

(2010) 05 OHC CK 0027

In the Orissa High Court

Case No : Writ Petition (C) No. 8731 of 2009

Orissa Management Colleges Association

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 22-05-2010

Acts Referred:

Constitution of India, 1950 — Article 142, 19(1), 226, 30, 32
Orissa Professional Educational Institutions (Regulation of Admission and Fixation of Fee) Act, 2007 — Section 11, 3, 4(1), 4(2), 4(4)

Citation : (2010) 110 CLT 484

Hon'ble Judges : M.M. Das, J

Bench : Single Bench

Judgement

M.M. Das, J.—The Petitioner has preferred the present Writ Petition praying for a declaration that the Petitioner-association is entitled to hold Common Entrance Test for admission of students in the member institutions by holding centralized Counselling inter alia for the reason that the State which has virtually nationalized admission of students in private unaided professional institutions u/s 3 read with Section 11 of the Orissa Professional Educational Institutions (Regulation of Admission & Fixation of Fee) Act, 2007 (for short "the Act"), has not been able to select & supply students for admission in the member institutions of the Petitioner on the basis of the JEE held by it in any of the year since 2007.

2. On 2.3.2007, the State of Orissa promulgated Orissa Ordinance No. 1 of 2007, namely, the Orissa Professional Educational Institutions (Regulation of Admission & Fixation Fee) Ordinance, 2007. The Ordinance was challenged by various Associations including the Petitioner-Association in this Court, inter alia, on the ground of lack of legislative competence. During pendency of the Writ Petitions, the State passed the Orissa Professional Educational Institutions (Regulation of Admission & Fixation of Fee) Act, 2007 replacing the Ordinance while retaining all the provisions of the said Ordinance in the Act.

3. A Division Bench of this Court delivered a common Judgment dated 18.5.2007 holding & declaring the said Act to be unconstitutional on the ground of lack of legislative competence & issued certain consequential directions for conducting admissions in future as well as for the academic session 2007-2008 which are contained in paragraphs- 53 to 62 of the Judgment.

4. The State of Orissa filed three Special Leave Petitions in the Hon"ble Supreme Court in which on 1.6.2007, the Court granted special leave to appeal & passed an interim order of stay of the Judgment. But while staying the operation of Sections 4(1), 4(2), 4(4), 6(1), 6(2) & 6(3) of the Act, constituted the Policy Planning Body & the Fee Structure Committee for the academic year 2007-2008 & made it expressly "clear that except the provisions relating to the constitution of the said Body/Committee which are stayed as aforesaid, other provisions of the Act shall continue to be in force". As a result, the Act has become enforceable.

5. After the grant of Special Leave, those were numbered as Civil Appeal Nos. 2871, 2872 & 2873 of 2007. The relevant provisions of the Act having a bearing on the present case are extracted here in- below.

Section 3 : Subject to the provisions of this Act, admission of students in all Private Professional Educational Institutions, Government Institutions & Sponsored Institutions to all seats including lateral entry seats, shall be made through JEE conducted by the Policy Planning Body followed by centralized Counseling in order of merit, in accordance with such procedure as recommended by the said body & approved by the Government.

Section 11 : Any admissions made in violation of the provisions of this Act or rules made hereunder shall be invalid.

6. However, in spite of the Hon"ble Supreme Court recording in its Order Dated 18:6.2007 that "we hope that the State Government will take all necessary steps to ensure that the seats do not remain vacant & adequate number of candidates are cleared for admission in the institutions" more than 500 seats in the member-institutions of the Petitioner-Association remained unfilled during 2007-2008.

7. Mr. Singh, Learned senior Counsel for the Petitioner submitted that in 2008-2009, the members of the Petitioner-Association could fill up most of the seats only by virtue of the orders passed by this Court & Hon"ble Supreme Court. It is further submitted that the State & its functionaries under the Act have taken total control of the admission in the member-institutions, which are unaided private management colleges. Large number of seats in these institutions are vacant as no candidates were made available by the authorities of the State under the Act & these institutions have been rendered unviable.

8. The Act has given entire control to the State in the matter of admission in private unaided professional institutions thereby nationalizing admission. The Act has delegated to the State the total process of selection for admission in private

unaided professional institutions. Therefore, the Petitioner-Association is entitled to be provided candidates to fill up all the seats in its member-institutions. But the State & its functionaries under the Act have completely failed to give sufficient number of students for admission into the member-institutions of the Petitioner-Association.

