

(2005) 01 KL CK 0023

In the High Court Of Kerala

Case No : W.A. No's. 12, 37 and 38 of 2005 and connected cases

Sandeep

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 17-01-2005

Acts Referred:

Constitution of India, 1950 — Article 141
Kerala Self Financing Professional Colleges Prohibition of Capitation Fees and
Procedure for Admission and Fixation of Fees Act, 2004 — Section 3, 4

Citation : AIR 2005 Ker 148 : (2005) 1 ILR (Ker) 324 : (2005) 1 KLT 549

Hon'ble Judges : B. Subhashan Reddy, C.J.;A.K. Basheer, J

Bench : Division Bench

Advocate : K. Ramakumar, T. Ramprasad Unni, V.M. Kurian, A.V. Thomas, Mathew B. Kurian, K.T. Thomas and M.P. Ashok Kumar, for the Appellant; Kurian George Kannanthanam and S. Gopakumaran Nair and C.K. Abdul Rahim, Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

B. Subhashan Reddy, C.J.—The Writ Appeals are directed against the interim order passed by the learned Single Judge by which the fees directed to be paid by the self-financing colleges at the rate fixed by Justice K.T.Thomas Committee was not stayed but was directed to be paid subject to the result of the Writ Petition. As the matter is concerning the educational institutions and at the request of the learned counsel, the Writ Petitions were drawn to be heard along with the Writ Appeals. We proceed to consider the merits of the case in the Writ Petitions by which Writ Appeals also get disposed of.

2. Writ petitioners are the students of medicine having been admitted to the self-financing colleges for the academic year 2003-2004. They had, by now, completed their first year of study and entered second year.

3. These Writ Petitions were filed aggrieved by the demand of the respondents/private self-financing medical colleges to pay the amount of Rs. 1,13,000/- as

fixed by Justice K.T.Thomas Committee for the academic year 2004-05. Brief facts are stated leading to constitution of the above committee. Private colleges emerged as Government could not afford to establish as many colleges as there is demand. The seats in Government Colleges are limited. Since more than two decades, the legal fight is on between the Government, students and the private self-financing medical colleges and particularly imparting education in professional courses relating to the method and manner of, admission and also quantum of fee. The entire case law relating to the subject may not be necessarily to be stated here as the adjudication is confined only to the validity of the quantum of fees demanded by the respondents/private self-financing medical colleges. To give a quietus to the litigation, a 11 Judge Constitution Bench of the Supreme Court in T.M.A. Pai Foundation and Others Vs. State of Karnataka and Others, by judgment dated 31.10.2002 laid legal principles relating to the admissions and the fee structure by the Private self-financing professional colleges. As the litigation arose in implementing the above judgment, again a 5 Judge Bench was constituted. In Islamic Academy of Education and Another Vs. State of Karnataka and Others, , the 5 Judge Constitution Bench by judgment dated 14.8.2003 directed the constitution of two committees headed by the retired High Court Judge. One committee is entrusted with the task of conducting the entrance examination if the private self-financing medical colleges choose so to conduct and another committee, a different one, is entrusted with the task of fixation of fees structure by the self-financing private colleges. In so far as the academic year 2003-04 is concerned, from the order of the Supreme Court, it is clear that as there was no sufficient time for constitution of the Committees so ordered and the resultant exercise to be made, the implementation of the Committee's decisions/actions were directed to be made from the academic year 2004-05. The Supreme Court also made it clear that the said arrangement was temporary pending a Parliamentary enactment. Education was in List II of Schedule VII of Constitution, but, by virtue of 42nd Constitutional amendment the same was lifted and placed in List III/concurrent list. Subject to Article 254 of the Constitution, both the Central and State Governments can enact laws in the said field of education.

