

(2016) 10 PAT CK 0047

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No.17664 of 2015

Mirza Ghalib T. T. College

APPELLANT

Vs

State of Bihar

RESPONDENT

Date of Decision : 27-10-2016

Acts Referred:

Constitution of India, 1950 — Article 19(1)(g), Article 29, Article 30

Citation : (2017) 1 BBCJ 282 : (2017) 1 PLJR 256

Hon'ble Judges : I.A. Ansari, CJ. and Chakradhari Sharan Singh, J.

Bench : Division Bench

Advocate : Mr. K. N. Singh, Sr. Adv. Mr. Vipin Kumar Girijesh Kumar, Advocate, for the University; Mr. D. K. Sinha, AAG 2, for the Respondent; Mr. Rajendra Pd. Singh, Sr. Adv. Mr. Rajeev Kumar Singh, Advocate, for the Petitioner

Final Decision : Disposed Off

Judgement

Mr. Chakradhari Sharan Singh, J. - There is a common challenge, in the present batch of writ applications, filed under Article 226 of the Constitution of India, to "Regulation and Ordinance for Admission in two-Year Bachelor of Education (Secondary) Programme under Universities of Bihar" (hereinafter referred to as the "Ordinance/Regulation"), published under the orders of the Chancellor, Universities of Bihar, in exercise of powers under Section 38 (4) and 39(2) (ii) of the Bihar State Universities Act, 1976, and similar provisions under Patna University Act, 1976, to the extent it lays down the procedure for admission to unaided privately managed professional minority and non-minority institutions and the fee structure, on the basis of which the students are to be charged their tuition and other incidental fees by such institutions.

2. We will be dealing with the rival stands, which have been taken in the present proceedings, in detail, at a later stage, but we can safely indicate, at the outset, that the challenge is fundamentally on the ground of violation of Articles 19(1) (g), 29 and 30 of the Constitution of India in the perspective of the law laid down by the Supreme Court, in the case of T. M. A. Pai Foundation and Others v. State

of Karnataka, reported in (2002) 8 SCC 481. Unreasonableness and arbitrariness, lack of rationale in the matter of laying down criteria for charging fees, including tuition fee and development fee, etc., are also the grounds, which have been taken in the present proceedings. Since the primordial legal issues, which the present batch of writ applications involve, are common, the cases have been heard together with the consent of the parties and are being disposed of by the present common judgment and order.

3. There are two categories of privately managed institutions, which have approached this Court, viz., unaided minority institutions and unaided non-minority institutions, engaged in conducting B.Ed. course, which is admittedly a professional course.

4. Though submissions at length have been advanced on behalf of the parties at the bar, for the purpose of convenience and clarity, we have referred to the pleadings in CWJC No. 7222 of 2016, preferred by Bihar State Minority Education College Association, Millat Teachers Training College, Madhubani and Mithila Teachers Training College, Madhubani, which claim to be minority institutions.

5. During the pendency of these writ applications, on prayers being made on behalf of the petitioners in different writ applications, we had allowed the institutions to admit students in B. Ed. Course, but subject to the outcome of the present proceedings and/or subject to such further order(s), which may be passed therein by interim orders.

6. For ready reference, we extract here in below the order, dated 13.05.2016, passed by this Court, in CWJC No. 7222 of 2016, which reads thus:

"Heard Mr. B. P. Pandey, learned Senior Counsel, appearing for the petitioners, and Mr. Lalit Kishore, learned Principal Additional Advocate General, appearing for the State. Heard also Mr. S. N. Pathak, learned Counsel, appearing for the respondent-NCTE.

Having regard to the facts, which have been made available on record, and the nature of reliefs, which have been sought for by the petitioners, we hereby, as an interim measure, allow, in the interest of justice, the petitioners to admit students in B.Ed. course subject to the outcome of this writ petition and/or subject to such further or other order(s), which may be passed in this writ petition.

The respondents shall remain at liberty to apply for modification or cancellation of the interim order, which has been passed herein above.

List this case, on 24.06.2016, along with C.W.J.C. No. 17664 of 2015, under the same heading, retaining its position."

7. Almost identical interim orders had been passed in other cases also.

8. The Bihar State Minority College Association, on whose behalf, CWJC No. 7222 of 2016, has been filed, claims to be a Society, registered under the Societies

Registration Act, formed for espousing the interest of Minority Colleges/ Institutions in the State of Bihar, having its registered office at Millat Teachers Training College Campus, Stadium Road, Madhubani. The petitioner Nos. 2 and 3 in the said case, namely, Millat Teachers Training College, Madhubani, and Mithila Teachers Training College, Madhubani are, as per pleadings, minority institutions, as declared by National Commission for Minority Educational Institutions, Government of India, New Delhi. It is has also been asserted that the said two institutions have been granted permanent recognition by the National Council for Teacher Education, Eastern Regional Committee, Government of India, and permanent affiliation by Lalit Narayan Mithila University, Darbhanga.

9. The Regulation aims at regulating Bachelor of Education (B.Ed.) programme in regular mode under self-finance scheme. It lays down the duration of course, curriculum, registration of students, examination and award of degree.

10. The Ordinance regulates, inter alia, admission in the said Bachelor of Education programme. Clause 1.1 of Ordinance for Admission prescribes that selection of candidates for admission to the Bachelor of Education programme in Regular mode shall be made on the basis of merit obtained in B. Ed. Entrance Test conducted by the respective University on charge of approved Entrance Test fee of Rs. 1000/-. The said Entrance Test fee is revisable by the competent authority, as and when required. Clause 1.3 of the Ordinance mandates that admission shall be strictly in order of merit, i.e., percentage of marks secured by the candidates at the B. Ed. Entrance Test, held for the said purpose. Clause 1.4 of the Ordinance lays down that there shall be reservation of seats, as per the rules of the State Government and reservation for persons with disability (PWD) has been provided in Clause 1.5 of the Ordinance. Clause 1.6 of the Ordinance makes it mandatory for an aspirant desirous of admission to the said course to appear at the Entrance Test. Clause 1.7 of the Ordinance lays down that a Joint B. Ed. Entrance Test will be conducted centrally by the concerned University and the date of B. Ed. Entrance Test will be announced by the University and merit list will also be prepared by the University after evaluation of the answer scripts and admission-merit list shall be prepared by the respective University and seat allotment shall be done through counselling. Clause 1.8 of the Ordinance provides that list of admitted students must be submitted to the University within one month after declaration of the merit list. Clause 1.1.0 of the Ordinance further mentions that after providing the opportunity for admission to the candidates having descending order of merit of lower qualification up to the marks fixed by the respective University, if the reservation percentage of any reserved category is not filled up, the same shall be exchanged as per State Government Rules.

11. Clause 2 of the said Ordinance deals with the eligibility criteria; whereas, Clause 3 deals with intake of students. It prescribes that there shall be basic unit of 50 students with a maximum of two units and this intake capacity can be modified as per the terms and guidelines prescribed by the National Council for

Teacher Education (NCTE) from time to time. Clause 4 of the Ordinance contains the fee structure, which an institution can charge for the said two-Year Bachelor of Education course.

12. In order to avoid any scope of even slightest of confusion, we must point out here that the term "Ordinance", referred to mention above, is referable to Section 37 of the Bihar Universities Act/Patna University Act, 1976, which can be made by the Syndicate of the University in the manner prescribed under Section 38 of the said Acts. Regulations, made under Section 39 of the said two Acts, can be made, subject to the provisions of the Act, Statutes and the Ordinances.