9. During pendency of this Writ Petition, in misc. case Nos. 7601 & 7600 of 2009, which were filed by the State & the Petitioner respectively, on 3.7.2009, this Court considering the prayer made by the State to modify an earlier Order Dated 11.6.2009 by which the Petitioner was permitted to proceed with the selection process for admission to private unaided professional educational institution, but was directed not to take any final decision without leave of this Court & considering the prayer made by the Petitioner to issue a direction to the State & its functionaries not to interfere with the selection process for admitting students in the member-institutions as per their intake capacities approved by the AICTE, this Court on elaborately considering the decisions relied upon by the Petitioner & keeping in view the provisions of Section 3 of the Act disposed of the said misc. cases observing & directing as follows:

For the present, therefore, I am not inclined to allow the Member-Institutions of the Petitioner association to admit any student out of the JEE rank list. It shall be proper to admit students from the JEE selection list in accordance to merit under the supervision of the Policy Planning Body. However, it is made dear that in the "event any" seat remains vacant, the Petitioner-association Will be free to approach this Court for appropriate direction to fill up the said seats.

10. In a connected Writ Petition, being W.P.(C) No. 13843 of 2009 filed by the present Petitioner where a prayer was made in misc. case No. 11744 of 2009 for conducting a common entrance test, this Court by Order Dated 17.9.2009 allowed the Petitioner to conduct the said test. The Policy Planning Body preferred SLP Nos. 29875 & 29876 of 2009 against the said order with a prayer for interim stay of operation of the said order. The Hon'ble Supreme Court on 16.11.2009 was pleased to direct as follows:

Heard Learned Attorney General of India. Issue notice.

There shall be interim stay of the direction that even after the 2nd Joint Entrance Examination, there shall be further entrance examination & permitting the Petitioner-institution to fill up the vacancies until further orders.

11. The said SLPs are pending adjudication before the Hon'ble Apex Court. The Petitioner also preferred SLP No. 15136 of 2009 against the Order Dated 3.7.2009 passed by this Court in this case before the Supreme Court & the Supreme Court by Order Dated 13.8.2009 dismissed the said SLP. The Petitioner thereafter in the pending Civil Appeal No. 2872 of 2007 filed an interim application, being I.A. No. 5 of 2009. On 9.11.2009, the Petitioner sought to withdraw the interim application as the Writ Petition is pending before this Court. The Hon'ble Supreme Court granted permission & recorded that I.A. No. 5 of

2009 is dismissed as withdrawn. Subsequently, by Order Dated 16.11.2009, the Hon''ble Supreme Court upon hearing Learned Counsel ordered in the interim application as follows:

In continuation of this Court's Order Dated 9.11.2009, the following may be read as a part of the order. The High Court is requested to dispose of the Writ Petition as early as possible.

Accordingly, this Writ Petition was taken up for final hearing.

12. Mr. S.P. Singh urged that in view of the order passed by the Hon''ble Supreme Court on 16.11.2009, this Court should decide the Writ Petition on merits without being influenced by the pendency of the Civil Appeals before the Hon''ble Supreme Court & the previous orders passed by this Court. He further relied upon the decision in the case of P.N. Kumar and Another Vs. Municipal Corporation of Delhi, , where the Hon''ble Supreme Court has held the scope of the powers of the High Courts under Article 226 of the Constitution is wider than the scope of the powers of this Court under Article 32 of the Constitution; The relief prayed for in the petition is one which may be granted by the High Court & any of the parties who is dissatisfied with the Judgment of the High Court can approach this Court by way of an appeal. The fact that some cases involving the very same point of law is pending in this Court is no ground to entertain a petition directly by passing the High Court; If the parties get relief at the High Court, they need not come to the Supreme Court & to that extent the burden on the Supreme Court is reduced; The hearing of the case at the level of the High Court is more convenient from several angles & will be cheaper to the parties as well as it saves a lot of time too & it will be easier for the clients to give instructions to their lawyers. Each High Court has its own high traditions & they have judges of eminence who have initiative, necessary skills & enthusiasm & their capacity should be harnessed to deal with every type of case arising from their respective areas, which they are competent to dispose of. Every High Court Bar has also its high traditions having its members with wide experience in handling different kinds of cases, who are fully aware of the history of every legislation in their States & their services should be made available to the litigants in the respective States & submitted that this Court should independently decide the case as this Writ Petition proceeds on the basis that the Act is enforceable in view of the order of stay passed by the Hon''ble Supreme Court in the pending Civil Appeals. He further submitted that in the order of the Hon''ble Supreme Court dated 16.11.2009 even though the Supreme Court has used the word "Request" by stating that the High Court is requested to dispose of the Writ Petition as early as possible, the said word "Request" has been held by the Supreme Court to be construed as an obligation in carrying out the mandate, maintaining the writ of the Supreme Court running large through out the country. (See Spencer and Company Ltd. and Another Vs. Vishwadarshan Distributors Pvt. Ltd. and Others,).