4. For the year 2003-04 the respondents/private self-financing medical colleges had charged the fees at Rs. 11,825/- per year for Government quota students which is based on merit secured in the common entrance examination. But coming to the year 2004-05, the demand is made to pay the fees as fixed by Mr. Justice K.T.Thomas Committee. Honourable Mr. Justice K.T.Thomas, a retired Judge of the Supreme Court was appointed pursuant to the above judgment in Islamic Academy of Education case (supra) by a Governmental order dated 11.11.2003, the above committee made enquiry in which the self-financing private medical colleges participated apart from the Governmental Authorities. Thereafter, the said committee passed order on 28.5.2004 fixing the fees structure to be levied by the self financing private medical colleges in the State of Kerala at Rs. 1,13,000/- per annum revisable every three years.

5. The petitioners' contention is that being merit students under Government quota they are only liable to pay the fees which is charged by the Government medical colleges and only the students under management quota can be subjected to the fees which has been fixed by Mr. Justice K.T. Thomas Committee. M/s. K. Ramkumar, V.M.Kurian and M.RAshok Kumar, the learned counsel for the petitioners reiterated the said contention of the petitioners and submitted that even if the fees fixed by Mr. Justice K.T.Thomas Committee is to be levied on the students in self-financing private medical colleges, the same is only applicable for the students who were admitted for the first year course from 2004-05 onwards and that the petitioners having been admitted for the academic year 2003-04 cannot be subjected to the said fees. In effect, their submission is that Mr. Justice K.T.Thomas Committee's decision on the fees structure for self-financing private medical colleges cannot act retrospectively, but, is applicable only prospectively for such students who are admitted for the academic year 2004-05. They rely strongly on Cl. II of Mr. Justice K.T.Thomas Committee's decision which reads "the above rates shall prevail as annual fees for the students admitted in the year 2004-05 onwards for a period of three years". Learned counsel for the petitioners further contended that with the enactment of Kerala Self-financing Professional Colleges (Prohibition of Capitation Fees and Procedure for Admission and Fixation of Fees) Act, 2004 (Act 17 of 2004), the students admitted under Government quota cannot be subjected to pay the fees fixed by Mr. Justice K.T.Thomas Committee at all.

6. Mr. Kurian George Kannanthanam appearing for the respondents/private self-financing medical colleges counters the above arguments and submitted that the theory of prospectivity cannot be applied to this case as fees could not be fixed payable in the self-financing private medical colleges for the academic year 2003-04 because the judgment itself was rendered on 14.8.2003 and because of the observations in the said judgment that in so far as 2003-04 was concerned, time was running out and that the Committee's recommendations were to be made applicable only from the academic year 2004-05 onwards. It is also submitted by the learned counsel that Kerala Act 17 of 2004 can only apply prospectively for the students to be admitted later. He points out to the bonds executed by the students promising to adhere to the fixation of fees structure by Mr. Justice K.T.Thomas Committee and that the petitioners cannot wriggle out of the said bonds. He further submits that the Kerala Act 17 of 2004 cannot be put into operation because of the interim orders granted by the Supreme Court in W.P.(C)No.374 of 2004.

7. Learned counsel for the petitioners, in their reply arguments, submitted that Mr. Justice K.T.Thomas Committee's decision is not applicable to the merit quota students at all and that the above Supreme Court order is only applicable to the parties thereto and not in general and that the bonds which are projected by the learned counsel for the respondents/private self-financing medical colleges were obtained under duress taking undue advantage of the anxiety of the students for admission to medical course and they are neither valid nor binding and in any

event being contrary to law, they are inoperable on the ground of estoppel.

8. The contentious issue arising out of the arguments advanced by learned counsel for the petitioners and the respondents are following:

i. Whether merit students admitted under Government quota in self-financing colleges need to pay fee akin to the students admitted under management quota?

ii. Whether Kerala Act 17 of 2004 places an embargo on the self-financing medical colleges from charging the fees fixed by Justice K.T.Thomas committee for the students admitted under 50% of the merit quota allotted to the Government?

iii. Whether students admitted for the academic year 2003-04 are entitled to pay fees fixed by the Government in Government Colleges till the end of their course?

iv. Whether Kerala Act 17 of 2004 is only prospective in operation for future admissions?

v. Whether Justice K.T.Thomas committee's fee structure is operable only for the students admitted from 2004-05 onwards and not for the students admitted for academic year 2003-04.

