

(1984) 10 KAR CK 0006

In the Karnataka High Court

Case No : Writ Petition No's. 13463 and 13609 of 1984

Indian Medical Association

APPELLANT

Vs

State of Karnataka

RESPONDENT

Date of Decision : 15-10-1984

Acts Referred:

Karnataka State Universities Act, 1976 — Section 2 (2), 53, 53 (1), 53 (3)

Citation : (1985) ILR (Kar) 1202 : (1985) 2 KarLJ 1

Hon'ble Judges : Rama Jois, J

Bench : Single Bench

Advocate : C.R.V. Swamy and S. Vijayashankar, for the Appellant; Santosh Hegde, General, K. Shivashankar Bhat, Sr. Central Government Standing Counsel, K.R.D. Karanth, B.M. Chandrasekhariah and V.S. Gunjal, for the Respondent

Judgement

Rama Jois, J.—The first Writ Petition is presented by the Indian Medical Association, Karnataka Branch, questioning the legality of the order of the State Government dated 14th August (sic) according permission to respondents 4 and 5 to establish two medical colleges at Bijapur and Mysore respectively, and has also sought for the issue of a writ to the Government not to consider any application seeking permission to start new medical colleges in the State. The second Writ Petition is presented by Bijapur Liberal District Educational Association and others questioning the validity of the same order, but on different grounds and in addition seeking for the issue of a writ of mandamus directing the State Government to accord permission to the Association to start a medical college at Bijapur.

2. Both the Petitions were heard together as the validity of the same Government Order has been challenged in both the Petitions.

1. Re. W.P; No. 13463 of 1984 :

3. The averments, in brief, in W.P. No. 13463/84 are as follows : The petitioner is

a society registered under the provisions of the Karnataka Societies Registration Act. It is affiliated to the Indian Medical Association. It is an organisation meant for the welfare of the medical profession and medical education. There were already 13 medical colleges in the State out of which 5 are located in the City of Bangalore. There are already about 70,000 Doctors in the State and out of them about 8,000 Doctors are unemployed. By permitting new medical colleges about 400 Doctors would remain unemployed annually. The World Health Organisation, on consideration of relevant statistics was of the view that there should be one medical college for every 50 lakhs of population. Having regard to the population of this State, which is about 3 1/2 crores, seven medical colleges were more than sufficient, but already there were 13 medical colleges. Out of them three medical colleges have not been recognised, as they do not conform to the standards prescribed by the Medical Council of India established under the Indian Medical Council Act, 195, which is responsible for ensuring the professional standards and standards of medical education. In or about the year 1983 when the Government was thinking of according permission to a few more medical colleges, there was serious opposition from all corners including the petitioner-organisation. It was also urged that the permitting of medical colleges on payment of Capitation fee would be detrimental to public interest. In connection, with the agitation against the starting of new Medical Colleges, the Petitioner and Medical Council of India had made representations (vide Annexures A and B). In view of the serious opposition made to the starting of new colleges, the Government constituted a High Power Committee consisting of seven persons by order dated 20-3-81 (Annexure-C). One of the questions referred for investigation and recommendation was, whether the starting of new private medical colleges in the State should be permitted? (See: annexure The Committee recommended that there should be no more medical colleges in the State. On the basis of the said recommendation, the then Chief Minister made a Press statement which appeared in Deccan Herald dated 26th August 1981 to the effect that there would be no more new medical college in the State (See Annexure - E). The said Committee had also recommended the abolition of the Capitation fee. In spite of this, the Government which had refused to accord permission for the starting of new Medical Colleges earlier, has now passed the impugned order and that too permitting them to collect Capitation fee. The decision is arbitrary and based on collateral consideration and, therefore, it is liable to be set aside.

4. Statement of objection has been filed by the State Government as well as the contesting Respondents. The substance of the objection may be summarised thus:

The petitioner has no locus standi to present this Petition. The petitioner-association being an association of doctors, their interest is self-interest and no public interest is involved and, therefore, the Petition cannot also be regarded as public interest Petition. Apart from this there is no case on merits also for the reason the main basis for the Writ Petition was that a High Power Committee

appointed by the State Government, had, on consideration of all relevant material recommended to the Government that no more medical colleges in the State should be permitted, and that the present decision has been taken totally ignoring the said recommendation, there being no opinion to the contrary by any Expert Committee appointed by the Government. The press statement by the then Chief Minister did not say that the decision was taken on the basis of the recommendation of the High Power Committee appointed by the Government. After taking all the relevant facts into account, the Government was of the view that there is need for two more medical colleges. The petitioner has not made out any case for setting aside the decision of the Government to permit the starting of new medical colleges.