13. This is to be kept in mind, as is evident from the letter No. BSU(Regulation)-16/2015-1283/GS(I), dated 02.09.2015, that the recommendations made for prescribing the admission procedure and fee structure, after having been approved by the Chancellor of the Universities, have become binding in the matter of admission procedure and fee for professional institutions affiliated to the Universities in the State of Bihar. It is also evident that the said Regulation came to be issued on 02.09.2015.

14. We have heard Mr. Rajendra Prasad, learned Senior Counsel, Mr. Y. V. Giri, learned Senior Counsel and Mr. B. P. Pandey, learned Senior Counsel, appearing on behalf of the petitioners, and Mr. Lalit Kishore, learned Principal Additional Advocate General No. 1, Mr. D. K. Sinha, learned Additional Advocate General No. 2, Mr. Prabhat Kumar Verma, learned Additional Advocate General No. 5, Mr. Anjani Kumar, learned Additional Advocate General No. 6, Mr. P. N. Shahi, learned Additional Advocate General No. 10 and Mr. Ashok Kumar Keshari, learned Additional Advocate General No. 11, appearing on behalf of the State-respondents. We have also heard Mr. S. N. Pathak, learned Counsel, for the National Council for Teachers Education, Mr. Rajendra Giri, learned Counsel, appearing on behalf of the Chancellor, and Mr. K. N. Singh, learned Senior Counsel, appearing on behalf of the Magadh University, Mr. Ajay Behari Singh, learned Counsel, appearing on behalf of Lalit Narayan Mithila University and Mr. Satyendra Kumar, learned Counsel, representing B.N.M. University.

15. As has been noticed at the outset, it has emerged on the basis of pleadings on record and the submissions, which have been advanced on behalf of the parties that out of the several prescribes of the Regulation and general Ordinance, issued on 02.09.2015, by the Office of the Chancellor of the Universities of Bihar, the primary attack is on admission and selection procedure to such institutions and the fee which has been prescribed under the Regulation, chargeable for B. Ed. Regular mode course, for, according to the petitioners, they interfere with their right to manage and administer their institutions. For the purpose of better appreciation, it would be apt to extract the relevant provisions of Regulation, which are as under: -

"Ordinance For Admission

1. Admission and Selection Procedure

1.1 The selection of candidates for admission to the Bachelor of Education Programme (B.Ed.) in Regular mode shall be made on the basis of merit obtained in B.Ed. Entrance Test conducted by the respective University on charge of approved Entrance Test fee of Rs. 1000/-.

1.2 xx xx xx

1.3 Admission shall be made strictly in order of merit, i.e. percentage of marks secured by the candidate at the B.Ed. Entrance Test held for the purpose.

1.4 xx xx xx

1.5 xx xx xx

1.6 Appearance in the Entrance Test is mandatory. The reserved category candidates shall have to submit a copy of the certificate mentioning that the candidate belongs to a particular reserved category from an officer not below the rank of S.D.M.

1.7 Joint B.Ed. Entrance Test will be conducted centrally by the University. Date of B.Ed. Entrance Test will be announced by the University and merit list will also be prepared by the University after evaluation of answer books.

1.8 List of admitted students must be submitted to the University within one month after declaration of merit list.

1.9 xx xx xx

1.10 xx xx xx

1.11 xx xx xx

1.12 xx xx xx

1.13 xx xx xx"

16. The fee structure prescribed under the Regulation is as follows:-

Sl. No.	Fee Structure	Amount (in Rs.)
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1	Admission including Registration Fee (One time)	1000
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2	Tuition Fee (Rs. 40,000/- x 2=80,000/-)	80000
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3	Examination Fee (1,000 x2)=	2,000/- 2000
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4	Development Fee (One time)	5000
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5	Library Fee (one time)	1000
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17. Learned Senior Counsel, appearing on behalf of the petitioners, have contended that the right of professional institutions to establish and manage educational institutions is akin to fundamental right to occupation, under Article 19 (1) (g) of the Constitution of India. It has, secondly, been submitted that the

said right to establish and manage educational institutions, includes right to select candidates for their admission. They have, accordingly, submitted that making a provision for selection process for admission to such institutions, through an examination to be conducted by the respective University imposes unreasonable restriction on the professional institutions' right to manage and administer educational institutions imparting B.Ed. regular course. Heavy reliance has been placed on the said decision of the Supreme Court, in the case of T. M. A. Pai Foundation (supra), with a particular reference to paragraph 25, which reads thus:

"25. The establishment and running of an educational institution where a large number of persons are employed as teachers or administrative staff, and an activity is carried on that results in the imparting of knowledge to the students, must necessarily be regarded as an occupation, even if there is no element of profit generation. It is difficult to comprehend that education, per se, will not fall under any of the four expressions in Article 19(1)(g). "Occupation" would be an activity of a person undertaken as a means of livelihood or a mission in life. The above quoted observations in Sodan Singh case⁶ correctly interpret the expression "occupation" in Article 19(1)(g)."

18. It has also been submitted that the issuance of the impugned Regulation, in fact, amounts to usurping the very function of conducting the admission tests and thereby interfering with the right to selecting candidates for the admission to respective individual educational institutions. According to the petitioners, though the Chancellor could have framed Ordinance/Regulation to regulate such admission test by the concerned educational institutions, but it is not constitutionally permissible to forbid the institutions from having the freedom of holding their own admission tests.

19. It is also their case that for the academic sessions 2016-18, the Universities have not held any admission test, based on and in conformity with the impugned Regulation. There is no controversy over this fact.

20. It appears that in the light of interim orders, passed by this Court, as indicated above, the educational institutions were permitted to admit students, subject to outcome of the present batch of cases. However, this Court had neither restrained the Universities to hold such tests nor any observation was made that the students, who are being permitted to get admission on the basis of interim orders, will be exempted from appearing at the examination, if such examination is ever held.

21. Questioning the provisions made in the said Regulation, fixing fee, again invoking fundamental right enshrined under Article 19 (1) (g) of the Constitution of India, it has been argued that the educational institutions being unaided, the State, within the meaning of Article 12 of the Constitution of India, had any authority to assume power of fixing fee. It has been argued that the scale of fee fixed under the said Regulation is, ex facie, unreasonable since it does not take

into account the ground realities and the expenses such educational institutions are required to meet in order to satisfy the minimum statutory requirements for grant and continuance of recognition and affiliation by the competent bodies.

22. Relying on paragraph 54 of the Supreme Court's decision, in the case of T. M. A. Pai Foundation (supra), it has been argued that fixing of rigid fee structure without any objective and empirical basis cannot be said to be reasonable restriction, within the meaning of Article 19 (6) of the Constitution of India, over the fundamental right to occupation of such institutions.

23. There being great emphasis laid on behalf of the petitioner that before framing of the Regulation, with proper reference to prescribing the fee structure, no proper exercise was carried out to determine and evaluate as to what should be the reasonable fee which an institution, engaged in imparting B.Ed. education, should reasonably charge, we had requested learned Counsel for the Chancellor to produce before us, the original documents, based on which, it was decided to fix the maximum fee which could be charged by such institutions, as prescribed in the impugned Regulation. Accordingly, Mr. Rajendra Giri, learned Counsel, representing the Chancellor, has produced before us the original records, which, we have perused.