9. At the outset, we hold that the argument relating to the bonds executed by the students cannot have any relevance as the matter has to be adjudicated not in the context of contractual obligations but only in the context of statutory enactments as interpreted by Courts. What is discernible from the statutory enactments as interpreted by the Apex Court in various judgments including the latest Islamic Foundation case is that private professional colleges cannot charge capitation fee as education is not a business and that a rational fee structure should be adopted by the management which would not be entitled to charge capitation fee and that 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 the education is permissible. As the self-financing professional colleges and the Government were making their own interpretations of the legal principles enunciated in T.M.A. Pai Foundation case, specific guidelines were issued by the Supreme Court in Islamic Foundation case directing the appointment of two separate committees, one, to go into the fees structure and another, for holding entrance examinations. Keeping in tune with the above directions by the Supreme Court, the fees was collected by the respondents/private self-financing medical colleges at the Government rates for the year 2003-04 for Government quota students. In fact, the State Government had issued G.O.MS .No. 194 dated 12.9.2003 on the same lines and also issued a clarification in G.O.Rt. No. 7 dated 9.1.2004 that while the fees to be payable by the students of merit quota in self-financing private medical colleges is akin to that of students admitted in Government Medical Colleges, the same is applicable only for the year 2003-04, but, for the subsequent years, the fees as approved by the committee appointed pursuant to

the Islamic Foundation case is payable.

10. Mr. C.K.Abdul Rahim, Senior Government Pleader appearing for the Government now relies upon the Government's communication which reads thus:

"Government of Kerala

No. 48239/S3/04/H&FWD Health & Family Welfare (s) Department,
Thiruvananthapuram Dated 19.11.2004 From

The Principal Secretary to Government

To

The Principal, Dr. Somervell Memorial CSI Medical College, Karakonam,
Trivandrum.

Sir,

Sub:-- Health & Family Welfare Department--Academic -- Fee structure for MBBS
2003-04--Batch (Merit) reg--

Ref:--Yournote No. MCHK/Acad/N3/04 dated 12.10.2004.

It has come to the notice of Government that your institution is charging fees by Justice K.T. Thomas committee from the students admitted under merit quota during the year 2003-2004, The rate fixed by Justice K.T. Thomas Committee is not applicable to the students admitted during the academic year 2003-2004. Therefore, I am to clarify that the students admitted under merit quota during the year 2003-2004 will be charged with fees only at the rate as that in Government medical colleges.

Yours faithfully, P.K. Rajendran, Under Secretary,

For Principal Secretary to Government"

This judgment was slated to be delivered at 1.45 p.m. today. At 10.15 a.m. during mentioning hour, learned Government Pleader has placed G.O.(MS) No. 19/05/H & FWD before us. This was just issued day before, i.e., 15th January 2005. It only shows that the Government is anxious to lend support to the plea raised by the petitioners and resorted to Article 162 of the Indian Constitution to confer legal sanction to the above executive instruction dated 19.11.2004. But, for the reasons mentioned in the judgment we cannot countenance the said plea set up by the petitioners and supported by the Government.

11. The Supreme Court, in Unni Krishnan, J.P. and others Vs. State of Andhra Pradesh and others etc. etc., propounded the theory of payment seat and free seat. Free seat was to be given on merit and payment seat on collection of the amounts by the management charging the payment seats by way of a cross subsidy for the students admitted in merit quota. The said proposition was not approved by the Larger Bench in TM.A. Pai Foundation case (supra) and the ratio

