

(2004) 09 KL CK 0043

In the High Court Of Kerala

Case No : Writ Petition (C) No's. 20067, 20261 and 21483 of 2004

Kerala Self Financing Engineering College

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 08-09-2004

Acts Referred:

Constitution of India, 1950 — Article 30

Citation : (2004) 3 KLT 844

Hon'ble Judges : K. Balakrishnan Nair, J

Bench : Single Bench

Advocate : Kurian George Kannanthanam, K.P. Dandapani and Bechu Kurian Thomas, for the Appellant; M. Ratna Singh, General and Anil Thomas, Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

K. Balakrishnan Nair, J.

W.P. (C) No. 20067/2004

1. The petitioner is an Association of the Managements of Self, Financing Colleges in Kerala. It is challenging Ext.P6 order issued by the Government on 29.6.2004, governing the fee to be paid by the students, for this academic year, who were admitted in the Government quota in the unaided Professional Colleges during the academic year 2003-04. The brief facts of the case, as stated by the petitioner, are the following:

2. The petitioner is a Society, registered under the Travancore-Cochin Literary, Scientific and Charitable Societies Act. Its members are the Managements of Self Financing Engineering Colleges in the private sector in the State. Ext.P2 is the list of its members. The fee prescribed for the students of Self Financing Engineering Colleges, admitted during the academic year 2003-04, was fixed by Ext. P3 order, issued by the Government. As per para. 4 of Ext. P3, the annual tuition fee was fixed as Rs. 36,000/- Apart from the said fee, admission fee, special fee,

caution deposit and University fee, as applicable, were also to be paid by the students. It was also provided in para.7 of that order that the students, who were admitted earlier, would be governed by the fee structure, that was prevailing at the time of their admission. The petitioner submits, the fee fixed as per Ext.P3 was to govern the students during the entire course. The Government, by Ext.P4 order, granted a concession to the students admitted to B.Tech. Course in Government seats in Self Financing Engineering Colleges, by reducing their fees to Rs. 18,000/- per year, provided, their family income is Rs. 60,000/- or below. The petitioner submits, though Exts.P3 and P4 were issued after the decision of the Apex Court in T.M.A. Pai Foundation and Others Vs. State of Karnataka and Others, rendered on 31.10.2002, the Managements chose, not to challenge the said orders, as they were issued after consulting them also. In the meantime, the Supreme Court in Islamic Academy of Education and Another Vs. State of Karnataka and Others, , has ordered that the fee structure in Self Financing Colleges should be fixed by a Committee appointed by the Government. Apparently, in the light of the said direction of the Apex Court, the Government issued Ext.P5 order, stating that if the fee fixed by the Committee so appointed, for the academic year 2004-05, is lower than the fee fixed for the academic year 2003-04, the current year's (2003-04) fee will be refixed and the excess fees, if any, collected from the students during the current year (2003 -04), will be reimbursed to them,

3. While so, Justice K.T. Thomas Committee, appointed by the State Government, in the light of Islamic Academy's case, submitted its report on 27.05.2004, fixing the fee structure for different Self Financing Courses. The Government, apparently, dissatisfied with the recommendations of the Committee, decided to get over them and also the directions of the Apex Court, by resorting to appropriate legislation. The Bill for the same was introduced in the Assembly on 29.06.2004. On the very same day, the Government issued Ext.P6 order, providing, inter alia, that the students admitted . in the Government quota in the unaided Professional Colleges during 2003-04 need only pay the fee prescribed for corresponding courses in the Government Colleges. It is also provided therein that the loss, if any, suffered by the Managements, as a result of the reduction of fees to be paid by the students, admitted in the Government quota, can be recouped by enhancing the fees of the students, admitted in the Management quota. Ext.P6 also provided that students admitted in the Management quota with higher rank, when compared to the students, admitted in the merit quota, need only pay fee at the rate applicable to the students, in the Government Colleges. This Writ Petition is filed, challenging Ext.P6.

4. The petitioner challenge Ext.P6, mainly on two grounds. The first ground is that the Government are not competent to fix the fee structure in Self Financing Colleges, by issuing an executive order in the nature of Ext.P6, in view of the decisions of the Apex Court in T.M.A. Pai Foundation's case and Islamic Academy's case. In those decisions, the Apex Court has squarely condemned

cross subsidy. Ext.P6 plainly promotes cross subsidy. The second ground is that the 3rd clause in Ext.P6 will prompt meritorious students to seek admission in the Management quota, especially in reputed educational institutions and the result will be that such students admitted in the Management quota need only pay the fee payable by students in the Government Colleges, provided, there is a student, lower in rank in the merit quota. Practically, such Colleges will not be able to function. On the above grounds, the petitioner seeks to quash Ext.P6.