24. Learned Counsel, representing the Minority Institutions, have submitted that these institutions have special protection, guaranteed under Articles 29 and 30 of the Constitution of India. It has been contended on behalf of such institutions that their right to establish and administer, as contemplated under Article 30 of the Constitution of India, includes right to admit students on the basis of their own selection process, which cannot be tinkered by the State, within the meaning of Article 12 of the Constitution of India, in the manner the same is being done. It has been argued that minority unaided institutions cannot be forced to admit students on the basis of a combined entrance test to be held by the respective Universities, as contemplated under the Ordinance/Regulation, in question.

25. Mr. Rajendra Giri, learned Counsel, appearing on behalf of the Chancellor, has, on the other hand, relied on a recent Supreme Court's decision, delivered on May 2, 2016, in the case of Modern Dental College and Research Centre and Others v. State of Madhya Pradesh and Others, reported in (2016) 7 SCC 353, to submit that the issues raised on behalf of the petitioners, in the present batch of writ applications, found their answers in the said Supreme Court's decision. According to him, the Ordinance/Regulation, in question, do not suffer from any unreasonableness or arbitrariness. The Ordinance/Regulation, regulating admission to unaided privately managed institutions and their fee structure have been framed in the larger public interest in order to accomplish twin objectives of achieving excellence in the field of teachers training and controlling such educational institutions in a manner that they may not become schools of profiteering, he argues. He has also submitted that as a matter of fact, there is no reason for differentiating minority vis-à-vis non-minority unaided

educational institutions in the matter of admission and fixation of fee structure and, at least, the Supreme Court, in the case of T. M. A. Pai Foundation (supra), does not lay down such distinction.

26. Mr. P. K Shahi, learned Senior Counsel, has confined his submission to challenge the validity of Clause 4 of the Ordinance of Admission, wherein maximum fee chargeable from the students for pursuing B.Ed. course has been fixed. It has been submitted by Mr. Shahi that there cannot be any fixed rate of fee, which can be prescribed to be chargeable, in all the institutions irrespective of the facilities, different institutions may be providing to the students in terms of faculty members, infrastructure and other advanced methods for importing better quality of education and training.

27. Having briefly noted the points involved and rival submissions advanced, we need to examine concisely, the development of law on the question of right of professional institutions to establish, administer and manage educational institutions under Articles 19(1)(g), 29 and 30 of the Constitution of India vis-à-vis the permissible limit to which such rights can be regulated by the State, which has evolved through various pronouncements of Supreme Court. We are referring, for the said purpose only such judgments which are germane for deciding the issues involved in the present batch of cases.

28. A Constitution Bench of the Supreme Court, in the case of Unni Krishnan and Others v. State of Andhra Pradesh and Others, reported in (1993) 1 SCC 645, in categorical terms, had the occasion to consider and lay down the law that imparting education cannot be treated as trade or business, nor it could be allowed to be converted into commerce and even if wider meaning of a word "occupation" was to be given. The Supreme Court thus observed, in paragraphs 198 and 203, in the case of Unni Krishnan (supra), as follows:-

"198. We are, therefore, of the opinion, adopting the line of reasoning in State of Bombay v. R.M.D. Chamarbaugwala (AIR 1957 SC 699) that imparting education cannot be treated as a trade or business. Education cannot be allowed to be converted into commerce nor can the petitioners seek to obtain the said result by relying upon the wider meaning of "occupation". The content of the expression "occupation" has to be ascertained keeping in mind the fact that clause (g) employs all the four expressions viz., profession, occupation, trade and business. Their fields may overlap, but each of them does certainly have a content of its own, distinct from the others. Be that as it may, one thing is clear - imparting of education is not and cannot be allowed to become commerce. A law, existing or future, ensuring against it would be a valid measure within the meaning of clause (6) of Article 19. We cannot, therefore, agree with the contrary proposition enunciated in Sakharkherda Education Society v. State of Maharashtra (AIR 1968 Bom 91), Andhra Kesari Education Society v. Govt. of A.P. (AIR 1984 AP 251) and Bapuji Educational Assn. v. State (AIR 1986 Kant 119).

203. For the purpose of these cases, we shall proceed on the assumption that a person or body of persons has a right to establish an educational institution in this country. But this right, we must make it clear, is not an absolute one. It is subject to such law as may be made by the State in the interest of general public."

29. Before decision of Supreme Court by a Coram of eleven (11)-Judge, in the case of T. M. A. Pai Foundation (supra) came to be delivered, the right of private unaided professional institutions to establish and manage educational institutions was not recognised as a fundamental right under Article 19 (1) (g) of the Constitution of India. It was in the case of T. M. A. Pai Foundation (supra), that the Supreme Court held the right of professional institutions to establish and manage educational institutions as right to "occupation" within the meaning of Article 19 (1) (g) of the Constitution of India. The Supreme Court held, as has been rightly submitted on behalf of the petitioners, that the establishment and running of educational institutions, where a large number of persons are employed as teachers or administrative staffs and an activity is carried, all that results in the imparting of knowledge to students, is essentially an occupation, despite there being no element of profit generation.

30. After having said so, the Supreme Court in the case of T. M. A. Pai Foundation (supra), laid down in paragraph 50 that right to establish and administer broadly comprises the following rights: -

"(a) to admit students;

(b) to set up a reasonable fee structure;

(c) to constitute a governing body;

(d) to appoint staff (teaching and non-teaching); and

(e) to take action if there is dereliction of duty on the part of any employees."

31. There cannot be, thus any dispute that right of a professional institute to establish and manage educational institutions is an occupation, which has been recognised as a fundamental right under Article 19 (1) (g) of the Constitution of India, in view of the law, clearly laid down by the Supreme Court, in the case of T. M. A. Pai Foundation (supra). At the same breath, in T. M. A. Pai Foundation (supra), the Supreme Court held that an occupation of this nature could not be treated as a "business" or "profession".

32. On the premise that the right to establish and administer educational institution being an "occupation" within the meaning of Article 19 (1) (g) of the Constitution of India and, therefore, a fundamental right, can it be said that the said fundamental right is to the exclusion of the State to put reasonable restrictions by, inter alia, regulating admission to such institutions and prescribing outer limit of fee chargeable by such institutions?

33. On bare look at Article 19 (6) of the Constitution of India, it can be easily

noticed said that the fundamental right, under Article 19 (1) (g) of the Constitution of India, cannot be treated to be an absolute right and it is subject to any law, which the State may make in the interest of general public, imposing restriction on exercise of the said right, with particular reference to the right relating to carry on any occupation, trade or business.

34. Article 19 (6) of the Constitution of India reads thus:-

"19. Protection of certain rights regarding freedom of speech, etc. - (6) nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, 9[nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to, - "

35. In such background, we are proceeding to answer whether the Ordinance/ Regulation, under challenge, can be said to be putting reasonable restrictions in the matter of carrying on the occupation, namely establishment and administration of an educational institutions.

36. All the institutions before us claim to be unaided professional colleges, imparting B.Ed. course, having due recognition by NCTE and affiliation to respective Universities in the State of Bihar.

