

(2013) 07 OHC CK 0065

In the Orissa High Court

Case No : W.P. (C) Nos.13683 and 14306 of 2013

Orissa Private Engineering College Association

APPELLANT

Vs

State of Odisha

RESPONDENT

Date of Decision : 31-07-2013

Acts Referred:

Citation : (2014) 1 ILR (Ori) 72

Hon'ble Judges : B.N. Mahapatra, J

Bench : Single Bench

Final Decision : Allowed

Judgement

B.N. Mahapatra, J.—These Writ Petitions have been filed with a prayer to issue appropriate writ or writs in the nature of mandamus or any other appropriate form directing opposite parties, including authorities of the State Government and opposite party No. 3-OJEE to allow the member institutions of petitioner No. 1-association with other petitioner-institutions to fill up 10% approved intake of their respective institutions out of the reserved quota B. Tech (Engineering) seats earmarked u/s 9(3) of the Orissa Professional Educational Institutions (Regulation of Admission and Fixation of Fee) Act, 2007 (hereinafter referred to as "the Act, 2007") and in accordance with the principle and ratio laid down by this Court in W.P. (C) No. 11154 of 2012 and Writ Appeal Nos. 334 of 2012 and 74 of 2013 under the supervision of OJEE as well as in respect of approved intake for M. Tech Engineering, MCA and MBA seats out of OJEE merit list and other entrance examinations to be held by approved centralized agency. Mr. S.K. Padhi, learned Senior Advocate appearing for the petitioners referring to his written note of submission submitted that all the members of petitioner No. 1-association including petitioner Nos. 2, 3 and 4 are coming under the definition of Private Professional Educational Institution as defined u/s 2(s) of the "Orissa Act, 2007"). Consequent upon the judgment delivered by the Bench consisting of eleven Judges of the Hon'ble Supreme Court in the case of T.M.A. Pai Foundation and Others Vs. State of Karnataka and Others, , the All India Council for

Technical Education and Training (AICTE) has formulated its Regulations/ Guidelines vide its Interim Regulation notified on 07.03.2003 in exercise of its power conferred u/s 23 read with Sections 10(b), 10(j) and 10(o) of the AICTE Act, 1987 inter alia with regard to filling up the NRI quota seats. In paragraph-2 of the said Regulations, AICTE has conferred ample authority on the concerned State Government to prescribe certain percentage of seats which can be reserved for admission by the Management of Technical institutions in accordance with the local needs; however, while fixing the limit of such seats it is stipulated that the same shall not exceed 15% of the sanctioned intake. The issue relating to NRI/ Management quota seats in the case of T.M.A. Pal Foundation (supra) had further been dealt with by two subsequent Constitution Bench of the Hon''ble Supreme Court in the cases of Islamic Academy of Education and Another Vs. State of Karnataka and Others, and P.A. Inamdar and Others Vs. State of Maharashtra and Others, . Referring to paragraph-128 of P.A. Inamdar (supra), Mr. Padhi submitted that the Hon''ble Supreme Court noticed that 15% NRI seats were to be filled up depending upon the discretion of the Management subject to satisfying the conditions as mentioned in the said judgment.

2. Mr. Padhi further submitted that the State Government keeping in view the aforesaid two Constitution Bench judgments of the Hon''ble Supreme Court, i.e. Islamic Academy of Education (supra) and P.A. Inamdar (supra), have enacted the Act, 2007. The vires of the Orissa Act, 2007 was challenged by the petitioner association before the Division Bench of this Court and the same was quashed by a common judgment in the case of Orissa Management Colleges Association and etc. Vs. State of Orissa and etc., . Further, the Hon''ble Supreme Court considering the State Appeals vide C.A. Nos. 2873 of 2007 and others passed interim orders on 01.06.2007 in staying operation of Sections 4(1), 4(2), 4(4), 6(1), 6(2) and 6(3) of the Orissa Act, 2007 with regard to constitution of Policy Planning Body (PPB) and Fee Structure Committee (FSC) and formed the said two Committees which are presently functioning under the Chairmanships of Hon''ble Mr. Justice K.P. Mohapatra (Retd.) of FSC and Hon''ble Mr. Justice A.K. Parichha (Retd.) of PPB. Pursuant to such interim orders passed by the Hon''ble Supreme Court, Section 9 of the Orissa Act, 2007 is in operation. As per the provisions of the Act, 2007, out of total intake in Engineering Programme not exceeding 15% seats are earmarked for NRIs, 15% seats are for AIEEE (JEE-Main) rank holders and rest 70% seats are for O-JEE rank holder students. In shortfall of the NRI candidates, the vacant NRI seats are to be filled up from AIEEE and then from OJEE rank holders under Sections 9(3) and 9(5) of the Orissa Act, 2007. From the inception of the aforesaid Act, 2007, i.e., from the academic sessions 2007-08, 2008-09, 2009-10 and 2010-11 and till last academic session 2011-12, 15% NRI seats and vacant NRI quota seats were allowed to be filled up through member-institutions as per the provisions envisaged u/s 9 of the Orissa Act, 2007. However, in the academic years 2011-12, the OJEE had curtailed the NRI quota seats from 15% to 5% in its "Information Brochure 2011" and challenging such action of OJEE 2011, W.P. (C)

