for the last, at least, 25 years, shall be permitted to apply for or be granted exemption from admitting students in the manner set out hereinabove.

As regard the life of the Committee so constituted, the Hon"ble Supreme Court has laid down in explicit words as under:

Our direction for setting up two sets of Committees in the States has been passed under Article 142 of the Constitution of India which shall remain in force till appropriate legislation is enacted by Parliament...

12. In *P.A. Inamdar v. State of Maharashtra* (2005) 6 SCC 537 : 2005(3) ESC 373 (SC), the Hon"ble Supreme Court reiterated that the Committees constituted by the judgment in *Islamic Academy* (supra) in exercise of power under Article 142 of the Constitution are in stopgap arrangement until a suitable legislation or Regulation framed by the State steps in. Further, such Committees cannot be equated with Unni Krishnan Committees which were supposed to be permanent in nature. The relevant paragraphs runs as under:

A fortiori, we do not see any impediment to the Constitution of the Committees as a stopgap or ad hoc arrangement made in exercise of the power conferred on this Court by Article 142 of the Constitution until a suitable legislation or Regulation framed by the State steps in. Such Committees cannot be equated with Unni Krishnan Committees which were supposed to be permanent in nature.

(emphasis supplied)

13. It may also be added that from the propositions enunciated in *N. Ammad Vs. The Manager, Emjay High School and Others, The Secretary, Malankara Syrian Catholic College Vs. T. Jose and Others*, it is imminently clear that a minority

institution established by a minority community would continue to be so whether Government declared it as such or not. Further the extension of aid by the State does not alter the nature and character of the minority educational institution. Conditions can be imposed by the State to ensure proper utilization of the aid, without however diluting or abridging the right under Article 30(1) of the Constitution.

14. In *Malankara Syrian Catholic College* (supra) the questions cropped up before the Hon''ble Supreme were as under:

(I) To what extent, the State can regulate the right of the minorities to administer their educational institutions, when such institutions received aid from the State?

(II) Whether the right to choose a Principal is part of the right of minorities under Article 30(1) to establish and administer educational institutions of their choice. If so, would Section 57(3) of the Act violate Article 30(1) of the Constitution of India?

The Hon''ble Apex Court held that if any Regulations interfere with the overall administrative control by the management over the staff, or abridges/dilutes, in any other manner, the right to establish and administer educational institutions, such Regulations, to that extent, will be inapplicable to minority institutions. The Hon''ble Apex Court also summarized the general principles relating to establishment and administration of educational institution by minorities:

(1) The right of minorities to establish and administer educational institutions of their choice comprises the following rights:

(a) to choose its governing body in whom the founders of the institution have faith confidence to conduct and manage the affairs of the institution;

(b) to appoint teaching staff (teachers/lecturers and Headmasters/ Principals) as also non-teaching staff, and to take action if there is dereliction of duty on the part: of any of its employees;

(c) to admit eligible students of their choice and to set up a reasonable fee structure;

(d) to use its properties and assets for the benefit of the institution.

(i) The right conferred on minorities under Article 30 is only to ensure equality with the majority and not intended to place the minorities in a more advantageous position vis-a-vis the majority. There is no reverse discrimination in favour of minorities. The general laws of the land relating to national interest, national security, social welfare, public order, morality, health, sanitation, taxation etc. applicable to all, will equally apply to minority institutions also.

(ii) The right to establish and administer educational institutions is not absolute. Nor does it include the right to mal-administer. There can be regulatory

measures for ensuring educational character and standards and maintaining academic excellence. There can be checks on administration as are necessary to ensure that the administration is efficient and sound, so as to serve the academic needs of the institution. Regulations made by the State concerning generally the welfare of students and teachers, Regulations laying down eligibility criteria and qualifications for appointment, as also conditions of service of employees (both teaching and non-teaching), Regulations to prevent exploitation or oppression of employees, and Regulations prescribing syllabus and curriculum of study fall under this category. Such Regulations do not in any manner interfere with the right under Article 30(1).

(iii) Subject to the eligibility conditions/qualifications prescribed by the State being met, the unaided minority educational institutions will have the freedom to appoint teachers/lecturers by adopting any rational procedure of selection.

(iv) Extension of aid by the State does not alter the nature and character of the minority educational institution. Conditions can be imposed by the State to ensure proper utilization of the aid. Without however diluting or abridging the right under Article 30(1).

Thus from the above facts, it is apparently clear that minority institutions are free to establish and administer educational institutions of their choice and admit eligible students of their choice and to set up a reasonable fee structure etc. Further, the institution is free to appoint teaching staff including non-teaching staff and to take action if there is dereliction of duty on the part of any of its employees.