37. The eleven (11)-Judge Bench of the Supreme Court, in case of T. M. A. Pai Foundation (supra), in its decision has extensively dealt with the right of professional institutions to establish and manage educational institutions and the restrictions, which can be reasonably imposed on such institutions, pertaining to various aspects including admission of students in such institutions and levy of fees. The Supreme Court recognised and explicitly held in T. M. A. Pai Foundation (supra) case that when it came to higher education, particularly professional institutions, greater emphasis should be on the merit of a student seeking admission. The Supreme Court further laid down in paragraph 58 of the said decision, in case of T. M. A. Pai Foundation (supra), that appropriate regulation can be made for the said purpose, in the context of admission to unaided institutions, which reads thus: -

"58. For admission into any professional institution, merit must play an important role. While it may not be normally possible to judge the merit of the applicant who seeks admission into a school, while seeking admission to a professional institution and to become a competent professional, it is necessary that meritorious candidates are not unfairly treated or put at a disadvantage by preferences shown to less meritorious but more influential applicants. Excellence in professional education would require that greater emphasis be laid on the merit of a student seeking admission. Appropriate regulations for this purpose may be made keeping in view the other observations made in this judgment in the context of admissions to unaided institutions."

38. The Supreme Court, in paragraph 59 of the said decision, in case of T.M.A. Pai Foundation (supra), pointed out that usually marks obtained by a student in qualifying examination or School Leaving Certificate (SLC), followed by interview, or by the Common Entrance Test, conducted by the institutions or in case of professional colleges, such Common Entrance Test, conducted by the Government agencies, are determinative factors for assessing individual merit of a candidate for admission to professional educational institutions. Since, in our view, paragraph 59 of T.M.A. Pai Foundation (supra) case authorizes the Government agencies to conduct Common Entrance Test for admission, in case of professional colleges, laying our emphasis on the said statement of the Supreme Court, we quote the said paragraph 59 of the said decision, which reads thus:- "

"59. Merit is usually determined, for admission to professional and higher education colleges, by either the marks that the student obtains at the qualifying examination or school-leaving certificate stage followed by the interview, or by a common entrance test conducted by the institution, or in the case of professional colleges, by government agencies."

39. Dealing with as to what regulation is permissible for the State to be framed, the Supreme Court, in case of T. M. A. Pai Foundation (supra), laid down in paragraph 68 of its decision, as follows:-

"68. It would be unfair to apply the same rules and regulations regulating admission to both aided and unaided professional institutions. It must be borne in mind that unaided professional institutions are entitled to autonomy in their administration while, at the same time, they do not forgo or discard the principle of merit. It would, therefore, be permissible for the university or the government, at the time of granting recognition, to require a private unaided institution to provide for merit-based selection while, at the same time, giving the Management sufficient discretion in admitting students. This can be done through various methods. For instance, a certain percentage of the seats can be reserved for admission by the Management out of those students who have passed the common entrance test held by itself or by the State/University and have applied to the college concerned for admission, while the rest of the seats may be filled up on the basis of counselling by the state agency. This will incidentally take care of poorer and backward sections of the society. The prescription of percentage for this purpose has to be done by the government according to the local needs and different percentage can be fixed for minority unaided and non-minority unaided and professional colleges. The same principles may be applied to other non-professional but unaided educational institutions viz., graduation and post-graduation non-professional colleges or institutes."

40. On the question of the jurisdiction of the State to regulate fee structure of professional unaided institutions, the Supreme Court held in case of T. M. A. Pai Foundation (supra) that the management should adopt rational fee structure and it would not be entitled to charge a capitation fee. The Court held that the State or the University might devise an appropriate machinery to ensure that no

capitation fee was charged and that there was no profiteering, though a reasonable surplus for the furtherance of education could be allowed. Paragraph 69 of the said decision, in case of T. M. A. Pai Foundation (supra), is being extracted herein below:-

"69. In such professional unaided institutions, the Management will have the right to select teachers as per the qualifications and eligibility conditions laid down by the State/University subject to adoption of a rational procedure of selection. A rational fee structure should be adopted by the Management, which would not be entitled to charge a capitation fee. Appropriate machinery can be devised by the state or university to ensure that no capitation fee is charged and that there is no profiteering, though a reasonable surplus for the furtherance of education is permissible. Conditions granting recognition or affiliation can broadly cover academic and educational matters including the welfare of students and teachers."

41. Certain controversies arose soon thereafter over interpretation of Supreme Court's decision in case of T.M.A. Pai Foundation (supra) on various aspects, inter alia, in the matter of admission and fixation of fee structure in relation to unaided professional educational institutions (both minority and non-minority), which fell for consideration by the Supreme Court, in case of Islamic Academy of Education & Anr. v. State of Karnataka & Ors., reported in (2003) 6 SCC 697, wherein the Supreme Court formulated following four questions in paragraph 6 of the decision, for the purpose of settling the disputes: -

"(1) whether the educational institutions are entitled to fix their own fee structure;

(2) whether minority and non-minority educational institutions stand on the same footing and have the same rights;

(3) whether private unaided professional colleges are entitled to fill in their seats, to the extent of 100%, and if not, to what extent; and

(4) whether private unaided professional colleges are entitled to admit students by evolving their own method of admission."

42. The Supreme Court in case of Islamic Academy of Education (supra) on close examination and minutely scrutiny clarified the ratio laid down by the Supreme Court in case of T. M. A. Pai Foundation (supra), with particular reference to paragraph 68 of the said judgment (T. M. A. Pai Foundation) by splitting it into seven parts. In paragraph 12 of Islamic Academy of Education (supra), the Supreme Court, lucidly and explicitly clarified majority decision of T. M. A. Pai Foundation (supra), which reads thus:-

"12. Paragraph 68 of the majority judgment in Pai case can be split into seven parts:

Firstly, it deals with the unaided minority or non-minority professional colleges.

Secondly, it will be unfair to apply the rule and regulations framed by the State Government as regards the government-aided professional colleges to the unaided professional colleges.

Thirdly, the unaided professional institutions are entitled to autonomy in their administration; while at the same time they should not forego or discard the principles of merit.

Fourthly, it is permissible for the university or the Government at the time of granting recognition to require an unaided institution to provide for merit-based admission while at the same time giving the management sufficient discretion in admitting students.

Fifthly, for unaided non-minority professional colleges certain percentage of seats can be reserved for admission by the management out of those students who have passed the common test held by itself or by the State/University and for applying to the college/University for admission, while the rest of the seats may be filled up on the basis of counselling by the State agency.

Sixthly, the provisions for poorer and backward sections of the society in unaided professional colleges are also to be provided for.

Seventhly, the prescription for percentage of seats in unaided professional colleges has to be done by the Government according to the local needs. A different percentage of seats for admission can be fixed for minority unaided and non-minority unaided professional colleges."

43. The Supreme Court, in no uncertain terms, held in paragraph 13 of the of Islamic Academy of Education (supra), that in view of T. M. A. Pai Foundation (supra) case, in non-minority professional colleges, admission of students against seats, other than the percentage given to the management, can only be on the basis of merit as per the Common Entrance Test, conducted by the Government agencies. As to the manner in which the percentage given to the management could be filled in, both in minority and non-minority professional colleges, the Supreme Court, in case of Islamic Academy of Education (supra), again referred to paragraph 68 of the decision in case of T. M. A. Pai Foundation (supra), wherein it was held that in professional colleges admissions must be done on the basis of merit. The Supreme Court took a pragmatic view while accepting the argument that if a student was required to appear in more than one entrance test, it would lead to great hardship and would impose heavy burden on the students if they were compelled to pay application fees separately for each institute and if every such institute were allowed to hold separate entrance test. The inconvenience which the students would have in making arrangements for transportation from one place to another, if individual tests were conducted by each college, was also taken note of. In this background, the Supreme Court pointed out the significance of the words "Common Entrance Test", as mentioned in paragraph 68 of the eleven (11)-Judge Bench decision of the Supreme Court in case of T. M. A. Pai Foundation (supra).