laid by Larger Bench in the above case is that one student cannot be burdened with the payment of not only his fees but also fees of other student. Keeping that in view, the Five Judge Bench in Islamic Foundation case (supra) held that fee structure is to be regulated by a finding to be given by an expert body. No distinction is made between Government quota student and management quota student. Self-financing colleges are made obligatory to collect only such fees as fixed by the committee and any violation is visited with penal consequences. Government has got limited number of seats in the colleges run by it and only more meritorious will get admission in those Government colleges and other aspirants have to necessarily look to private self-financing colleges and the petitioners fall into that category. The petitioners, by virtue of 50% quota allotted to the Government are made entitled to get admission in private colleges and that itself is a concession to get education in professional course and particularly, medicine which is given a prime slot among all disciplines and no further concession in fee structure is provided in Islamic Foundation case (supra). The reason is obvious. The decision of Larger Bench in T.M.A. Pai Foundation case (supra) disapproving the cross subsidy and overruling of two categories like payment seat and free seat is the law under Article 141 of the Constitution of India and that is the reason why there is no distinction made in the payment of fees by the students of self-financing colleges between a Government quota student and management quota student and all are treated on par in so far as quantum of fee is concerned. The only distinction is in the matter of admission, where, under Government quota, the students have to be admitted in accordance with the rankings in common entrance examinations while under management quota, the students can be admitted at the option of the colleges to have an entrance examination by the consortium of colleges which is held under the supervision of an expert committee constituted pursuant to Islamic Foundation case (supra). But Kerala Act 17 of 2004 makes it clear in Section 4 that Government quota students need to pay only the fees payable by the students in Government colleges. The said Act came into force on 15.7.2004 and is applicable from the date onwards. It does not make any distinction between the students who were admitted before the commencing of that date to that of the students admitted later. Going by the clear provisions of the Act and there being no ambiguity and the Act having been enacted pursuant to the observations made in Islamic Foundation case (supra), the argument that it is only prospective in operation has to be repelled. Similarly, the other argument that students admitted during the academic year 2003-04 are liable to pay the same fees which were collected from that year also does not hold any force. The theory of retrospectivity or prospectivity has got no relevance in so far as the payment of fees pursuant to the Islamic Foundation case (supra) and the fees payable is applicable for the students who have joined the course in 2003-04 also. The only difference is that by the year 2003-04 whatever fee has been collected, that holds good, but, subject to such quantum which is fixed by the Committee from the year 2004-05 onwards. It is applicable to all the students whether admitted before 2003-04 or later to it. If the above Act is valid, certainly

whatever is prescribed in Sections 3 and 4 is binding on both the Government quota students and the management quota students. The above provisions read thus:

"3. Procedure for admission into self financing professional colleges:--

(1) Notwithstanding anything contained in any law for the time being in force or in any judgment, decree or order of any Court or any other authority or in any agreement, the admission of students into a self financing professional college shall be made on the basis of merit as provided in sub-ss.(2) to (6).

(2) In every self financing professional college fifty per cent of the total seats in each branch shall be Government Quota and the remaining fifty per cent shall be Management Quota.

(3) Seats in the Government Quota shall be filled up based on counseling by the Commissioner for Entrance Examinations on the basis of the ranks in the common entrance examination conducted by him, following the principles of reservation as ordered by the Government from time to time.

(4) Seats in the Management Quota shall be filled up either from the list prepared on the basis of the Common Entrance Examination conducted by the Commissioner for Entrance Examinations or from the list prepared on the basis of the common entrance test conducted by a consortium of a particular type in the State.

Provided that Managements shall have the option to earmark not more than 15% of the seats in the Management Quota to dependents of Non-Resident Indians and in that case the admission of the candidates shall be made on the basis of the marks they have obtained in the qualifying examination.

(5) Educational qualification for admission in the self-financing professional college shall be the same as are applicable to the corresponding courses in the Government colleges as may be notified by the Government from time to time.

(6) Notwithstanding anything contained in Sub-section (1), lapsed seats, if any, may be filled up by the management in accordance with sub-ss.(4) and (5).