No. 14302 of 2011 was filed by petitioner No. 1-association before this Court and this Court granted interim stay directing the authorities of the OJEE not to fill up the disputed 10% seats in respect of the member-institutions of petitioner No. 1 association. In the last academic session 2012-13, the AICTE has issued its "Approval Process Hand Book 2012-13" detailing procedures for admissions of sons and daughters of Non-Resident Indian(s) vide paragraph-13 of the said Hand Book. Paragraph-13.3 of the Hand Book 2012-13 prescribes fees for the concerned institutions for availing the Scheme evolved by AICTE including the manner for submission of such applications and procedure for admission under such Scheme. However, paragraph 13.1(b) of the said Approval Process Hand Book 2012-13 stated about provision of 5% within the sanctioned intake for NRI category. As per paragraph 13.2(b), in the event of non-availability of students in NRI category, the seats would be given to the general candidates. The PPB constituted as per the interim orders of the Hon'ble Supreme Court and as per Section 4 of the Orissa Act, 2007 in its meeting held on 02.01.2012 had noticed the aforesaid provisions of the AICTE detailed in its Approval Process Hand Book 2012-13 and decided that the reservation of seats for NRIs should be 15% as per the provisions of the Act, 2007. The OJEE-2012 again released its Information Brochure for the year 2012 prescribing allocation of not exceeding 5% seats of the approved intake of Private Professional Educational Institutions to be filled up by NRIs from the merit list prepared on the basis of OJEE-2012 as per guideline of AICTE Hand Book 2012-2013 issued in this regard.

3. It was submitted that challenging the above noted impugned actions of the OJEE and the authorities of the State Government, the petitioners had filed W.P. (C) No. 11154 of 2012 before this Court. The said writ petition was allowed by the learned Single Judge holding that it is open to the petitioner-institutions to fill up 10% of the approved intake capacity of the institutions under the Management quota and those seats shall be filled up from OJEE merit list under the supervision of OJEE-2012 Committee.

Challenging the said judgment of the learned Single Judge, the OJEE preferred writ appeals bearing W.A. Nos. 344, 371, and 373 of 2012 before the Division Bench of this Court, which were dismissed by a common judgment dated 13.12.2012 confirming the judgment of the learned Single Judge holding that the learned Single Judge was justified in holding that the provisions of Section 9 of the Orissa Act, 2007 regarding Management NRI quota in 2007 still holds the field. Another writ appeal bearing W.A. No. 74 of 2013 was filed by the OJEE before a Division Bench of this Court and the same was also dismissed. Last year the OJEE had complied with the direction of the aforesaid judgment passed by this Court allowing the member institution to fill up their vacant 10% quota seats from the OJEE rank holders under the supervision of the OJEE.

4. Mr. Padhi further submitted that the PPB is the apex statutory authority in dealing with the task of admission into all technical institutions, which in its meeting held on 01.12.2012 has unanimously decided to follow up the principles

that has been decided in the judgment of this Court in W.A. No. 344 of 2012. However, the OJEE in violation of the aforesaid judgment and deviation of PPB decision has again released its Information Brochure without keeping any provisions for member-institutions to fill up 10% quota seats of their respective approved intakes as per the judgments of this Court, though the petitioner No. 1-Association in its representation dated 16.04.2013 (Annexure-11) made request to opposite party No. 1 and OJEE for carrying out the judgments of this Court but the State Government and OJEE did not take any steps. In the present writ petition, the State Government, OJEE and BPUT have filed their respective counter affidavits reiterating their stands that had been taken by them before this Court in the earlier W.P. (C) No. 11154 of 2012 and W.A. No. 344 of 2012. After considering the submission and the counter submissions of all the parties, this Court passed interim dated 04.07.2013 directing the authorities of OJEE not to fill up 10% total intake of the approved intake till disposal of the writ petition.