44. In the background, as aforesaid, the Supreme Court said, in case of Islamic Academy of Education (supra), that the management should select students of their quota either on the basis of Common Entrance Test conducted by the State or on the basis of Common Entrance Test to be conducted by an Association of all colleges of a particular type. It also pointed out that the option of choosing between either of these tests must be exercised before issuing of prospectus and after intimation to the concerned authority and the committee set-up in accordance with the Supreme Court decision.

45. It further laid down that if any professional college chooses not to admit from Common Entrance Test conducted by the Association then that college must necessarily admit from Common Entrance Test conducted by the State. In terms of the said decision of Supreme Court in case of Islamic Academy of Education (supra) a copy of the merit list of common entrance test, if held by the association of institutions, must be forthwith sent to the concerned authority and the committee. The relevant portion of paragraph 16 of the Supreme Court's decision in case of Islamic Academy of Education (supra), is being extracted herein below:-

"16. The words "common entrance test" clearly indicate that each institute cannot hold a separate test. We thus hold that the management could select students, of their quota, either on the basis of the common entrance test conducted by the State or on the basis of a common entrance test to be conducted by an association of all colleges of a particular type in that State e.g. medical, engineering or technical etc. The common entrance test, held by the association, must be for admission to all colleges of that type in the State. The option of choosing, between either of these tests, must be exercised before issuing of prospectus and after intimation to the concerned authority and the Committee set up hereinafter. If any professional college chooses not to admit from the common entrance test conducted by the association then that college must necessarily admit from the common entrance test conducted by the State. After holding the common entrance test and declaration of results the merit list will immediately be placed on the notice-board of all colleges which have chosen to admit as per this test. A copy of the merit list will also be forthwith sent to the concerned authority and the Committee. Selection of students must then be strictly on basis of merit as per that merit list. Of course, as indicated earlier, minority colleges will be entitled to fill up their quota with their own students on basis of inter-se merit amongst those students. The list of students admitted, along with the rank number obtained by the student, the fees collected and all such particulars and details as may be required by the concerned authority or the Committee must be submitted to them forthwith. The question paper and the answer papers must be preserved for such period as the concerned authority or Committee may indicate."

46. The Supreme Court laid down that if it was found that any student had been admitted de-hors merit, penalty can be imposed on that institute and in

appropriate cases recognition/affiliation may be withdrawn. The Supreme Court further stated in paragraph 16 of the said decision, in case of Islamic Academy of Education (supra), thus:-

"16. If it is found that any student has been admitted de hors merit, penalty can be imposed on that institute and in appropriate cases recognition/affiliation may also be withdrawn."

47. Invoking its jurisdiction, under Article 142 of the Constitution of India, till appropriate legislation was enacted by the Parliament, the Supreme Court directed the respective State Governments to appoint a permanent committee, which would ensure that the test, conducted by the Association of colleges, was fair and transparent.

48. On the question as to whether such educational institutions were free to fix their own fee structure, in view of T. M. A. Pai Foundation (supra), the Supreme Court in case of Islamic Academic Foundation (supra) succinctly held that it was clearly laid down in majority judgment that there could be no rigid fee structure fixed by the Government and 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. The Supreme Court reiterated that such institutions must be able to generate surplus, capable of being used for the betterment and growth of the educational institutions. The decision on the fees to be charged must be left to such private educational institutions that do not seek nor are dependent on any funds from the State Government. It held that 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 for expansion and/or betterment of the institution etc. At the same time, the Supreme Court, in case of Islamic Academy of Education (supra), held that imparting of education is essentially charitable in nature and, therefore, there could be no profiteering and capitation fee could not be charged.

49. In order to give effect to the Supreme Court's decision, in case of T. M. A. Pai Foundation (supra), the Supreme Court in its decision, in case of Islamic Academy of Education (supra), directed the State Governments to set-up a committee, headed by a retired High Court Judge, a Member, who should be Chartered Accountant of repute to be nominated by the Judge and a representative of Medical Council of India (in short "MCI") / All India Council of Technical Education (in short "AICTE"), depending upon the type of the institution. The Supreme Court laid down the manner in which the fees, to be charged by such institutions, should be fixed. For the purpose of better appreciation and clarity, we reproduce herein below relevant extract from paragraph 7 of the Supreme Court decision in case of Islamic Academy of Education (supra), which reads thus:-

"7. 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 the 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 Governments/appropriate authorities should consider framing appropriate regulations, if not already, framed, where under if it is found that an institution is charging capitation fees or profiteering that institution can be appropriately penalized and also face the prospect of losing its recognition/affiliation."

50. Noticing the trend of collection of fees in advance for the entire course, i.e., for all the years by some of the educational institutions, the Supreme Court clearly held that an educational institution could charge only prescribed fees for one semester/year. It indicated that if any institution had collected fees in advance, only the fees of that semester/year could be used by the institution and balance fee might be kept invested in fixed deposit account in a nationalized Bank and as and when fee fell due for a semester/year only, then the fees falling due for that semester/year could be withdrawn by the institution and the rest of the amount must continue to remain deposited till such time that they fall due. The Supreme Court further clarified that at the end of the course, interest on such deposits must be paid to the students from whom the fees were collected.

51. The five (5)-Judge Bench of Supreme Court in its decision, in case of Islamic Academy of Education (*supra*), came up for reconsideration before Coram of seven Judges of Supreme Court, in case of *P.A. Inamdar & Ors. v. State of Maharashtra & Ors.*, reported in (2005) 6 SCC 537. Following were the points of

reference before the Supreme Court:-

"27. (1) To what extent can the State regulate admissions made by unaided (minority or non-minority) educational institutions? Can the State enforce its policy of reservation and/or appropriate to itself any quota in admissions to such institutions?

(2) Whether unaided (minority and non-minority) educational institutions are free to devise their own admission procedure or whether the direction made in Islamic Academy for compulsorily holding entrance test by the State or association of institutions and to choose therefrom the students entitled to admission in such institutions, can be sustained in light of the law laid down in *Pai Foundation*?

(3) Whether Islamic Academy could have issued guidelines in the matter of regulating the fee payable by the students to the educational institutions?

(4) Can the admission procedure and fee structure be regulated or taken over by the Committees ordered to be constituted by Islamic Academy?"