5. I shall in the first instance proceed to dispose of the first Petition as the relief sought for, in this Petition is for an order preventing the establishment of new medical colleges. The locus standi of the petitioner-association is questioned on the ground that it cannot be regarded as a public interest Petition on the ground that it represents only the interest of persons who are already doctors. I consider it unnecessary to go into the question of locus standi for the reason that on merits no case is made out by the petitioner. The main material on which the Petition was based was the recommendation by the High Power Committee constituted in 1980 which according to the petitioner on consideration of all relevant factors had expressed strongly against the starting of new medical colleges. If such a report was in existence and there was no rational basis for departing from such recommendation, that could have been a basis to characterise the present decision as arbitrary or based on collateral Consideration. Learned Advocate General produced the concerned file and submitted that there was no such report. In fact in the statements. of objection a specific averment has been made to the effect that in view of the serious difference of opinion between the members of the said High Power committee it did not conduct its deliberation at all and did not make any final report. The then President of the petitioner-association was a member of that Committee, Even after the existence of the report was disputed, no affidavit of that person has been filed to the effect that the report had been submitted and he was a signatory to the report. The assertion by the present President, who had no personal knowledge about the submission of the report as to the existence of the report is of no value Thus the petitioner is unable to prove the existence of such report. In the absence of any such considered view expressed by a committee constituted by the Government merely on the. basis of the averments made in the Petition to the effect that there are large number of doctors who are unemployed, it would be difficult for this Court to hold that no more medical colleges could be permitted by the Government in this State. The petitioner has produced a letter dated 22.12.1989 of the Medical Council (Annexure-B) In which the Council expressed the view that it was against the according of permission to new medical colleges on the basis of Capitation fee. As far as this aspect is concerned, new medical colleges even if permitted cannot collect Capitation fee

as the bar under the recently enacted law abolishing capitation fee is absolute against new colleges. There is another letter dated 2.8.1984 of the Medical Council (Annexure-N) which states that the Council and Government of India were against the opening of any new medical colleges in the country. In this behalf, it is pertinent to point out that in view of the question involved in the Petition viz, the propriety of opening of more medical colleges, I had directed that the Indian Medical Council, a statutory body entrusted with the responsibility for ensuring requisite standards in medical education and profession, be impleaded as a party, for the reason that it would be in a position to place relevant information before the Court, and was impleaded as a respondent. The Council did not come forward to place any material in support of its view that no more medical colleges were feasible. The resultant position is the report of the High Power Committee on which the Petition was based does not exist and no other material to uphold the plea of the petitioner that the opening of new medical colleges in the State is whimsical and arbitrary has been adduced.

6. Learned Counsel submitted that the standard of medical education in the existing colleges had already gone down, and the facilities in terms of standards laid down by the Indian Medical Council have not been complied with by 3 existing colleges.

7. I fail to see how the circumstances that 3 of the colleges in respect of which affiliation has already been granted have not complied with the conditions laid down by the Indian Medical Council or there has been fall of academic standard in some of the existing colleges could be a ground for refusing permission to the new colleges, if they are desirous of fully complying with the conditions prescribed by the Indian Medical Council and also having requisite standard.

8(i) For these reasons as also for the reason, as I shall point out later, that the necessity or otherwise of new medical colleges is a matter for consideration by the concerned University and the Government under Sections 53 (2)(a) and (5) of the Karnataka State Universities Act, 1976 ("the Act" for short) and it would be open for the association to represent its view before them, no direction can be issued to the Government not to consider any application seeking permission/affiliation to start new medical colleges. As for as the effect of the impugned order is concerned as I point out later, while dealing with the connected Writ Petition, it does not enable respondents 4 and 5 to start the colleges.

(ii) As regards the point raised in the Petition to the effect that the Government had granted permission to start colleges with permission to levy capitation fee, Learned Advocate General submitted that the Government Order does not give any such permission. Learned Counsel pointed out that in fact the press statement of the then Chief Minister on which the petitioners rely, as was pointed out for the respondents and as stated in the report (Annexure-E) itself, was based on Raj Committee Report, which was appointed by the Karnataka University and which had expressed itself against collection of capitation fee. The printed report was also produced at the time of hearing. Learned Advocate

General submitted that as far as capitation fee is concerned, the matter was covered by Section 3 of the Karnataka Educational Institutions (Prohibition of Capitation Fee) Act, 1984 according to which the permission to collect Capitation fee at prescribed rates could be given only in respect of colleges established prior to the commencement of the Act for a period of five years and not in respect of colleges commenced after the commencement of the Act. The sub-mission is well founded. The impugned order expressly states that the permission was subject to the aforesaid Act and according to the Act the abolition of Capitation fee in respect of new colleges is total.