5. Mr. Padhi further submitted that in the current academic session 2013-14, there is no change in facts and circumstances as prevailed in the last academic session 2012-13 in which learned Single Judge had been pleased to direct the State/OJEE to allow the member-institution to fill up 10% approved intake of their respective institutions out of the OJEE/AIEEE merit rank holders under the supervision of the OJEE. It was submitted that a cumulative reading of the above referred provisions of Section 9(2), (3) and (5) of the Orissa Act, 2007 make it clear that after completion of the counseling by the NRI candidates from the merit list of the OJEE, in the event of short fall the same are to be filled up resorting to the provisions enumerated u/s 9(3) and then 9(5) of the Orissa Act, 2007. Till last academic year 2011-12, the member-institutions were allowed to fill up such vacant NRI seats in view of Section 9(3) and (5) of the Orissa Act, 2007 under the supervision of PPB. The reservation is not exceeding 15% and there is no rule or guideline which empowers the State Government to make a reservation less than 15%. The restriction of OJEE is contrary to the statutory provisions contained in the Orissa Act, 2007 and not in consonance with the recommendation of PPB, but only on the basis of the AICTE Hand Book for the year 2013-14.

It was submitted that as per the AICTE Hand Book for getting sanction of intake of NRI of 5% an institute has to apply the Council and there is a prescription of fee of Rs. 2.00 lakh and in case of non-availability of students of NRI, the seats shall be given to general candidates and the general fees shall be applicable to these candidates. There is supernumerary reservation in the AICTE Hand Book which provides for application for supernumerary quota, for tuition fee waiver scheme, supernumerary quota for Foreign Nationals and it is needless to say that all the provisions have not been adopted by the JEE nor the JEE has prescribed that for getting the reservation of 5% of seats of NRI, the institution must make application. None of the Private Engineering Colleges has made any application with regard to the said NRI Scheme. This NRI scheme evolved by the AICTE has no nexus with the State Act prescribing not exceeding 15% reservation. All NRI

candidates under the State 15% quota must appear in the JEE Test while those opting for 5% under the said AICTE Scheme have to make application directly to the institution without appearing JEE Test. The Regulation of 2003 has not been superseded by the AICTE by any fresh Regulations nor the AICTE "Approval Process Hand Book 2013-14" can supersede a statutory Regulations. The State Act is holding the field and is not superseded by any other Central Statutes or Rules or Regulations and the Hand Book only contains the procedure to make applications, the provisions of the State Act cannot be superseded. "Non-Resident Indians" have been defined u/s 2(p) of the Orissa Act, 2007. The definition of NRIs under the Orissa Act, 2007 is also different from the definition prescribed in the AICTE Regulation. The State Act has two facets, i.e., one is a PPB to supervise the entire process of admission of students and to recommend measures to the Government and the second is the Fee Structure Committee which will fix the fee of the institutions. Referring to Section 7 of the Orissa Act, 2007, it is submitted that the Fee Structure Committee (FSC) may allow such institutions to collect a higher rate of fee from NRIs and the fee so collected over and above the fee determined for other students in that institution shall be utilized for awarding free-ship.

6. Placing reliance upon the judgment of the Hon"ble Supreme Court in the case of in the case of P.A. Inamdar (supra), Mr. Padhi submitted that under the concept of NRI seats and Management seats the technical institutions have been given some leeway where they can collect higher amount from the students which has been consistently held to be four times above the normal fee and this higher fee of NRI is calculated for the purpose of income of the institutions and consequently free seats and subsidiary seats are given. It will be relevant to note here that the State itself has notified that all Private Engineering Colleges will charge four times of the normal fees for NRI quota seats. Section 8 of the Orissa Act, 2007 provides for awarding free ship. The candidates admitted against NRI seats are required to give NRI fees which is taken into consideration by the State while computing the fees which the institution can collect from the normal students and NRI quota students and as per the fee structure notifications, the students admitted into the courses will continue to pay the said amount of fee till the year 2016. It is further submitted that Notification made in the year 2005 by the AICTE does not supersede the "Interim Regulation, 2003" of the AICTE.

7. Placing reliance on the judgment of Modern Dental College and Research Centre and Others Vs. State of Madhya Pradesh and Others, , it was submitted that the Hon"ble Supreme Court in that case held that - "it is open to the unaided professional educational institutions to fill up unfilled NRI seats for the year 2012-13 and for the succeeding years through the entrance test conducted by them till the disposal of the appeal subject to the conditions laid down in Inamdar case strictly on the basis of merits."

8. Further placing reliance on the order of this Court dated 31.7.2009 passed in W.P. (C) No. 15532 of 2008, Mr. Padhi submitted that this Court in that case held

that "even assuming that as a matter of principle in accordance with the decision of the apex Court, admissions to such technical colleges are to be given in a single window system, but in the considered opinion of this Court, provisions of Section 9 of the Act are deviation from the said procedure of giving admission through a single window, i.e., J.E.E. Counseling as the procedure provided in Section 9 of the Act is to be adopted when contingencies mentioned therein arise after Counseling by the JEE is completed."