52. The Supreme Court in case of *P.A. Inamdar* (supra) did not approve of the scheme evolved in case of *Islamic Academy of Education* (supra) to the extent it allowed the States to fix quota for seats-sharing between the management and the States, on the basis of local needs of each State, in unaided private educational institutions of both minority and non-minority categories and held that, that part of the judgment in case of *Islamic Academy of Education* (supra) did not lay down the correct law, running counter to the decision in case of *T. M. A. Pai Foundation* (supra). The Supreme Court, in case of *P.A. Inamdar* (supra), held in paragraph 132 that neither the policy of reservation could be enforced by the State nor any quota or percentage of admissions could be carved out to be appropriated by the State in a minority or non-minority unaided educational institution. It went on to hold that minority institutions were free to admit students of their own choice including the students of non-minority community as also Members of their own community from other States, both to a limited extent only and not in a manner and to such an extent that their minority educational status was lost. It observed that if such minority institutions did so, they would be losing the protection of Article 30(1) of the Constitution of India. Paragraph 132 of the said decision, in case of *P.A. Inamdar* (supra), is the answer to the first question of reference, which reads thus:-

"132. Our answer to the first question is that neither the policy of reservation can be enforced by the State nor any quota or percentage of admissions can be carved out to be appropriated by the State in a minority or non-minority unaided educational institution. Minority institutions are free to admit students of their own choice including students of non-minority community as also members of their own community from other States, both to a limited extent only and not in a manner and to such an extent that their minority educational institution status is lost. If they do so, they lose the protection of Article 30(1)."

53. Adverting to the second question referred to, i.e., as to whether unaided (minority and non-minority) educational institutions were free to devise their own admission procedure or whether the direction made in case of Islamic Academy of Education (supra) for compulsorily holding entrance test by the State or institution and to chose therefrom the students, entitled to admission in such institutions, could be sustained in the light of law laid down in case of T. M. A. Pai Foundation (supra), the Supreme Court in case of P.A. Inamdar (supra) held in paragraph 136 that a Common Entrance Test for admission in professional courses will better ensure fulfilment of twin objects of transparency and merit and laid down as follows: -

"136. CET is necessary in the interest of achieving the said objectives and also for saving the student community from harassment and exploitation. Holding of such common entrance test followed by centralised counselling or, in other words, single-window system regulating admissions does not cause any dent in the right of minority unaided educational institutions to admit students of their choice. Such choice can be exercised from out of the list of successful candidates prepared at CET without altering the order of merit inter se of the students so chosen."

54. The Supreme Court concluded that in Pai Foundation case, it was held that minority unaided institutions can legitimately have unfettered fundamental right to choose the students to allow admission and the procedure therefor, subject to it being fair, transparent and non-exploitive, which should be applied equally to non-minority unaided institutions. The Supreme Court further observed that all the institutions, imparting same or similar professional education, could join together for holding a Common Entrance Test, specifying the aforesaid triple test, namely, fair, transparent and non-exploitive. At the same time, the State could also provide a procedure for holding a Common Entrance Test in the interest of securing fair and merit-based admissions and preventing mal-administration. While stating so, the Supreme Court held that if the admission procedure adopted by the private institutions or group of institutions failed to satisfy the triple test, as indicated above, it can be taken over by the State, substituting its own procedure. The Court further held that having regard to larger interest and welfare of the student community to promote merit, achieving excellence and carve out mal-practices, it would be permissible to regulate admissions by providing a centralised and single window procedure, which to a large extent can secure guarantee of merit-based admissions on a transparent basis. It also held that till regulations were framed "admission committees" can oversee admissions so as to ensure that merit is not the casualty.

55. In response to the third question as to whether the Supreme Court could have issued guidelines in the matter of regulating fee payable by the students to the educational institutions, the Supreme Court held in case of P.A. Inamdar (supra) that though every institution was free to devise its own fee structure, but the same can be regulated in the interest of preventing profiteering. It also held

that no capitation fee could be charged. Before answering the question, the Supreme Court held that the Court cannot shut its eyes to the hard realities of commercialisation of education and the evil practices being adopted by many institutions to earn large amounts for their private or selfish ends. The Supreme Court held categorically in paragraph 140, in case of P.A. Inamdar (supra), that it is permissible to regulate admission and fee structure to check capitation fee and profiteering. On the question as to whether the States were lawfully directed by the Supreme Court, in case of Islamic Academy of Education (supra), to constitute two committees, one each for admission and fee structure, the Supreme Court answered in affirmative, holding that direction to this effect did not come beyond law laid down in case of T. M. A. Pai Foundation (supra) and other decisions of the Court. This is to be noted that in case of P.A. Inamdar (supra), while answering the first question, the Supreme Court had already held that the decision in case of Islamic Academy of Education (supra) to the extent it spoke of fixation of quota for State seats and management seats by the State Government, was not in accord with rather running counter to T.M.A. Pai Foundation (supra) case and, accordingly, the observations made in case of Islamic Academy of Education (supra) in this regard, for constituting committee to oversee admission, became redundant for that reason.

56. The issue of holding Common Entrance Test for admission to unaided privately managed professional institutions as mandatory and regulating fee structures again came to be considered, in a recent decision of Supreme Court in case of Modern Dental College and Research Centre & Ors. v. State of Madhya Pradesh & Ors., reported in (2016) 7 SCC 353, wherein constitutional validity of "Niji Vyavasayik Shikshan Sanstha (Pravesh Ka Viniyaman Avam Shulk Ka Nirdharan) Adhiniyam, 2007" (hereinafter referred to as "2007 Act") and admission rules framed therein were under challenge.

57. The said 2007 Act provided for regulation of admission and fixation of fee in private professional educational institutions in the State of Madhya Pradesh. The Act also provided for reservation of seats to persons belonging to Scheduled Castes, Scheduled Tribes and Other Backward Classes. As per Section 6 of 2007 Act, admission to sanctioned intake in private unaided professional educational institution could be made on the basis of Common Entrance Test, to be prescribed by the State Government. Section 3(d) of 2007 Act, defined Common Entrance Test, as an entrance test, conducted for determination of merit of candidates followed by centralised counselling for the purpose of merit-based admission to professional colleges or any agency authorised by it. Section 7 of 2007 Act provided that any admission made contrary to the provisions of the Act, shall be treated to be void.

58. The provisions of the Act to the extent they related to admission and fixation of fee came to be upheld by the Madhya Pradesh High Court in its judgment, dated 15.05.2009, sustainability of which was under challenge before the Supreme Court in case of Modern Dental College & Research Centre (supra). The

Supreme Court on applying the ratio laid down in *T. M. A. Pai Foundation* (supra), *Islamic Academy of Education* (supra) and *P.A. Inamdar* (supra), rejected the contention made on behalf of the institutions that the private medical colleges have any absolute right to make admissions or to fix fees, being inconsistent with earlier decisions of the Supreme Court. The Supreme Court held that neither the merit could be compromised in admissions to professional institutions nor capitation fee could be permitted to be levied and in order to achieve these objectives, it was open to the State to introduce regulatory measures. The Supreme Court also rejected the plea that intervention of the State in such matters could be only after proving that the merit was compromised or capitation fee was being charged. The Supreme Court clearly held in paragraph 49, in case of *Modern Dental College & Research Centre* (supra) that post-audit measures would not meet the regulatory requirements and control was required at the initial stage itself. Paragraph 49 of the said decision, in case of *Modern Dental College & Research Centre* (supra), is important, which reads thus: -

"49. Thus, the contention raised on behalf of the appellants that the private medical colleges had absolute right to make admissions or to fix fee is not consistent with the earlier decisions of this Court. Neither merit could be compromised in admissions to professional institutions nor capitation fee could be permitted. To achieve these objects it is open to the State to introduce regulatory measures. We are unable to accept the submission that the State could intervene only after proving that merit was compromised or capitation fee was being charged. As observed in the earlier decisions of this Court, post-audit measures would not meet the regulatory requirements. Control was required at the initial stage itself. Therefore, our answer to the first question is that though "occupation" is a fundamental right, which gives right to the educational institutions to admit the students and also fix the fee, at the same time, scope of such rights has been discussed and limitations imposed thereupon by the aforesaid judgments themselves explaining the nature of limitations on these rights."