II. Re.W.P. No.)3609/84

9. The material averments in the Petition are as follows :

The petitioner is a Society which was established in the year 1914. Originally it was registered under the Central Societies Registration Act, 1860, and therefore under the Bombay Public Trusts Act, 1950, After the reorganisation of States when Bijapur became part of this State, it is deemed to have been registered under the Karnataka Societies Registration Act. The main object of the association was the establishment of schools and colleges for the, advancement of education of the people of the district of Bijapur. The petitioner-society had established 16 colleges, out of them 10 were degree colleges including an engineering college and 6 junior colleges On 26-1-1979 the petitioner made an application to the Karnataka University u/s 53 of the Act seeking affiliation to start a medical college at Bijapur vide Annexure A. By communication dated 27th January 1980 (Annexure-B), the Registrar of the University informed the petitioner that after local inspection, the records had been submitted to the State Government as required under sub-section (5) of Section 53 of the Act. A communication dated 16-2-1982 (Annexure-C) was received by the petitioner from the University informing the petitioner that the Government had decided not to permit the starting of any new medical colleges in the State during the year 1981-82. The communication dated 12/18-12-1981 from the Government addressed to the University, which incorporated the said decision was enclosed to the said letter.

When this was the position, the petitioners came to know that by an order dated 28-5-1984 the Government had accorded permission for starting of new medical college at Bijapur to the 2nd Respondent-society. Immediately thereafter the petitioner filed W.P. No, 10240 84 before this Court questioning the validity of the said order. In the said Writ Petition a memo dated 5-6-1984 was filed by the Advocate General who appeared for the State stating that all pending applications for sanction of medical colleges would be considered by the State and that the order dated 28-5-1984 would not be given effect to. The said memo was recorded and the Writ Petition, was dismissed as having become unnecessary. Thereafter, the impugned order dated 14-8-84 was made by which permission had been accorded for the starting of a new medical college at Bijapur to the 2nd Respondent and for starting a medical college at Mysore to

Respondent-4. In passing the aforesaid Government order there was no fair consideration of the comparative merits of the petitioner and Respondent-2 both of whom were desirous of starting a new medical college at Bijapur and, therefore, it was discriminatory. The application of the petitioner seeking affiliation to open a new medical college made u/s 53 was pending. The Government had no power to accord permission ignoring the provisions of Section 53 of the Act.

The stand taken on behalf of the 2nd Respondent-Al-Ameen Charitable Fund Trust may be summarised thus: The 2nd Respondent-trust is a central body to help , the establishment of educational institutions principally for the benefit of Muslims and in addition for the benefit of others. The founders of the Trust are 9 Muslims and it is a religious minority in the State. Therefore, they have the fundamental right to establish a medical college in view of Article 30 of the Constitution of India. On their application, the State Government had granted the permission to start a medical college at Bijapur. The affiliation contemplated u/s 53 of the Act is different from the permission which the State Government had the power to grant. Before according permission to the 2nd Respondent the case of the petitioner had also been considered. Therefore the allegation that the petitioner has been discriminated is devoid of any merit.

10. The State Government has in its common statement of objection, as regards the second Petition, has stated as follows : The contention of the petitioner that the affiliation should be granted first and there could be no permission de hors affiliation was not correct. Affiliation can be obtained by the college concerned after the establishment of the college with the permission of the Government. After the disposal of W.P. No. 10240/84 the State Government decided to consider all pending applications who had sought permission to start medical colleges. Accordingly the first petitioner was asked to appear before the Government on 18-7-1984. Pursuant to the said notice, the petitioner appeared before the Government, but raised a preliminary objection to the effect that the Government should decide in the first instance the question of affiliation. The Government declined to consider the said preliminary objection. The petitioner refused to furnish necessary information on the ground that the Government declined to decide the preliminary objection. Therefore, there was no question of the State Government considering the request of the first petitioner on merits. The decision taken by the Government to permit the two medical colleges is bona fide and there is no ground to interfere.

11. The Karnataka University has filed its statement of objections. The relevant averment made therein are as follows : The petitioner and second Respondent-trust had made applications earlier for starting of a new medical college at Bijapur during the academic year 1981-82. The University, after inquiry had recommended both the applications to the Government for grant of affiliation. But the request was rejected by the Government by its communication dated 18-12-1981 (Annexure - RI). It reads :

" XX XX XX XX Sub: Sanction of fresh affiliation to the medical college at Bijapur by the Al-Ameen Charitable Fund Trust, Bangalore.

With reference to your letter No. I Aca/Afflo/80-81/1960 dated 27-6-81 on the subject mentioned above, I am directed to state that Government has decided not to permit starting of any new private medical colleges in the State during 1981-82.

Therefore, your request for starting a college at Bijapur by the Al-Ameen charitable Fund Trust, Bangalore, is rejected."