9. Concluding his argument, Mr. Padhi submitted that issuance of the OJEE-2013 Information Brochure under Annexure-10 containing the impugned provisions that in a Private Professional Educational Institutions other than minority institutions not exceeding 5% of the approved intake may be filled up by the NRI from the merit list prepared on the basis of OJEE -2012 as per the AICTE Approval Process Hand Book 2013-14. Guideline issued in this regard is wholly illegal and liable to be set aside.

10. Mr. S.S. Das, learned counsel appearing for the petitioner in W.P. (c) No. 14306 of 2013 while adopting the submission made in W.P. (C) No. 13683 of 2013 agitated further following points.

11. Mr. Das, placing reliance on paragraph 68 of T.M.A. Pal Foundation case (supra) submitted that the management of such institutions need to be given sufficient discretion in admitting students such as by allotting certain percentage of seats which can be reserved for admission by the management out of those students who have passed the common entrance test. Under such circumstances, the Hon'ble Supreme Court directed the State Government to fix such percentage keeping in view the local needs. The question of allocation of percentage regarding reservation for NRI category as well as filling up of consequential vacant seats in the said category has no longer been res Integra. The said issue having been clarified in clear terms by the Hon'ble Supreme Court in the case relating to Modern Dental College and Research Centre and others (supra), there remains virtually no ambiguity in dealing with the NRI quota as well as the manner in which the consequential vacancies would be filled up. It has been categorically held and directed that it is open to the unaided professional educational institutions to fill up un-filled NRI seats by themselves on the basis of merit till the Constitution Bench of the Hon'ble Supreme Court finally decides the issue.

12. Mr. Das further submitted that the interim Regulation dated 7.3.2003 of the AICTE is in force till date since the AICTE on its own wisdom has not by any notification superseded the said Regulation and therefore cannot absolve itself from not implementing the said regulation. On the other hand, reservation as earmarked by the AICTE having a separate structural entity cannot be said to be having the over riding effect on Section 9(3) of the State Act. In other words, the reservation as has been codified vide Section 9(3) of the State Act is independent of the reservation as mentioned in the AICTE Approval Process Hand Book 2013-14 regarding intake of students in NRI category. Therefore, there

cannot be any repugnancy in the event the provision of the State Act is allowed to operate in the said field. The quota of reservation under NRI category which has been fixed by the State vide its Admission Brochure 2013-14 is bad in the eye of law and the reservation under NRI category be made at 10% of the total intake capacity of the petitioner institutions. Moreover, the vacant seats in the NRI category be directed to be filled up at the Institution level as per the settled principles of law.

13. Mr. A.K. Mishra, learned Additional Government Advocate submitted that the petitioner-association is not affected in prescribing 5% seats under NRI quota. In last few years not a single NRI candidate has taken admission in the petitioners' institution. During the year under consideration, only 187 NRI candidates appeared in OJEE-2013 out of which 145 candidates qualified and from among them only two candidates participated in OJEE Counseling 2013. No where in the State Act, i.e., the Act, 2007 it has been prescribed that 15% will be provided for NRI quota. Rather it has been prescribed that maximum up to 15% shall be provided for NRI quota. The Hon'ble Supreme Court has kept the Act, 2007 in force vide order dated 01.06.2007 passed in SLP No. 10318 of 2007 and in three others. All India Council for Technical Education (AICTE), which is the apex body so far as technical education is concerned prescribes in its Approval Process Hand Book for the year 2013-14 that 5% seats within sanctioned intake is provided for NRI category for admitting sons and daughters of NRI(s). The State Government in a judicious manner prescribes 5% seats under NRI quota following the provisions of the State Act and norms of AICTE. The Odisha State Legislature in its wisdom after coming to the conclusion that the triple tests (fair, transparent and non-exploitative) were not satisfied by the admission procedure adopted by the private professional institutions, has enacted the Act, 2007 and has taken over the admission procedure and substituted it by its own procedure of admissions with the object of securing fair and merit-based admissions and preventing maladministration. As per the directions in para 128 in P.A. Inamdars case (supra), the Policy Planning Body has adopted a centralized single window admission procedure as envisaged in the Act, 2007. The State Government cannot go beyond the provisions prescribed in the Act, 2007.