59. Addressing the issue in relation to educational institutions run by the minorities, the Supreme Court held that so far as the regulatory measures were concerned, the same could certainly be adopted by the State in respect of minority run institutions. The Supreme Court distinguished the decision rendered in *St. Stephen's College* (supra), on the ground that the said case did not relate to professional educational institutions.

60. Paragraph 55 of the Supreme Court's decision, in case of *Modern Dental College & Research Centre* (supra), is relevant and is, therefore, being reproduced as under:-

"55. It would be necessary to clarify the position in respect of educational institutions run by minorities. Having regard to the pronouncement in *T.M.A. Pai Foundation*, with lucid clarifications to the said judgment given by this Court in *P.A. Inamdar*, it becomes clear that insofar as such regulatory measures are

concerned, the same can be adopted by the State in respect of minority-run institutions as well. Reliance placed by the appellant in *St. Stephen's College v. University of Delhi* may not be of much help as that case did not concern with professional educational institutions."

61. Further, the Supreme Court, in case of *Modern Dental College & Research Centre* (supra), noticed earlier decisions, in cases of *T.M.A. Pai Foundation* (supra), *Islamic Academy of Education* (supra) and *P.A. Inamdar* (supra) to emphasize the need of Common Entrance Test to be held by agencies, for admission to educational institutions, more particularly those imparting professional education, which enjoy utmost credibility and expertise in the matter to achieve fulfilment of twin objectives of transparency and merit. The Supreme Court has also observed that it is in the larger public interest which warranted such measure. Taking note of malpractices in the Common Entrance Test, conducted by such private institutions themselves, the Supreme Court held that in larger interest and welfare of the student community, in order to promote merit add excellence and curb malpractices, that regulatory measures should be introduced. In paragraph 68 of the decision, in case of *Modern Dental College & Research Centre* (supra), the Supreme Court held thus:-

"68. We are of the view that the larger public interest warrants such a measure. Having regard to the malpractices which are noticed in the CET conducted by such private institutions themselves, for which plethora of material is produced, it is, undoubtedly, in the larger interest and welfare of the student community to promote merit, add excellence and curb malpractices. The extent of restriction has to be viewed keeping in view all these factors and, therefore, we feel that the impugned provisions which may amount to "restrictions" on the right of the appellants to carry on their "occupation", are clearly "reasonable" and satisfied the test of proportionality."

62. Having said so, the Supreme Court, in case of *Modern Dental College & Research Centre* (supra), concluded that the provisions relating to admission, as contained in the Act and the Rules, were not offensive of Article 19(1)(g) of the Constitution.

63. What emerges from the decision of Supreme Court, in case of *Modern Dental College & Research Centre* (supra), on the question of the right of State to make provisions for CET for admission to unaided private educational institutions, that the Court not only upheld the provisions of 2007 Act in this regard, rather emphasized its need in the larger interest and welfare of the student community to promote merit and excellence and curb malpractices.

64. Coming to the next question of the provision, relating to fixation of fee, which could be charged by the private unaided institutions, the Supreme Court observed that the occupation of education cannot be treated on par with another academic activities and the State cannot remain a mute spectator and has an obligation to regulate it, in order to prevent exploitation and commercialisation

by the private sector. The Court noticed that when there can be regulators, which can fix the charges for telecoms companies in respect of various services that such companies provide to the consumers; regulators can fix premium and other charges which the insurance companies are supposed to receive from the persons, who are insured and when the regulators can fix the rates at which the producer of electricity is to supply the electricity to the distributors, provisions for regulatory mechanism when it came to education, which is not to be treated as purely economic activity, but welfare activity in achieving social purpose, cannot be questioned.

65. Having discussed thus, the Supreme Court, in case of Modern Dental College & Research Centre (supra), held in paragraph 92 as follows:-

"92. ?????? Likewise, when it comes to fixation of fee, as already dealt with in detail, the main purpose is that the State acts as a regulator and satisfies itself that the fee which is proposed by the educational institution does not have the element of profiteering and also that no capitation fee, etc. is charge. In fact, this dual function of regulatory nature is going to advance the public interest inasmuch as those students who are otherwise meritorious but are not in a position to meet unreasonable demands of capitation fee, etc., are not deprived of getting admissions. The impugned provisions, therefore, are aimed at seeking laudable objectives in larger public interest. Law is not static, it has to change with changing times and changing social/societal conditions."

66. Dealing with the challenge to the provision of 2007 Act, which prescribed the factors, which were to be taken into consideration by the Committee for determination of fee, that may be charged by the private educational institutions, the Supreme Court, in case of Modern Dental College & Research Centre (supra) again referred to the decisions in cases of T. M. A. Pai Foundation (supra) and Islamic Academy of Education (supra), wherein the Court, in order to harmonize the plea of private educational institutions to earn a reasonable surplus and with the aim of preventing commercialisation of education, had directed the State to set up a committee, headed by a retired High Court Judge, to approve the fee structure or to propose some other fee that can be charged by the institute. The Supreme Court also noticed the observations made in case of P.A. Inamdar (supra) reiterating the view taken in case of T. M. A. Pai Foundation (supra) that fee charged by the private educational institutions should not amount to profiteering.

67. In view of judicial pronouncements of Supreme Court, as noted above, we can easily summarize the legal position in relation to right of a professional institution to establish and manage educational institution as under:-

(i) Right of professional institutions to establish and manage educational institutions is right to occupation, which is a fundamental right within the meaning of Article 19(1)(g) of the Constitution of India. However, the said right to carry on the occupation that education is, not on par with other occupations or

business activities. The education is treated as a noble occupation on "no profit no loss basis". While carrying on occupation in the field of education, the educational institutions cannot indulge in profiteering or commercialisation.

(ii) The said fundamental right to carry on occupation, in the field of education, can be subjected to regulatory measures by the State so that admissions to such institutions of students and levy of fee from them satisfy the "triple test" of fairness, transparency and non-exploitative ness.

(iii) The State, in order to ensure fairness in the matter of admissions, can provide for a Combined Entrance Test for all professional institutions in the State, which are imparting education in same/similar professional courses. The restriction on admissions to such educational institutions, through Common Entrance Test, is reasonable restriction which satisfies the test of proportionality.

(iv) Holding of such Common Entrance Test, followed by a centralised counselling or, in other words a single window system, regulating admissions does not cause any abridgement of the right of minority unaided educational institutions to admit students of their choice as such choice can be exercised from the list of successful candidates, prepared at CET, without altering the order of merit inter se of the students so chosen.

(v) Minority institutions, based on the result of CET, are free to admit students of their own choice including students of non-minority community as also members of their own community from other States, but both to a limited extent only and not in a manner and to such an extent that their minority educational institution status is lost. In case, a minority institution does so, it would be losing the protection of Article 30(1) of the Constitution of India [paragraph 132; P.A. Inamdar (supra)].