Thereafter, no fresh application was received from the second Respondent - Trust. In fact by letter dated 2-7-1984 (Annexure R2) the Registrar of the University had informed the 2nd Respondent-Trust that as its earlier application had been rejected by the Government, by the communication dated 18-12-1981, it was necessary for the second respondent-Trust to make a fresh application. Copy of the said communication, which is produced as Annexure R-2, reads -

2 July 1984

The Hon. Secretary, Al Ameen Charitable Fund Trust, 52, Qsmania Building, Narasimharaja Road, Bangalore - 560 002

Sir, Sub: Starting of Medical College at Bijapur. Ref: Government Order No. HFW 96 MME 83 dt. 28-5-84 from the Health and Family Welfare Department, Bangalore.

1. Through the reference cited above, Government in Health and Family Welfare Department have accorded permission to your trust for starting a Medical College at Bijapur. In the preamble to the Government Order, it is mentioned that Karnataka University has already granted affiliation to start a Medical College, This is incorrect.

2. After you had applied for affiliation through your letter No. 786/AACET/CPN-MED-CLG. 1/79-80. dt. 12-5-1980, your application was referred to the Local Inquiry Committee. The recommendations of the committee were forwarded to the Government in Education Department. However, Government in Education Department through their letter No. ED 196 UAC SO dt. 18-12-1981 rejected the request of your Trust for starting the Medical College at Bijapur. This was communicated to you vide our letter No. Aca/Affla/1981 82/4236 dt. 13-2-1982. In this connection, I may bring to your kind notice that it is not the University which grants the affiliation, by the Government itself

3. In view of the above, you are advised to make a fresh application for the affiliation in order to enable the University to initiate appropriate action."

The University by its notification dated 28-7-1982, 22-7-1983 and 4-8-1984 had invited applications for fresh affiliation during the relevant academic year, but no fresh application was received from the 2nd respondent-Trust, during all these academic years. Section 53 of the Act contemplates three types of affiliation:

- (i) Fresh affiliation, i e , in respect of a new college to be established.
- (ii) Continuation of affiliation in respect of colleges which are already established and affiliated for limited period.
- (iii) Extension of affiliation in respect of colleges which have the affiliation, but seek affiliation in respect of new courses. The securing of affiliation u/s 53 of the Act is a condition precedent for the establishment of a new college which proposes to sponsor the students for any University examination.

12. In view of the stand taken by the Petitioner and the Karnataka University on the one hand and the stand taken by the Government and respondents 2 and 4, the following important questions of law arise for consideration.

(i) Whether a. college desirous of sponsoring students to a University examination can be established and it could proceed to make admission of students to a course leading to a University examination without securing affiliation?, and

[ii] Whether there is any power vested in the State Government to accord permission for the starting of a college apart from the power vested in it u/s 53[5] of the Act?

Sub-sections(1) to (5) of Section 53 of the Act which are relevant for the purpose of this case reads:

"53. AFFILIATION OF COLLEGES: [1] Colleges within the University Area may, on satisfying the conditions specified in this section be affiliated to the University as affiliated colleges by the State Government.

[2] A college applying for affiliation to the University shall send an application to the Registrar within the time limit fixed by Ordinances and shall satisfy the Syndicate and the Academic Council,-

[a] that it will supply a need in the locality, having regard to the type of education intended to be provided by the college, the existing provision for the same type of education made by other colleges in the neighbourhood and the suitability of the locality where the college is to be established;

[b] that it is to be under the management of a regularly constituted governing body;

[c] that the strength and qualifications of the teaching staff and the conditions governing their tenure of office are such as to make due provision for the courses of instruction, teaching or training to be undertaken by the college;

[d] that the buildings in which the college is to be located are suitable and that provision will be made in conformity with the Ordinance for the residence in the college or in lodgings approved by the college, for students not residing with their parents or guardians and for the supervision and welfare of students:

[e] that due provision has been made or will be made for a library:

[f] where affiliation is sought in any branch of experimental science, that arrangements have been or will be made in conformity with the Statutes, Ordinances and Regulations for imparting instruction in the branch of science in a properly equipped laboratory or museum:

[g] that due provision will, as far as circumstances may permit, be made for the residence of the Principal and members of the teaching staff in or near the college or the place provided for the residence of students:

[h] that the financial resources of the college are such as to make due provision for its continued maintenance and efficient working; and

[i] that rules fixing the fees [if any] to be paid by the students have been framed or will be framed.

[3] The application shall further contain an assurance that after the college is affiliated any transference of management and all changes in the teaching staff and all other changes which result in any of therefore said requirements not being fulfilled or continued to be fulfilled shall be forthwith reported to the Syndicate and to the State Government or such authority as the State Government may specify.