14. Mr. Mishra further submitted that the petitioner-institutions have not been debarred from collecting the approved fee prescribed for NRI category from the candidates admitted under the said category. Seats under NRI category cannot be compared with the vacant seats under NRI category. The vacant seats under NRI category cannot be termed as Management Quota Seats to be filled up at institution level in sheer violation to the provisions of the Act, 2007. When less than 0.1% candidates are applying under NRI category there is no need to enhance the reservation of seats from existing 5% to 15%. The judgment of this Court has been complied with and the institutions have been allowed to admit students in respect of 10% seats taking candidates from OJEE-2012 and AIEEE-2012 merit list. OJEE is the admission authority of the State Government and it can take decisions in accordance with the direction of the Government

from time to time. OJEE-2013 cannot violate the provisions of the State Act and norms/regulation of AICTE to satisfy the vested mala fide interest of the petitioners. Around 30 Engineering Colleges have represented to surrender the vacant NRI seats to OJEE-2013 for conduct of counseling. During the academic session 2012-2013, out of total seats of 4001 available in 90 Engineering Colleges, 10% seats for admission at institution level was provided in pursuance of the order of this Court. Only 1566 students have taken admission in 78 private Engineering Colleges. In 18 Colleges, admission under the said 10% seats is nil.

15. Mr. A.K. Mishra submitted that AICTE prescribes that 5% of seats within sanctioned intake is provided for NRI category. The Act, 2007 prescribes that in a private professional educational institution other than minority institution not exceeding fifteen percentum of the approved intake may be filled up by NRI from the merit list prepared on the basis of JEE As per Section 3 of the Act, 2007 institutional level counseling is not allowed. Admission of students in all private professional educational institutions, Government institutions and 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 and approved by the Government. Reservation of 15% of the intake capacity under NRI quota may cause seat blocking exploitation of students and their parents, dislocation in non-negotiable academic calendar of BPUT, affecting quality etc.

16. Mr. Palit, learned counsel appearing for the OJEE adopts the counter filed by the State. It is submitted that only the private professional technical institutions are entitled to give admission under the NRI quota. It was further submitted that the NRI students as defined in Orissa Act, 2007 and AICTE Hand Book are eligible to take admission against the NRI quota. There is no concept of management quota after the judgment of the Hon''ble Supreme Court in the case of PA, Inamdar (supra).

17. Mr. A.K. Mohapatra, leaned counsel appearing on behalf of the BPUT submitted that the Interim Policy Regulation, 2013 of AICTE itself specifies that the same is for a specific period of time, i.e., till final regulation is prepared. Further it also specifies that the said interim policy regulation is applicable to technical institutions governed by existing regulation of AICTE. The existing regulation of AICTE, 2003 was the regulation of 1994 amended by Regulations 1997 and 2002. The provision of management quota not exceeding 15% has been criticized by Hon''ble Supreme Court in P.A. Inamdar''s case (supra). Thereafter the AICTE brought the final regulation in 2005 in supersession of all earlier main Regulations.. After P.A. Inamdar''s case, the Government of Orissa enacted the Orissa Act, 2007, Section 9 of the State Act deals with reservation of seats for different categories of students. Section 9(5) of the State Act provides that the vacant seats under NRI quota shall be filled up by general category students from OJEE merit list.

18. Mr. Mohapatra submitted that when the statute provides for an Act to be done in a specific manner, it is to be done in the manner provided in it or not at all. After coming into force of AICTE Regulation, 2005 there exists no such quota called management quota. Section 5 of the BPUT Act, 2002 provides that BPUT shall follow the Rules, Regulations, Orders, Guidelines and directions issued by the Central Government or AICTE. Section 3 of the Act, 2007 provides that students shall be admitted to the institutions under BPUT through the OJEE conducted by the State Government. It is a discretion vested in the State Government to fix a quota to NRI students from 1% to 15% u/s 9 of the Act, 2007. Fixation of such quota by the State Government being an academic policy decision the scope of interference by this Court is very limited.