(vi) Though every unaided privately managed educational institution, either minority or non-minority, is free to devise its own fee structure, but the same can be regulated in the interest of preventing profiteering and it is, therefore, permissible for the State to regulate fee structure to check capitation fee.

(vii) Committees, constituted under the directive of Supreme Court, in case of Islamic Academy of Education (supra), are required to oversee the admission and fee structure of various institutions.

(viii) While fixing fee structure, the following considerations are to be kept in mind:-

(a) the infrastructure and facilities available;

(b) investment made, salaries paid to the teachers and staff; and

(c) future plans or expansion and/or betterment of institution, subject to two restrictions viz., non-profiteering and non-charging of capitation fees. (Modern School v. Union of India; (2004) 5 SCC 583).

68. Now, before we proceed to test the challenge made to the Ordinance/ Regulation in the background of above discussions, we have taken note of the undisputed fact that B.Ed. course is an undergraduate professional course of 2 (two) years duration that prepares teachers for primary level, middle level, secondary level and senior secondary level education. No dispute has been raised by either of the parties of the present proceedings over the fact that B.Ed. course is a professional course.

69. Regulation 1 of the Regulation recognises Bachelor of Education Programme, as a professional course, that prepares teachers up to secondary level of education. The Ordinance lays down procedure for admission to Bachelor of Admission Programme (regular mode), under self-finance scheme, meaning thereby that these are meant for unaided programmes only. Under the Ordinance, entrance test is to be conducted by the respective Universities and the seats allotment is to be done through counselling.

70. In view of the decisions of Supreme Court, as discussed above, we do not find any illegality or unconstitutionality in prescribing for Common Entrance Test, to be held by a University, for the institutions conducting B.Ed. programme, under the said particular University, on the basis of merit-list, so obtained, and allotment of seats through counselling. In view of the law which has been laid down by the Supreme Court in case of Modern Dental College & Research Centre (supra), a Combined Entrance Test, by an agency which enjoys credibility in the matter to achieve fulfilment of twin objectives of transparency and merit, can be provided by the State, which is in the larger public interest. Such restriction has been held to be reasonable, satisfying the test of proportionality by the Supreme Court in case of Modern Dental College & Research Centre (supra). The principle equally applies to minority institutions and minority and non-minority institutions cannot be distinguished for the purpose of regulating admission on the basis of Combined Entrance Test. It would, however, have been better situation, if State level CET was held instead of University wise tests.

71. We, therefore, do not find any merit in the plea made on behalf of the appellants that the provisions, laid down in the Ordinance, to the extent they relate to laying down the procedure for admission through Combined Entrance Test to be held by the respective Universities, are violative of any constitutional provision or other statutory enactment.

72. From the pleadings on record, we have noticed that the institutions have claimed to have taken admission on the basis of tests, separately held by the individual institutions. No Combined Entrance Test was held by the Association of institutions for the purpose of admissions in unaided institutions, imparting B.Ed. programme, in the State of Bihar. Such admissions, which have been taken, are, apparently, in violation of the law declared by the Constitution Bench of Supreme Court in case of Modern Dental College & Research Centre (supra), as has been discussed above, which is in the light of previous Supreme Court decisions in case of T.M.A. Pai Foundation (supra), Islamic Academy of Education (supra) and

P.A. Inamdar (supra).

73. Taking a cue from the observations made in paragraph 19 of Supreme Court decision in case of Islamic Academy of Education (supra), we observe that the Chancellor of the Universities of Bihar shall have 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, against which no finger has ever been raised and no complaint made regarding fairness, to adopt its own admission procedure. It is made clear 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 through CET. If any Committee has been constituted, in the light of Supreme Court decisions in case of Islamic Academy of Education (supra)/ P.A. Inamdar (supra), such Committee shall also have the power to grant such exemption, after due notice and adequate opportunity to the State of Bihar and the affiliating University of hearing.

74. The interim orders, allowing the institutions to admit students, accordingly, stand vacated. The institutions shall be required to abide by the provisions under the Ordinance in this regard.

75. In the facts and circumstances of the case, we direct the Universities to hold a Combined Entrance Test for admission to B.Ed. courses in unaided education institutions, if not already held, within a period of one month from today, in accordance with the provisions of the Ordinance.

Challenge to Fee Structure :-

76. Coming to the challenge to fee structure, prescribed in the Ordinance, chargeable from the students, we notice that total fee for two years B.Ed. course has been fixed as Rs. 95,000/-. In letter No. BSU (Regulation)- 16/2015-1283/GS(I), dated 02.09.2015, through which the said Ordinance is sought to be implemented, it has been mentioned that the said fee has been fixed provisionally and the State Government shall constitute a State Level Committee, in future, for deciding the fees for the said course, as per the guidelines of UGC Regulations, 1997, within three months and the decision of the State Level Committee in respect of fees shall be binding for such professional institutions affiliated to the Universities in the State.

77. In order to find out the basis for fixation of fee structure, prescribed in the Ordinance, we had called for the original records dealing with such fixation. On perusal of such records, we do not find any material available which can be said to be the basis for arriving at the said fee structure. It appears that NCTE has laid down Norms and Standards for Bachelor of education programme leading to Bachelor of Education (B.Ed.) Degree, which contains, inter alia, the admission procedure and the fees, which can be charged by unaided teachers' educational institutions. Clause 3.3 of the said Norms, which prescribes admission procedure, reads thus:-

"3.3 Admission Procedure: 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 the policy of the State Government/U.T. Administration and the University."

78. Clause 3.4 of the said Norms, which deals with fees, reads thus:-

"3.4 Fees The institution shall charge only such fee as prescribed by the affiliating body/state government concerned in accordance with provisions of National Council for Teachers Education (NCTE) (Guidelines for regulations of tuition fees and other fees chargeable by unaided teacher education institutions) Regulations, 2002, as amended from time to time and shall not charge donations, capitation fee etc. from the students."

79. We, however, from the original records have not been able to make out as to whether while fixing fee of Rs. 95,000/-, for two years B.Ed. programme, the factors, as prescribed in Clause 3.4 of the norms and standards, laid down by the NCTE, had been taken into account. As has been indicated above, the Supreme Court, in case of Modern Dental College (supra), has held that for fixing the fee structure, factors, like infrastructure and facilities, investment made, salaries paid to the teachers and staff and future plans for expansion and/or betterment for institution, are to be kept in mind, subject to two restrictions, namely, non-profiteering and non-charging of capitation fee.

80. We do not find any material on record, which can demonstrate that these considerations had been kept in mind while deciding the fee structure and any adequate exercise was at all done in this direction.

81. We are mindful of the fact and it has been mentioned in the letter, dated 02.09.2015, through which the Regulation/Ordinance is being sought to be implemented that the said fee structure has been fixed provisionally and a State Level Committee is proposed to be constituted for deciding the fee structure. Since we do not find any material basis on record for arriving at the fee structure, as prescribed, we intend to hold the said fixation of fee, which has been made a part of the Ordinance itself, to be without any basis and, therefore, unsustainable.

82. With the aforesaid observation and direction, all these proceedings are closed. The interim orders, passed in all the cases, aforementioned, stand vacated.

83. However, there shall be no order as to costs.

84. Let the original records, produced by Mr. Rajendra Giri, learned Counsel, be handed over to him forthwith.

I. A. Ansari, CJ. - I agree.