13. Mr. S. Palit, Learned Counsel appearing for the Policy Planning Body-Opp.

Party No. 3, on the contrary, submitted that in view of the repeated orders passed by the Hon"ble Supreme Court on interim applications filed by the Petitioner arising from this Writ Petition as well as the connected Writ Petitions where the Supreme Court has rejected the prayer of the Petitioner to conduct a common entrance test & in view of the fact that as the question with regard to vires of the Act is pending consideration of the Apex Court in the Civil Appeals filed against the Judgment of the Division Bench of this Court declaring the Act as ultra vires, this Court should dispose of the Writ Petition directing the Petitioner to move the Hon"ble "Supreme Court in the pending Civil Appeals & allowing the relief to the Petitioner as prayed for would amount to modifying Section 3 of the Act as it stands inasmuch as the relief sought for is in direct conflict with Section 3 of the Act, which has been kept alive by virtue of the order of stay granted by the Supreme Court. This Court should not, therefore, interfere in the matter & grant any relief to the Petitioner.

14. The question raised in this Writ Petition is therefore, whether in view of Sections 3 & 11 of the Act being in force, the said Sections can be harmoniously construed along with the views expressed by the Hon"ble Supreme Court in the cases of T.M.A. Pai Foundation and Others Vs. State of Karnataka and Others, , Islamic Academy of Education and Another Vs. State of Karnataka and Others, & P.A. Inamdar and Ors. v. State of Maharashtra and Ors. (2005) 6 SCC 537 or Sections 3 & 11 of the Act should be held to be a complete bar for the Private Professional Educational Institutions for giving admission to the students by conducting a Common Entrance Test.

15. The Constitution Bench in T.M.A. Pai Foundation and Ors. (supra) with regard to Rules & Regulations regulating admission to both aided & unaided professional institutions held as follows:

It would be unfair to apply the same rules & regulations regulating admission to both aided & 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 forego 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 & 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 & backward Section of the society. The prescription of percentage of this purpose has to be done by the Government according to the local needs & different percentages can be fixed for minority unaided & non -minority unaided & professional colleges. The same principles may be applied to other non-

professional but unaided educational institutions viz. graduation & post graduation non-professional colleges or institutes.

16. In the case of Islamic Academy of Education and Anr. (supra), the Supreme Court while considering whether educational institutions are entitled to fix their own fee structure & whether private unaided professional colleges are entitled to fill in their seats, to the extent of 100% & if not to what extent & whether private unaided professional colleges are entitled to admit students by evolving their own method of admission analyzing para-68 of T.M.A. Pai Foundation and Ors. (supra), held in para-16 of the said Judgment as follows:

Paragraph 68 provides that admission by the management can be by a common entrance test held by "itself or by the State/University". 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.

In paras-19 & 20 of the said decision, the Supreme Court directed as follows:

19. We now direct that the respective State Governments do appoint a permanent Committee which will ensure that the tests conducted by the association of colleges is fair & transparent. For each State a separate Committee shall be formed. The Committee would be headed by a retired Judge of the High Court. The Judge is to be nominated by the Chief Justice of that State. The other member, to be nominated by the Judge, would be a doctor or an engineer of eminence (depending on whether the institution is medical or engineering/technical). The Secretary of the State in charge of Medical or Technical Education, as the case may be, shall also be a member & act as the Secretary of the Committee. The Committee will be free to nominate/co-opt an independent person of repute in the field of education as well as one of the Vice-Chancellors of the University in that State so that the total number of person on the Committee do not exceed five. The Committee shall have powers to oversee the tests to be conducted by the association. This would include the power to call for the proposed question paper(s), to know the names of the paper-setters & examiners & to check the method adopted to ensure papers are not leaked. The Committee shall supervise & ensure that the test is conducted in a fair & transparent manner. The Committee shall have the power to permit an institution, which has been established & which has been permitted to adopt its own admission procedure for the last, at least, 25 years, to adopt its own admission procedure & if the Committee feels that the needs of such an institute are genuine, to admit, students of their community, in excess of the quota allotted to them by the State Government. Before exempting any institute or varying in percentage of quota fixed by the State, the State Government must be heard before the Committee. It is clarified that different percentage of quota for students to be admitted by the management in each minority or non-minority

unaided professional college(s) shall be separately fixed on the basis of their need by the respective State Governments & in case of any dispute as regards fixation of percentage of quota, it will be open to the management to approach the Committee. It is also clarified that no institute, which has not been established & which has not followed its own admission procedure for the last, at least, 25 years, shall be permitted to apply for or be granted exemption from admitting students in the manner set out hereinabove.

20. Our direction for setting up two sets of Committees in the States has been passed under Article 142 of the Constitution of India which shall remain in force till appropriate legislation is enacted by Parliament. The expenses incurred on the setting up of such Committees shall be borne by each State. The infrastructural needs & provision for allowance & remuneration of the Chairman & other members of the Committee shall also be borne by the respective State Government.