5. The respondent has filed a counter affidavit, supporting the impugned order and resisting the prayers in the Writ Petition. It is submitted that the impugned order has been issued lawfully by the Government under Article 162 of the Constitution of India. The observations regarding cross subsidy made by the Apex Court, will not weaken the efficacy of Ext.P6. It is also submitted that the impugned order has been issued to safeguard the interest of the students, who were admitted during the year 2003-04, pending passing of the Bill on Self Financing Colleges, by the Legislative Assembly. The respondent has also filed an additional counter affidavit, in which it is submitted that the directions issued in Ext.P6 will govern only the students admitted in the year 2003-04 and who are undergoing B.Tech. Courses in 2004-05.

6. Heard Mr. Kurian George Kannanthanam appearing for the petitioner, Mr. K.P. Dandapani, appearing for the petitioner in the connected W.P.(C) No. 20261/2004 and also Mr. Bechu Kurian Thomas, appearing in W.P.(C) No. 21483/2004, filed by Marthoma Institute of Information Technology, which is conducting M.C. A. Course. I also heard the learned Advocate General Mr. M. Ratna Singh and the learned Special Government Pleader Mr. Anil Thomas, appearing for the State.

7. The impugned order Ext.P6 reads as follows:

"Government are pleased to order as follows:

1) Students of Unaided Professional Colleges admitted in the Government quota in 2003-04 need pay only the fees prescribed for the corresponding courses in the Government Colleges.

2) Students admitted in the Management quota in 2003-04 shall pay fees which will be fixed by a Management, taking into account the reduction in income, as a result of the fixation of fee as stated above.

3) The students in the Management quota who had higher ranks in the Entrance Examination than the students with lower ranks admitted to the same course in the same college in merit seat need pay only the fees at the rate indicated in para. 1 above.

4) The fees, if any, collected by the Management in excess of the amount indicated above in paras. 1 and 3 shall be refunded to the students forthwith".

8. By the said order, the Government have attempted to fix the fee structure in

the unaided Professional College in the State, In T.M.A. Pai Foundation's case, at para. 37, the Apex Court has condemned cross subsidy in the following words:

"The Unni Krishnan's judgment has created certain problems, and raised thorny issues. In its anxiety to check the commercialization of education, a scheme of "free" and "payment" seats was evolved on the assumption that the economic capacity of the first 50% of admitted students would be greater than the remaining 50%, whereas the converse has proved to be the reality. In this scheme, the "payment seat" student would not only pay for his own seat, but also finance the cost of a "free seat" classmate. When one considers the Constitution Bench's earlier statement that higher education is not a fundamental right it seems unreasonable to compel a citizen to pay for the education of another, more so in the unrealistic world of competitive examinations which assess the merit for the purpose of admission solely on the basis of the marks obtained, where the urban students always have an edge over the rural students. In practice, it has been the case of the marginally less merited rural or poor student bearing the burden of a rich and well-exposed urban student."

At para. 54, the Apex Court, in the following words, has stated that the Government cannot fix any rigid fee structure for such Colleges:

"The fixing of a rigid fee structure, dictating the formation and composition of a governing body, compulsory nomination of teachers and staff for appointment or nominating students for admissions would be unacceptable restrictions."

In para 56, it is further reiterated that the decision on the fee to be charged, must be left to the private educational institutions. The said portion of the judgment reads as follows;

"An educational institution is established for the purpose of imparting education of the type made available by the institution. Different courses of study are usually taught by teachers who have to be recruited as per qualifications that may be prescribed. It is no secret the better working conditions will attract better teachers. More amenities will ensure that better students seek admission to that institution. One cannot lose sight of the fact that providing good amenities to the students in the form of .competent teaching faculty and other infrastructure costs money. It has, therefore, to be left to the institution, if it chooses not to s, eek any aid from the Government. to determine the scale of fee that it can charge from the students. One also cannot lose sight of the fact that we live in a competitive world today, where professional education is in demand. We have been given to understand that a large number of professional and other institutions have been started by private parties who do not seek any Government aid. In a sense, a prospective student has various options open to him/her where, therefore, normally economic forces have a role to pay. The decision on the fee to be charged must necessarily be left to the private educational institution that does not seek or is not dependent upon any funds

from the Government."