[4] On receipt of a letter of application under sub-section [2], the Syndicate shall -

[a] direct a local inquiry to be made by a competent person or persons authorised by the Syndicate in this behalf in respect of such matters as may be deemed necessary and relevant;

[b] make such further inquiry as may appear to it be necessary: and

[c] record its opinion after consulting the Academic Council on the question whether the application should be granted or refused, either in whole or in part, stating the result of any inquiry under clauses [a] and [b] :

[5] The Registrar shall within such time as the Government may time to time specify submit application and all proceedings, if any, of the Academic Council and tot the Syndicate relating thereto to the State Government which after such inquiry as may appear to it to be necessary shall grant or refuse the application or any part thereof." Sub-section (2) provides that a College applying for affiliation has to send its application within the time limit fixed by the Ordinances and should satisfy the Syndicate and the Academic Council the conditions specified under clauses (a) to (i) of the said Sub-section. In particular according to clause (a) one of the conditions for granting of affiliation is whether the college seeking affiliation would supply a need in the locality having regard to the type of education intended to be provided by the college and the suitability of the place where the college has to be established. On receipt of such an application, sub-section (4) requires the University to have a local enquiry conducted by

persons authorised by the Syndicate. The Syndicate has to record its opinion after consulting the academic council and submit its report to the State Government. Sub-section (5) provides that the Government may on consideration of the recommendation of the academic council and the Syndicate and after marking further inquiry if it considers necessary to do so, grant or refuse the application or in part thereof. Section 4(ii)(a) of the Act reads -

"4. POWERS OF THE UNIVERSITY - Subject to the provisions of this Act and such conditions as may be prescribed by the Statutes or Ordinances, the University shall have the following powers and perform the following duties, namely :-

(i) ** **

(ii) hold examinations and grant and confer degrees, diplomas and other academic distinctions on persons who-

(a) have pursued a course of study in the University or in any college, unless exempted therefrom in the manner prescribed by the Statutes, Ordinances or Regulations and have passed the examinations prescribed by the University; or"

(Underlined by me)

According to the above provision, the University has to hold examination and grant and confer degrees, diplomas and other academic distinctions on persons who have pursued a course of study in the University or in any college, unless exempted therefrom in the manner prescribed by the Statutes, Ordinances or Regulations. The expression "College" is defined u/s 2(2) of the Act. It reads -

" "College" means an institution maintained by the University as such and includes an institution admitted to the privileges of the University as an affiliated college of the University in accordance with the provisions of this Act"".

According to the above definition, a college means either a University college or a college affiliated to the University.

13. The combined effect of Section 4(ii)(a) and Section 2 of the Act is that the University can admit to an university examination only the students, who have pursued a course of study either in an affiliated college or in a University college. In view of this provision, it is contended by the Learned Counsel for the Karnataka University that no college, which is intended to introduce a course of study leading to a university examination, can be commenced without first securing affiliation of the University concerned.

14. Learned Advocate General and the Learned Counsel for the 2nd Respondent contended that as sub-section (2) of Section 53 of the Act speaks of a College applying for affiliation, it means the College should be established first and thereafter it should apply for affiliation.

15. Learned Counsel for the University submitted that the expression "College" used in Section 53(2)(a) of the Act in so far it relates to a. College seeking fresh

affiliation is concerned has to be understood as, "a proposed college" and not a college which has already been brought into existence. He submitted that as the Section covers not only cases of fresh affiliation but also cases of continuation of affiliation and extension of affiliation, the expression "College" has been used in the said sub-section and that in view of Section 4(ii)(a) of the Act, the construction placed by the Learned Advocate General and Counsel for the 2nd and 4th Respondents that a college can be commenced first and thereafter affiliation could be sought for, was not correct.

16. I shall now proceed to analyse the various clauses of Section 53 in order to ascertain as to whether the application for affiliation is contemplated by a college after it is established and began functioning or before it is established.

(i) Sub-section (2) of Section 53 of the Act no doubt speaks of a college applying for affiliation to the University. But Section 2(2) of the Act defines the word "college" as meaning a university college or affiliated college. As far as the university college is concerned, there is no question of its seeking affiliation to the University and as far as the college already affiliated to the University is concerned also there is no question of its seeking affiliation. Therefore the definition of the word "college" given in Section 2(2) of the Act has no application to the word "college" used in sub-section (2)

(ii) Sub-section (2) of Section 53 of the Act requires that the applicant seeking affiliation has to satisfy the Syndicate and the academic council the conditions specified in clauses (a) to (i). Now coming to clause (a), the first condition to be satisfied is that the college will supply a need it the locality taking into account the existing provision for the same type of education in the locality concerned. Therefore it is a condition which has to be satisfied before the commencement of the college and not after its commencement.