17. Again in the case of P.A. Inamdar and Ors. (supra), the Constitution Bench of the Supreme Court to which the case was referred on three questions being (i) the fixation of "quota" of admissions/students in respect of unaided professional institutions; (ii) the holding of examination for admissions to such colleges, that is, who will hold the entrance tests; & (iii) the fee structure, framed the following questions:

In the light of the two orders of reference, referred to herein above, we propose to confine our discussion to the questions set out 4 hereunder which, according to us, arise for decision:

(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 & non-minority) educational institutions are free to devise their own admission procedure or whether the direction made in Islamic Academy for compulsorily holding an entrance test by the State or association of institutions & 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?

18. Answering question No. 2 above, which is relevant for the purpose of this case, the Supreme Court laid down that excellence in education & maintenance of high standard at this level are a must. To fulfill these objectives, the State can & rather must, in national interest, step in. The education, knowledge & learning at this level possessed by individuals collectively constitute national wealth.

19. In para-137 of the said Judgment, the Supreme Court held as follows:

137. Pai Foundation has held that minority unaided institutions can legitimately claim unfettered fundamental right to choose the students to be allowed admission & the procedure therefore subject to its being fair, transparent & non-exploitative. The same principle applies to non-minority unaided institutions. There may be a single institution imparting a particular type of education which is not being imparted by any other institution & having its own admission procedure fulfilling the test of being fair, transparent & non-exploitative. All institutions imparting same or similar professional education can join together for holding a common entrance test satisfying the above said triple tests. The State can also provide a procedure of holding a common entrance test in the interest of securing fair & merit based admission & preventing maladministration. The admission procedure so adopted by a private institution or group of institutions, if it fails to satisfy all or any of the triple tests, indicated hereinabove, can be taken over by the State substituting its own procedure. The second question is answered accordingly.

20. Ultimately the Apex Court opined that on the basis of the Judgment in T.M.A. Pai Foundation and Ors. (supra) & various previous Judgments of the said Court which have been taken into consideration in that case, the scheme evolved out of setting up the two Committees for regulating admissions & determining fee structure by the Judgment in Islamic Academy cannot be faulted either on the ground of alleged infringement of Article 19(1)(g) in case of unaided professional educational institutions of both categories or Article 19(1)(g) read with Article 30 in case " of unaided professional institutions of minorities.

21. The Apex Court concluded as follows:

It is for the Central Government, or for the State Governments, in the absence of a Central legislation, to come out with a detailed well-thought-out legislation on the subject. Such a legislation is long awaited. The States must act towards this direction. The judicial wing of the State is called upon to act when the other two wings, the legislature & the executive, do not act. The earlier the Union of India & the State Governments act, the better it would be. The Committees regulating admission procedure & fee structure shall continue to exist, but only as a temporary measure & an inevitable passing phase until the Central Government or the State Governments are able to devise a suitable mechanism & appoint a competent authority in consonance with the observations made hereinabove. Needless to say, any decision taken by such Committees & by the Central or the State Governments, shall be open to judicial review in accordance with the settled parameters for the exercise of such jurisdiction.

22. The Orissa Professional Educational Institutions (Regulation of Admission & Fixation of Fee) Act, 2007 legislated by the State of Orissa is a resultant of the decision in P.A. Inamdar and Ors. (Supra).

23. Considering the above views of the Apex Court & visualizing the situation that the vires of the Act is sub-judice before the Apex Court & by an interim

order, the said Act except the Sections mentioned specifically in the said order, is in force, this Court is of the view-that there should be a harmonious construction of the views expressed by the" Supreme Court in the above cases & Sections 3 & 11 of the Act. Thus, it cannot be said that in view of the operation of Sections 3 & 11 of the Act, unaided private professional educational institutions through their associations are not entitled to conduct a common entrance test under the supervision of the Policy Planning Body constituted under the Act in a transparent manner complying with the triple test as laid down by the Supreme Court. On the aforesaid analysis, though this Court is of the view that the associations are entitled to conduct a common entrance test on a harmonious construction of Sections 3 & 11 of the Act & the views expressed by the Hon"ble Supreme Court in the aforesaid decisions & such test should be conducted in the manner as indicated above, but since, the matter is pending before the Hon"ble Supreme Court in the Civil Appeals filed against the Judgment of this Court by which the Act was declared to be ultra vires on the ground of legislative incompetency, this Court is not inclined to issue any direction with regard to holding of a common entrance test by the Petitioner association for its member institutions. The Petitioner association, if so advised, may move the Hon"ble Supreme Court in this regard.

With the aforesaid observations, the Writ Petition is disposed of.