15. In the State of Uttar Pradesh, by U.P. Act Nos. 24 of 2006 the State Government enacted The Uttar Pradesh Private Professional Educational Institution (Regulation of Admission and Fixation of Fee) Act, 2006 on 10th July, 2006. Section 2 deals with the applicability of the Act and provides that the provisions of the Act be applicable to the private aided or unaided professional education institutions, excluding minority institutions. Section 3 is the definitions clause and Section 3(g) and 3(h) defines minority and minority institution as under:

(g) "minority" means a minority defined under Clause (f) of Section 2 of the National Commission for Minority Educational Institutions Act, 2004 (Act Nos. 2 of 2005).

(h) "minority institution" means an institution, established and administered by a minority and notified as such by the State Government.

16. Section 12 deals with the overriding effect and says that the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

17. It is relevant to point out that the life of the Committees which were

constituted by the judgment in Islamic Academy case was till the suitable legislation or Regulation by the respective State is enacted. As averred above, the State of Uttar Pradesh, by U.P. Act No. 24 of 2006 has enacted The Uttar Pradesh Private Professional Educational Institution (Regulation of Admission and Fixation of Fee) Act, 2006 on 10th July, 2006. The Bill received the assent of the Governor on September 7, 2006 and was published in the U.P. Gazette, Extra, Part I Section (ka) dated 8th September, 2006. So the existence of both the Committee constituted by the judgment in Islamic Academy case ceased automatically, the moment the aforesaid Act, 2006 came into force i.e. on 10th July, 2006. Section 2, as indicated above, clearly enshrines that the provisions of the said Act are not applicable upon the minority institutions.

18. Thus it is clear that the Uttar Pradesh Private Professional Educational Institution (Regulation of Admission and Fixation of Fee) Act, 2006 is applicable to the private aided or unaided professional educational institutions and is not applicable on minority institutions, which is evident from Section 2 of the Act itself.

19. After coming into force of the Act of 2006, the Committees constituted in pursuance of the Islamic Academy of Education and P.A. Inamdar's case (supra) ceases to exist and because of the fact that by virtue of Section 2 of the Act of 2006, the minority institutions are excluded from the purview of the Act of 2006, the Petitioner institution, undoubtedly, being a minority institution has a right to admit the students on their own. It is pertinent to add that by virtue of proviso appended to Section 28(5) of the U.P. State Universities Act, 1973 the provisions of Section 28(5) are also not applicable on the minority institutions.

20. The objection of the University Counsel that National Council for Teacher Education is a necessary party is wholly misconceived as the Petitioner's grievance is not against the NCTE but they are aggrieved by the inaction of the University in not holding the examination, even though the Government Order dated 15.10.2009 is not applicable upon the minority institution and moreso, when the aforesaid Government Order dated 15.10.2009 has already been set-aside by a Division Bench of this Court in writ petition Nos. 11908(MB) of 2009 decided on 23.3.2010. No relief has been sought against the NCTE, therefore, the objection raised by the University Counsel is misconceived. Moreover, the judgment of the Full Bench of this Court in the case of Tuples Education Society, which has been relied upon by the University Counsel, is not applicable in the instant case as the said Full Bench has not dealt with the rights and privileges of the minority institutions. It may also be added that assailing the Government Order dated 15.10.2009, number of writ petitions were filed by private unaided institutions and non-minority institutions separately and the different Division Benches of this Court while observing that u/s 28(5) of the State Universities Act, the minority institutions are exempted provided that the students admitted by the minority institution shall be permitted to continue to study in the academic session 2009-10.

21. As averred above, Counsel for the University has argued that the minority institutions are permitted to admit only 50% of seats on their own and 50% seats are to be filled through the Entrance Test conducted by the State Government and in this regard, he has placed reliance on an interim order dated 1.2.2010 passed by a Division Bench of this Court in Writ Petition No. 810 (MB) of 2010.1 have also gone through the interim order dated 1.2.2010 and the assertion of the University Counsel is wholly misconceived and misleading. Nowhere, in the interim order dated 1.2.2010 if; has been provided that minority institutions are permitted only to fill-up 50% seats on their own and 50% seats are to be filled through the candidates allocated to the institution by Counselling. It appears that on some objections having been raised by the Counsel for the University, the Division Bench was pleased to provide that the order would inure only for 50 students, who were admitted in July, 2009 and not for any other admission. At this juncture it would be relevant to reproduce the relevant portion of the order dated 8.9.2010 passed in Writ Petition No. 8824 of 2010(MB) wherein also a Division Bench of this Court in respect of a minority institution directed that the students so admitted by the institution shall be allowed to appear in the emanations also and their result shall be declared and mark-sheet shall also be issued:

Considering the pleas raised by the learned Counsel for the Petitioner Sri Prashant Chandra and Sri Sandeep Dixit, we, are prima-facie satisfied that in view of series of orders passed by this Court, the copies of which have been brought on record including the order dated 7.1.2010, passed in Writ Petition Nos. 11617 of 2009 (MB) in re: St. Andrews College v. State of U.P. and Ors. coupled with the fact that Section 2 of Uttar Pradesh Admission to Educational Institutions (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 2006, excludes its applicability to minority institutions, we direct that no further action will be taken against the Petitioner's Institution, in pursuance of the directive issued by the Vice-Chancellor dated 3.9.2010 (contained as Annexure No. 1 to the writ petition) and the Petitioner Institution shall be allowed to continue to provide education to the B. Ed students and the students so admitted shall be allowed to appear in the examinations also, their result shall be declared and mark-sheet shall also be issued.

22. As regard declaring the academic session 2009-2010 as Zero Session by the State Government, number of writ petitions were filed and this Court provided that the students admitted by the minority institution in the present academic session shall continue to study and the aforesaid Order of 1987 as amended by the Government Order dated 15.10.2009, shall not come in its way in getting the examination conducted for the academic session 2009-10. The question of competence of the State Government in declaring the Academic Session 2009-10 was also examined by this Court in Writ Petition Nos. 11908 (MB) of 2009 Jamuna Devi Naresh Cahdnra Mahavidyalaya v. State of U.P and Anr. and other connected writ petitions and a Division Bench of this Court held as under:

On having a close look upon the events aforesaid, we have no hesitation in observing that the State Government was having no competence to declare the academic session 2009-10 a zero session by issuing the impugned order and, therefore, the said order cannot be sustained legally. The impugned order of the State Government dated 15.10.2009 is per se without any authority and cannot be justified even on the facts and the reasons given therefore. The said order is liable to be quashed, which is hereby quashed.

23. It may also be added that number of minority Institutions affiliated to the Chhatrapati Shahu Ji Maharaj University, Kanpur, University of Lucknow and Agra University approached this Court when the examinations of their institutions were not being conducted by the respective University. The Coordinate Benches of this Court after examining the matter directed for holding the examination in the month of March, 2011. A Division Bench of this Court in the matter of St. John's College, Agra criticized the delay on the part of the University in not conducting the examination. At this juncture, it is relevant to mention that number of writ petitions were also filed before this Court at Allahabad [Writ-C Nos. 70664 of 2009 and other connected writ petitions decided on 7.2.2011] by the Minority Institutions and their grievance was that though teaching work has been completed and respective Universities have been informed of this fact, but the Universities are not holding the written examination for these candidates. The Court while allowing the writ petitions observed as under:

Learned Counsel appearing for the Mahatma Jyotiba Phule Rohil Khand University, Bareilly had made a statement before the Lucknow Bench of this Court in Writ Petition No. 10694 of 2010 that the University shall hold the examination. It is the contention of the learned Counsel for the other Universities that they are not bound by such a statement. It may be so, but when the decision of the State Government to declare the Academic Session 2009-10 as Zero Session has been set aside by the Court in Jamuna Devi Naresh Chandra Mahavidyalaya (supra) and the Institutions affiliated to these Universities have also made admissions of the students to the B. Ed. Course, there is no good reason why the University should not hold the examination.

24. in view of the aforesaid discussions and series of orders, referred to above, passed by this Court in this context, I find no justification on the part of Dr Ram Manohar Lohia Avadh University, Faizabad in not conducting the examination of students admitted in B. Ed. Course for the academic session 2009-10 by the minority institution like the Petitioner. Any delay in conduct of exam has a chain reaction also affecting the career of the students and it is totally unfair and irrational on the part of the University in not conducting the examination at the earliest.

25. Accordingly, it is provided that the Petitioner-institution shall forward the names of the students admitted to the Institutions alongwith their applications; forms to the University, if not sent earlier. The University after scrutinizing the documents, shall complete the necessary formalities for conducting the

examinations and shall conduct the examinations, within a maximum period of three months from today. It is further provided that the result of the students shall also be declared and mark-sheet shall also be issued to them.

The writ petition stands allowed in above terms.