(iii) Clauses (b) to (i) requires the applicant to ensure-

(A) That the college would be under a management of a regularly constituted body [vide clause (b)];

(B) That the strength and qualification of the teaching staff and the conditions governing their tenure of office would be such as to make due provision for the courses of instruction, teaching or training to be undertaken by the college [vide clause (c)];

(C) That the buildings in which the college is to be located are suitable and that provision will made in conformity with the Ordinance for the residence for the students and for the supervision and welfare of students [vide clause (d)];

(D) That due provision will be made for a library [vide clause (e)];

(E) That in respect of branch of experimental science, that arrangements will be made in conformity with the statutes, ordinances, etc., for imparting instruction in that branch of science in a properly equipped laboratory or museum [vide

clause (f)];

(F) That due provision will be made for the residence of the Principal and members of the teaching staff in or near the college or the place provided for the residence of students [vide clause (g)] ;

(G) That financial resources of the college are such as to make due provision for its continued maintenance and efficient working [vide clause (h)] ;

(H) That the rules fixing the fees to be paid by the students have been or will be framed [vide clause (i)] ;

(iv) Sub-section (3) provides that after the college is affiliated, any transfer of management or change in the teaching staff will be reported to the Syndicate and to the State Government.

(v) Sub-section (4) provides that after receipt of a letter of application under sub-section (2) of Section 53, the Syndicate should cause a local inquiry to be made by a competent person or persons authorised by it in respect of matters as may be deemed necessary and relevant and the recording of opinion by the Syndicate after consulting the Academic Council.

(vi) Sub-section (5) requires the registrar to submit an application and all proceedings to the State Government which is required to pass an order either granting or refusing the application after such inquiry as may appear to it.

17. Having regard to the requirements of clauses (a) to (i) of Section 53, it appears to me that the construction placed on Section 53 by the counsel for the Karnataka University is sound. The Section covers not only the cases of colleges proposed to be established in respect of which affiliation is sought for for the first time, but also colleges in respect of which affiliation had already been granted for a period, but are seeking affiliation for a further period and also in respect of colleges which are already affiliated but are seeking affiliation in respect of new courses. On a careful reading of the provision, there is no room for doubt that in so far it relates to fresh affiliation, what Section 53 contemplates is, that before the college is established and the students are admitted to the college, the application has to be made to the University seeking affiliation and only after affiliation is received the college can be established. It is also pertinent to point out that though Section 53 speaks of a college applying for affiliation to the University, actually it is the management of the college which has to submit the application as is evident from Section 52(2)(b) which provides that the college has to be under the management of a duly constituted governing body, it is also clear from the facts of the case that it is the Petitioner and respondent-2 who applied to the Karnatak University seeking affiliation for the establishment of a medical college at Bijapur and it is respondent- 4 who applied to the Mysore university seeking affiliation in respect of a college proposed to be established by the said respondent and the application was not made by the college. If the construction placed on Section 53(2) by the learned Advocate General and

learned Counsel for the 2nd respondent and 4th respondent is correct, the applications could not be entertained at all as they were not by the colleges. In fact, in the nature of things, it is impossible to hold that a college should be established in the first instance and it is the college which should apply for affiliation. Therefore the reasonable construction of Section : 3(2) of the Act would be that the application contemplated by the said provision, in so far it relates to a fresh affiliation is concerned, the body of persons, who propose to open a particular type of college at a particular place, have to apply u/s 53(2) of the Act seeking affiliation to the proposed college. This interpretation would also be in conformity with the clear and unambiguous language of Section 4(ii)(a) of the Act, according to which, only the students who had pursued the study in a University college or an affiliated college could be admitted to the University examination and it is only on such persons, degrees and diplomas of the University would be conferred. To sum up, I hold that according to Section 53 of the Act, affiliation is a condition precedent for establishing a new college and for inviting applications for admission to courses leading to a degree or diploma or any academic distinction of a University at such College.

18. Learned counsel for respondent-2 submitted that as the 2nd respondent is a body constituted by a religious minority, they have fundamental right to establish and administer the educational institution and, therefore, it can-not be prevented from starting a new medical college, it is true that they have such right under Article 30 but that right is subject to the law imposing conditions of affiliation except those which are inconsistent with Article 30 of the Constitution . (See: The Ahmedabad St. Xavier's College Society and Another Vs. State of Gujarat and Another, ; Lily Kurian Vs. Sr. Lewina and Others, ; Sidnarajbhat -v.- State of Gujarat, AIR 1963 SC 540 and All Saints High School, Hyderabad and Others Vs. Government of Andhra Pradesh and Others, Therefore, the 2nd respondent has to comply with the provisions of section 53 of the Act and secure affiliation for the purpose of establishing new medical colleges.

19. What applies to the 2nd Respondent also applies to the 4th Respondent and the petitioner who claims the right to establish a medical college under Articles 14, 19(1)(g) and 21 of the Constitution relying on the judgment of this Court in Bapuji Educational Association -v.- State of Karnataka ILR 1985 KAR 20.

20. Learned Counsel for the petitioners submitted that as the 2nd Respondent has to depend, as far as the requirement of hospital facilities are concerned, on the Government District Hospital and as there could be no medical college without hospital facilities, the right flowing from Article 30 would be of no assistance to the 4th Respondent. This is also a matter which the Government has to consider while considering the question of affiliation u/s 53 of the Act.