19. Mr. J.K. Mishra, learned Senior Advocate appearing on behalf of AICTE submitted that in the Interim Policy Regulations, 2003 it was specifically mentioned that the revision of AICTE Regulations in respect of fees and admission is under consideration and till the same is amended, following Interim Regulations shall apply in supersession of existing provisions. In exercise of its power conferred under sub-section (1) of Section 23 read with Sections 10 and 11 of AICTE Act, 1987, AICTE is empowered to make regulations not inconsistent with the provisions of the Act, and the Rules, generally to carry out the purpose of this Act. AICTE being the apex body in Technical Education at the National level, has full legal sanctity and right to publish from time to time, the Approval Process Hand Book dealing the procedure to process the application of the Institutions and/or promoters in terms of Clause 4.3 of the AICTE Regulation, 2012. In this process, AICTE has published Regulations of 2010 for the academic year 2010-11, Regulations of 2011 for the academic year 2011-12/2012-13 and Regulations of 2012 for the academic year 2013-14 wherein keeping in view the line of directions given by the Hon'ble Supreme court in the judgment delivered in PA. Inamdar's case (supra) and more specifically paragraph 128 of the said judgment, the percentage of TFW/PIO/NRI, have been incorporated. Since the reservations have been provided in these AICTE Regulations, the Interim Policy Regulations dated 7.3.2003 merges with these Regulations. Therefore, the Interim Policy Regulations, 2003 finally merges with AICTE Regulations from 2010 onwards. It is AICTE, who has full authority under law in framing the norms of the admissions and reasonable stipulations to improve the standard of the Technical Education. Therefore, Clause 4.3 of AICTE Regulations provides the power to the AICTE to publish Approval Process Hand Books. Fixing the percentage of NRI quota at 5% was not a sudden decision, it was well notified earlier since February, 2012 onwards as up to now. As such there is no provision for management quota in any of these Regulations framed by AICTE and that there cannot be any deviation from the Act/Rule/Regulations/Guidelines/Norms of AICTE in substituting NRI seats with Management quota seats. As a matter of policy decision within the frame work of the provision of the Act, the new AICTE Regulations were framed and there is no violation of Articles 14, 19, 21, 39(a) and 41 of the Constitution of India.

20. Mr. J.K. Mishra, learned Senior Advocate submitted that the AICTE Act, 1987 has been suitably placed under Entry 66 of List I of the Seventh Schedule of the Constitution of India, and that empowered the Central Government for establishment of the AICTE with a view to proper planning and coordinated development of the Technical Education System throughout the country, the promotion of qualitative improvements of such education in relation to planned quantitative growth and the regulation and proper maintenance of norms and standards in the technical education system and for all matters connected therewith. Since the matter pertaining to technical education and approval of technical institution is a field covered under the AICTE Act, 1987, the State has no competence to take any action in relation to any matter pertaining to either initial approval of technical institution or extension of such approval except forwarding its views for consideration. In support of the above contentions, Mr. Mishra relied upon the decisions of the Hon"ble Supreme Court in the cases of: (i) State of T.N. and Another Vs. Adhiyaman Educational and Research Institute and Others, ; (ii) Jaya Gokul Educational Trust Vs. The Commissioner and Secretary to Government Higher Education Department, Thiruvananthapuram, Kerala State and Another, ; (iii) State of Tamil Nadu and Another Vs. S.V. Bratheep (Minor) and Others, ; (iv) Govt. of A.P. and Another Vs. J.B. Educational Society and Another etc., .

21. Mr. Mishra submitted that AICTE has received no views from the State Government and/or any authority/les functioning under them with regard to fixation of any reservation quota as per the impugned Act of 2007. For the academic session 2013-14 no Technical Institutions from Orissa have applied for grant of approval and/or extension of approval of their institutions as per AICTE Approval Process Hand Book relating to the reservation quota fixed by AICTE as per its Regulations, 2012. Therefore, Sections 9(2) and 7(b) of the Act, 2007 fixing 15% of NRI quota stand repugnant to the AICTE Act, 1987 as well as AICTE Regulations, 2012 and Approval Process Hand Book emanating from the AICTE Act, 1987. There is no provision relating to reservation with regard to the management quota seats. Modern Dental College and Research Centre and others" case (supra) relates to surplus NRI seats and in what manner such surplus seats are to be allocated. The present petitioners with their ulterior motive filed an interim application on 31.10.2011 bearing LA. No. 9 of 2011 in the pending Civil Appeal No. 2873 of 2011 for issuance of an order for filling up of vacant NRI seats at College level counseling and as per the procedure laid down by the Policy Planning Body and State Government. On 18.11.2011 the Hon"ble Supreme Court rejected the said prayer in limine.

22. Paragraphs 68 to 72 in TMA Pal Foundation case (supra) were dealt with in paragraph 122 to 135 of P.A. Inamdar case relating to Reservation category of Management seats as well as NRI seats in the Admission process in Technical Institutions. Para-128 in P.A. Inamdar case is the deciding principle. Section 2(b) of State Act of 2007 defines "approved intake" which means and implies the total number of seats sanctioned by the competent statutory authority for admitting

students in each course of studies in a professional educational institution. Concluding his argument Mr. J.K. Mishra submitted that grant of allocation of any NRI seat as has been specified under the State Act would lead to repugnancy to the AICTE Act, 1987 if it exceeds 5% so as to attract Article 246(1) r/w. Article 254(1) of the Constitution of India.