Further, summarising the points decided, the Apex Court, in para 162-G, held as follows:

"Q.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 service 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."

9. In view of the above majority view in the eleven Judge Bench decision, the Government cannot issue an executive order, fixing the fee to be charged by Self Financing Professional Colleges and also providing cross subsidy.

10. The Constitution Bench of the Apex Court again considered the matter in Islamic Academy's case and held as follows:

"7. So far as the first question is concerned, in our view the majority judgment is very clear. There can be no fixing of a rigid fee structure by the Government. Each institute must have the freedom to fix its own fee structure taking into

consideration the need to generate funds to run the institution and to provide facilities necessary for the benefit of the students. They must also be able to generate surplus which must be used for the betterment and growth of that educational institution. In paragraph 56 of the judgment it has been categorically laid down that the decision on the fees to be charged must necessarily be left to the private educational institutions that do not seek and which are not dependent upon any funds from the Government. Each institute will be entitled to have its own fee structure. The fee structure for each institute must be fixed keeping in mind the infrastructure and facilities available, the investments made, salaries paid to the teachers and staff, future plans or expansion and/or betterment of the institution etc. Of course there can be no profiteering and capitation fees cannot be charged. It thus needs to be emphasized that as per the majority judgment imparting of education is essentially charitable in nature. Thus the surplus/profit that can be generated must be only for the benefit/use of that educational institution. Profits/surplus cannot be diverted for any other use or purpose and cannot be used for personal gain or for any other business or enterprise. As, at present, there are statutes/regulations which govern the fixation of fees and as this Court has not yet considered the validity of those statutes/regulations, we direct that in order to give effect to the judgment in T.M.A. Pai case, the respective State Governments/concerned authority shall set up, in each State, a Committee headed by a retired High Court Judge who shall be nominated by the Chief Justice of that State. The other member, who shall be nominated by the Judge, should be a Chartered Accountant of repute. A representative of the Medical Council of India (in short "MCI") or the All India Council for Technical Education (in short "AICTE"), depending on the type of institution, shall also be a member. The Secretary of the State Government in charge of Medical Education or Technical Education, as the case may be, shall be a member and Secretary of the Committee. The Committee should be free to nominate/co-opt another independent person of repute, so that total number of members of the Committee shall not exceed five. Each educational institute must place before this Committee, well in advance of the academic year, its proposed fee structure. Along with the proposed fee structure all relevant documents and books of accounts must also be produced before the Committee for their scrutiny. The Committee shall then decide whether the fees proposed by that institute are justified and are not profiteering or charging capitation fee. The Committee will be at liberty to approve the fee structure or to propose some other fee which can be charged by the institute. The fee fixed by the Committee shall be binding for a period of three years, at the end of which period the institute would be at liberty to apply for revision. Once fees are fixed by the Committee, the institute cannot charge either directly or indirectly any other amount over and above the amount fixed as fees. If any other amount is charged, under any other head or guise e.g. donations, the same would amount to charging of capitation fee. The Government/appropriate authorities should consider framing appropriate regulations, if not already framed, whereunder if it is found that an institution is charging capitation fees or profiteering that

institution can be appropriately penalised and also face the prospect of losing its recognition/affiliation".

11. In view of the above binding directions issued by the Apex Court, the directions issued under Ext.P6, concerning the fee structure in unaided Professional Colleges, are ex facie unsustainable. The contentions to the contrary, urged by the Government, relying on Article 162 of the Constitution of India, are plainly untenable. Accordingly, Ext.P6 is quashed.

12. It is made clear that I have not decided on the effect of Act 17/2004, on the fee structure applicable to the students admitted in the Government quota in the Self Financing Professional Colleges. The said Act was brought into force on 15.7.2004. The impugned order Ext.P6 was issued On 29.6.2004. Both sides submitted that this Court need decide only the validity of Ext. P6 order. In other words, the controversy, regarding the effect of the above said Act, on the fee structure is not raised or considered in this case. The Writ Petition is allowed as above.

W.P.(C) Nos. 20261 & 21483/2004:

13. The very same order impugned in W.P.(C) No. 20067/2004 is impugned in these Writ Petitions also. Accordingly, it is ordered that the judgment in W.P.(C) No. 20067/2004 will govern these cases also.