21. (i) The second question for consideration is whether the impugned order under which the Government purported to grant permission to start new medical college is without authority of law or in other words, whether it conferred any right on Respondents 2 and 4 to start the medical college.

(ii) Section 53(2)(a) of the Act expressly indicates that one of the conditions to be satisfied by an applicant is that the college will supply a need in the locality having regard to the type of education intended to be provided, taking note of the existing provisions for the same type of education.

Thus it may be seen that one of the conditions precedent to be satisfied before according affiliation is a decision that there is a necessity for the starting of a college. Therefore, a decision on that aspect forms part of the decision to be taken by the Government u/s 53(5) of the Act. From this it follows that a college has to be established only after securing affiliation. Therefore it is clear that the Act does not contemplate the grant of permission to start a college apart from an order which it could pass u/s 53(5) of the Act. In other words, the permission which could be accorded for starting a new college could only form part and parcel of the decision to accord affiliation. It is well settled that the executive power of the State under Article 162 of the Constitution is not available when the field is occupied by Legislation, in this behalf, in the case of *B.N. Nagarajan and Others Vs. State of Mysore and Others*, the Supreme Court aid thus ;

"It is hardly necessary to mention that if there is a statutory rule or an act on the matter, the executive must abide by that act or rule and it can not in exercise of the executive power under Article 162 of the Constitution ignore or act contrary to that rule or act."

Therefore the Government had no power to make the impugned order.

(iii) I asked the Learned Advocate General and the Counsel for Respondents 2 and 4 to state why and under what provision permission to start a new college was sought for and granted. Learned Advocate General submitted that there was no provision of law enacted by Legislature or even an executive order, which required the seeking or granting of permission to start a new college, apart from Section 53. Learned Advocate General pointed out that in fact the impugned Government Order itself said that the permission accorded was subject to the securing of affiliation from the concerned University. The answer of the counsel for Respondent-2 also was the same.

(iv) Learned Counsel for Respondent 4 conceded that if Section 53 of the Act provides both for the examination of the question of necessity, as well as the eligibility of the applicant, for starting a new college, then there could be no exercise of executive power to accord permission. He also submitted that therefore the 4th Respondent proposes to start the college only after securing affiliation.

22. I am of the opinion that any view that the Government has the power to accord permission to the starting of a new college otherwise than by an order made u/s 53(5) would lead to incongruous result. For instance, if there are two persons who have filed applications before a University seeking affiliation for starting a college at the same place and the applications are being processed by the University and if in the meanwhile the Government were to accord

permission to one such applicant and ultimately on inquiry held as required u/s 53 of the Act, it is found that only one college is feasible and that it is the other Applicant in whose favour no such permission was granted was eligible and in the meanwhile on the basis of the permission given by the Government the other applicant established the college and admitted the students, it would not only defeat the provisions of the Act but would also adversely affect the interests of students admitted and such a situation is bound to become the basis for mounting pressure on the University and the Government for granting affiliation, even though it does not deserve. Certainly the Legislature did not intend such a result

23. It is well settled that any construction of the provision of a statute which would lead to friction or defeat the object and purpose of the statute has to be eschewed and the one which promotes the object and smooth functioning of the statute alone has to be accepted. Applying the above principles of construction, I am of the view that in so far it relates to a college which is intended to have a course of study leading to a degree or diploma of any of the universities under the Act, the securing of affiliation u/s 53 of the Act, is a condition precedent. Though a person might, in exercise of his fundamental right either under Article 30 and or Articles 19(1)(g) and 21 establish an institution and impart instruction in the subject or trade of his choice, to those who are willing to have it, no person or college can invite applications from students for admission to a course leading to degree or diploma of an University without securing affiliation as no student who has not studied in a college affiliated to the University can be admitted to any university examination. Therefore the impugned order does not entitle respondents 2 and 4 to establish new medical colleges and, therefore, there is no need to quash it.

24. In view of the conclusion, it follows that the only relief to which the petitioner would be entitled to would be a direction to the State Government to consider the application of the 1st petitioner seeking affiliation to start a new medical college at Bijapur in accordance with the provisions of Section 53 of the Act. The 2nd respondent Trust also being a competing applicant for starting a medical college at Bijapur and being a minority institution, claiming its right under Article 30 of the Constitution, it is also necessary to direct the Government to consider the application of the petitioner and of respondent-2 Trust, together in accordance with Section 53 of the Act.

25. At this stage an objection is raised by the counsel for the Karnatak University to the effect that as the application of respondent-2 has been rejected on 18.12.1981 there was no subsisting application for consideration by the State Government. In support of his submission, learned Counsel relied on the Ordinance framed under the Karnatak University Act, 1949 which according to the Learned Counsel is in force, under the 1976 Act, as no new Ordinance has been framed on the topic, A copy of the same was produced at the time of hearing.