23. On the rival contentions, the question that falls for consideration by this Court is as to whether 5% of sanctioned intake capacity reserved by OJEE for NRI category should be enhanced to 10% of the intake capacity so as to enable the petitioner-institutions to give admission to more students under the NRI quota collecting higher prescribed admission fee for the purpose of utilization of such amount for development of the institution.

24. Specific stand of the petitioner-institutions is that in order to maintain standard/quality of education by providing necessary infrastructure, teaching staff etc. as required under the AICTE Act, 1987 and Regulations framed there under and for awarding free-ship, substantial amount of money is required which cannot be met from the fees collected from the students admitted in the general category. It is only possible if more number of admissions will be given under NRI category so that they can be able to maintain the standard prescribed by the AICTE Act and for awarding free-ship. Further case of the petitioners is that Regulations, 2003 provide 15% of the intake capacity under NRI quota. The Act, 2007 also provides that in Private Professional Educational Institutions other than minority institution not exceeding 15% of the intake capacity may be filled up by NRI on the basis of the merit list prepared by the OJEE. The further case of the petitioners is that, this Court in its judgment dated 01.10.2012 passed in W.P. (C) No. 11154 of 2012 directed the opposite parties to earmark 10% of the intake capacity under NRI quota. In Writ Appeal Nos. 344, 371 and 373 of 2012 the Division Bench of this Court in its common order dated 13.12.2012 has dismissed three appeals filed by OJEE and confirmed the judgment of the learned Single Judge fixing the NRI quota at 10% of the intake capacity. Therefore, it is submitted by Mr, Padhi, learned Senior Advocate for the petitioner that this Court may not take a view different than the view taken by the Division Bench in its decision in Writ Appeals stated supra in respect of reservation of seats under NRI quota.

25. The common stand of opposite parties is that the object behind making the provision to keep some percentage of seats reserved for NRIs is well explained in paragraph 128 of the judgment of the Hon"ble Supreme Court in the case of P.A. Inamdar (supra). According to opposite parties, under the NRI quota admission should be given to NRIs, as defined in Section 2(p) of the Act, 2007 and Clause 4.3 of the AICTE Hand book but the petitioner-institutions are mis-utilizing the NRI quota by not giving admission to NRIs as defined in Act, 2007 and AICTE Hand Book. Specific case of the State is that in the past several years no NRI as defined under Act, 2007 and by AICTE Regulations has taken admission. In the OJEE-2013 only two NRI candidates have participated in the counseling under

NRI quota. The response of NRI candidates is less than 1%. The stand of AICTE is that none of the institutions has availed 5% seats kept reserved by AICTE under NRI quota. Thus, the opposite parties vehemently opposed that there is no reason/justification to reserve more seats than 5% of the approved intake capacity under NRI quota. It is further submitted that by keeping any seat reserved under the NRI quota equal number of meritorious candidates are deprived of getting admission in Private Professional Technical Educational Institutions.

26. It is not in dispute that as per the decision of the Hon'ble Supreme Court in the case of P.A. Inamdar (supra) and the Regulations, 2003 of AICTE and Act, 2007, the seats in the Private Professional Technical Educational institutions not exceeding 15% of the approved intake may be filled up by NRI candidates from the merit list prepared on the basis of JEE.

27. At this juncture, it would be appropriate to refer to the relevant portion of the judgment of the Hon'ble Supreme Court in the case of P.A. Inamdar (supra), which is quoted below:-

128. Here itself we are inclined to deal with the question as to seats allocated for Non-Resident Indians ("NRI", for short) or NRI seats. It is common knowledge that some of the institutions grant admissions to certain number of students under such quota by charging a higher amount of fee. In fact, the term "NRI" in relation to admissions is a misnomer. By and large, we have noticed in cases after cases coming to this Court, neither the students who get admissions under this category nor their parents are NRIs. In effect and reality, under this category, less meritorious students, but who can afford to bring more money, get admission. During the course of hearing, it was pointed out that a limited number of such seats should be made available as the money brought by such students admitted against NRI quota enables the educational institutions to strengthen its level of education and also to enlarge its educational activities. It was also pointed out that people of Indian origin, who have migrated to other countries, have a desire to bring back their children to their own country as they not only get education but also get reunited with Indian cultural ethos by virtue of being here. They also wish the money which they would be spending elsewhere on education of their children should rather reach their own motherland. A limited reservation of such seats, not exceeding 15%, in our opinion, may be made available to NRIs depending on the discretion of the management subject to two conditions. First, such seats should be utilized bona fide by the NRIs only and for their children or wards. Secondly, within this quota, the merit should not be given a complete go-by. The amount of money, in whatever form collected from such NRIs, should be utilized for benefiting students such as from economically weaker sections of the society, whom, on well defined criteria, the educational institution may admit on subsidized payment of their fee. To prevent misutilisation of such quota or any malpractice referable to NRI quota seats, suitable legislation or regulation needs to be

framed. So long as the State does not do it, it will be for the Committees constituted pursuant to Islamic Academy's direction to regulate.