It reads -

"0.194. The Management of every college or institution affiliated to the University shall pay an annual fee of Rs. 250/- on or before 30th September.

0.194-A. The Management applying for affiliation of a college or institution, shall pay the following fee (s) along with the application for affiliation, before 30th September of the preceding year ;

(i) Rs. 2,000/- in the case of affiliation of a new college.

(ii) Rs. 250/- for continuation of affiliation of the college.

(iii) For extension of affiliation of the college, Rs. 250/- plus Rs. 100/- for every subject under Major or Minor for the 2nd and 3rd years of the 3-Year B.A., and B.Sc., Degree courses or for a special subject for the 2nd and 3rd years of the 3-years, B.Com. Degree course, provided the College applying for extension of affiliation in a subject both under Major and Minor simultaneously, shall pay Rs. 100/- for that subject".

Relying on the above Ordinance, learned Counsel submitted that the 2nd respondent has to file a fresh application. Learned Counsel for the first petitioner submitted that as far as the 1st petitioner was concerned, it had made an application during the current academic year.

26. After the 1976 Act has been enacted as a common Act for the whole State, no common procedure has been evolved for the purpose of Section 53 of the Act. The resultant position has been, that as far as the Mysore University is concerned, to which respondent-4 made an application in the year 1979, that application is kept pending and is being processed by the University. As far as the Karnatak University is concerned, it relies on the aforesaid Ordinance and contends that a fresh application is necessary for each academic year.

27. I am of the view that the Ordinance on which the learned Counsel for the Karnataka University relies does not debar the Government from considering the application of the petitioner as well as of respondent-2 made in the year 1979 under sub-section (5) of Section 53 seeking affiliation to start a new medical college at Bijapur for the following reasons.

(i) The starting of a medical college is not for a particular year, though having regard to the Ordinance of the Karnatak University, the applicants were required to seek affiliation for a particular academic year.

(ii) The application of both the petitioner and respondent-2 were rejected by Endorsement dated 18.12.1981 not on the ground that either the petitioner or respondent-2 was ineligible or not fully equipped for starting a medical college but on account of a policy decision taken by the Government that it will not permit any new medical college.

28. It may be that if the application seeking affiliation was rejected on the

ground that the applicant was not eligible and had not got the necessary equipment or stability fund, then it might become necessary for such an applicant to make a fresh application during the next academic year after acquiring necessary equipment or fund. But if the application had been rejected solely on the ground that no new college was to be permitted as a matter of policy, it becomes obligatory for the Government to consider the same application if insisted by the concerned applicant as and when the opening of new college is considered feasible and necessary.

29. To insist on making an application every year when on an earlier application filed by the concerned applicant and at the cost of the applicant, a local inquiry committee constituted by the Syndicate made inspection and inquiry and submitted the report and the academic council and Syndicate had applied their mind and were of the view that the applicant concerned was eligible for securing affiliation, would be unreasonable and also amounts to violation of the constitutional right of the applicant to establish an educational institution of the choice of the applicant.

30. Further existence of different procedure in the universities governed by common law, would lead to discriminatory results. Therefore, on consideration of all the facts and circumstances of the case, I am of the view that a direction should be issued to the State Government to consider the application of the Petitioner and of respondent-2 for affiliation to start a new medical college at Bijapur on their merits and if necessary after holding inquiry as it considers necessary and as permitted by sub-section (5) of Section 53 of the Act.

31. In the result, I make the following order-

I. W.P. No. 13463 of 1984:

For the reasons set out at paragraphs 5 to 8 of this order the rule is discharged. Petition is dismissed.

II. W.P. No. 13609 of 1984:

(1) The Writ Petition in so far it relates to the challenge to the Government Order date 14-8-1984 (Annexure-G) is concerned, it is dismissed as unnecessary, for the reasons set out at paragraphs 21 to 23 of this order.

(2) A Writ in the nature of Mandamus shall issue to respondents 1 and 3 to consider the application of the Petitioner and of the 2nd respondent on the basis of the application presented by them seeking affiliation to start a new medical college at Bijapur which was rejected by Government Endorsement dated 8-12-1981 (Annexure-D), in accordance with the provisions of Section 53 of the Act along with other applications of any other person similarly situated if any who had routed his application through the University.

(3) A Writ in the nature of Mandamus shall also issue to Respondent 1 to consider the application of Respondent to start a new medical college at Mysore

submitted through the Mysore University.

(4) The Petitioners and Respondent-2, Respondent 4 and others are at liberty to place such further material before the State Government by means of representations if they so desire within two weeks from today.

(5) The State Government is directed to dispose of the applications of the Petitioners, Respondent-2 and Respondent - 4 most expeditiously.