28. The State Government keeping in view the judgments of Hon'ble Supreme Court in P.A. Inamdar (supra) and Islamic Academy of Education and others (supra) have enacted the Orissa Act, 2007. It may be noted that the Hon'ble Supreme Court considering the State Appeal vide C.A. No. 2873 of 2007 and others passed interim order on 1.6.2007 staying operation of sections 4(1), 4(2), 4(4), 6(1), 6(2) and 6(3) of the Orissa Act, 2007. Thus, Section 9 of the Orissa Act, 2007 is in operation which deals with reservation of seats including NRI seats and how to fill up the seats remained unfulfilled due to non-availability of NRI candidates or where students out of such list leave after selection to such seats.

29. It may be relevant to reproduce Section 9 of the Orissa Act, 2007: Section 9 of the Act, 2007 reads as follows:-

9.(1) In every professional educational institution admissions shall be in accordance with the reservation policy of the Government notified for the purpose of this Act.

Provided that nothing in this sub-section shall be applicable to the minority institutions.

(2) In a private professional educational institution other than minority institution not exceeding fifteen per centum of the approved intake may be filled up by NRI from the merit list prepared on the basis of JEE.

(3) Where any shortfall in filling up of seats from NRI occurs, such vacant seats may be filled up from the merit list of All India Engineering Entrance Examination or All India Medical Entrance Examination, as the case may be, conducted by Central Board of Secondary Education.

Provided that while filling up such vacant seats NRI shall be preferred.

(4) In a private professional educational institution fifteen per centum of the approved intake may be filled up strictly from the merit list of All India Engineering Entrance Examination or All India Medical Entrance Examination, as the case may be, conducted by Central Board of Secondary Education.

(5) Where the seats remain unfilled due to non-availability of candidates in the list specified in sub-sections (3) and (4) or where student out of such lists leaves after selection to such seats, the same shall be filled up by the candidates belonging to the general category from the merit list of the JEE.

(6)(a) Where seats for reserved category are left unfilled due to non-availability of candidates from a particular category in the list of JEE, such seats shall be filled up by candidates of same category from the merit list of All India Engineering Entrance Examination or All India Medical Entrance Examination, as the case may be, failing which such vacant seats shall be filled up by candidates

not belonging to any reserved category in accordance with the merit list of JEE.

(b) if still seats remain vacant, a second JEE may be conducted.

(7)(a) In a Minority institution, not less than fifty per centum of the approved intake shall be filled up by minority students from within the State belonging to the minority community to which the institution belongs on the basis of inter se merit in the merit list of the JEE.

(b) The remaining seats shall be for the general category out of which up to fifteen per centum may be filled up by NRI.

30. Perusal of the provisions the Orissa Act, 2007 extracted above reveals that in Private Professional Educational Institutions not exceeding 15% of the approved intake may be filled up by the NRI from the merit list prepared on the basis of OJEE. It further reveals that where the seats remained unfulfilled due to non-availability of NRI candidates or where students out of the NRI list leave after selection to such seats, the same shall be filled up by the candidates belonging to general category from the merit list of the JEE.

31. For the academic year 2012-13, the State Government reduced the aforesaid quota of reservation to 5% of the total intake capacity from 15% of the total intake. The aforesaid action of the Government was challenged before this Court in various writ petitions including W.P. (C) No. 11154 of 2012, which was disposed of by the learned Single Judge by a common judgment dated 01.10.2012 dealing with the issues with a direction that it is open to the petitioner-institutions to fill up 10% of the approved intake capacity of the institutions under the Management quota and those seats shall be filled up from OJEE merit list under the supervision of the OJEE 2012. The said judgment was also confirmed vide judgment dated 13.12.2012 in W.A. No. 344 of 2012 by the Division Bench of this Court. In view of the position indicated by the Division Bench, I respectfully follow the same.

32. In view of the above, this Court directs that the Private Professional Educational Institutions can give admission from the OJEE list to the extent permitted by interim order dated 04.07.2013, i.e., 10% of the intake approved capacity. Further, if any seat remains vacant after giving admission to NRIs, the vacant seats shall be filled up from OJEE merit list in terms of Section 9 of the Orissa Act, 2007. The writ petitions are allowed to the extent indicated above with the aforesaid observations and directions.