4. Fee Structure: -- (1) Notwithstanding anything contained in any law for the time being in force or in any judgment, decree or order of any Court or other authority or in any agreement,

(a) the fee to be collected from the candidates admitted in the Government Quota shall be the same as the fee prevailing for the corresponding course in the State Government colleges.

(b) the fee to be collected from the candidates admitted in the Management Quota shall be determined by the management taking into consideration the inevitable expenses for running the institution.

(2) The fees to be determined under clause (b) of Sub-section (1) may include all

or any of the following items, namely:

- (a) tuition fees on yearly basis;
- (b) library fee;
- (c) laboratory fee;
- (d) caution deposit;
- (e) development fee; and
- (f) refundable deposit, if any.

(3) The management shall not indulge in profiteering while determining the fees structure".

12. Two judgments rendered by this Court, one, by the learned Single Judge in Kerala Self Financing Engineering College Vs. State of Kerala, and that of the Division Bench in Academy of Medical Sciences v, Regina 2004 (3) KLT 628 were cited before us. In so far as the learned Single Judge's order is concerned, it is with regard to the levy of fees in engineering colleges and the Division Bench judgment is regarding the validity of the merit list which is in appeal before the Supreme Court. In the Division Bench judgment Mr. Justice Abdul Gafoor speaking for the Division Bench in Para 42 held as follows:

"Section 4 of the Act provides for the fees structure to be followed in the self-financing professional colleges. Necessarily, this is correlated with the procedure provided for admission in Section 3. The candidates admitted against the seats in Government Quota need pay only the fees prescribed for the corresponding course in State Government Colleges; whereas the fee to be collected from the candidates admitted to management quota shall be that determined by managements, taking into account expenses for running the institutions. Only if the candidates are able to pay such higher rate of fees, they need apply for the seats in Management Quota. When a candidate with a higher rank in the State Merit List, but did not get a seat in Government Quota, offers the fees demanded by the management, there arises no question of the appellants preferring a candidate having a rank far below the former".

The argument raised is that the said judgment is an obiter and not binding, but, we need not go into that argument as there is a Supreme Court order passed in W.P.(C) No. 347/2004 dated 29.7.2004. The said Writ Petition has been filed before the Supreme Court directly under Art,32 of the Indian Constitution challenging the vires of the Act No. 17/2004 and particularly Section 3 and 4 thereof and dealing with the fee structure, the order of the Supreme Court is to the following effect:

"The other question is regarding the fee structure. In terms of the decision in Islamic Academy's case, the Government of Kerala appointed a Committee headed by Justice K.T. Thomas, a former Judge of this Court. The said

Committee has fixed the fee at Rs. 1.13 lakh as the maximum annual fee to be collected from each student of the private self-financing medical colleges. The Committee in its order dated 28th May, 2004 has observed that the cross-subsidy has been disfavoured by this Court in T.M.A. Pai Foundation case.

Mr. Venugopal took us through some of the portions of the said decision, including the judgment of Hon''ble Variava, J., to contend that cross-subsidy has not been held to be illegal in the said decision. On this aspect, prima facie, the opinion of Variava, J., does not represent majority opinion. Section 4 of the Act, prima facie, brings in cross-subsidy which, prima facie, is not permissible as per the decision in T.M.A. Pai Foundation's case. The question as to whether the students can afford or not the fee fixed by Justice Thomas Committee is not very relevant for the present purposes. No one stops the State Government to subsidize such students as it may deem just, fit and proper.

For the present purpose, as interim measure, we are of the view that the students should provisionally pay the fee as fixed by Justice Thomas in the order dated 28th May, 2004, which means that the students should neither pay the fee as claimed by the petitioner institution nor one postulated by Section 4 of the Act. This direction would be applicable for the present Academic Year 2004-05. The provisional payment at the aforesaid rate would be subject to further orders as may be passed by this Court".

This order cannot be said to have application only in the case of management quota students. The said order is applicable to all the students of self-financing medical colleges. There is also no scope to read the said order as applicable to the students admitted for the academic year 2004-05. The said order is applicable to all the students, whether Government Quota or Management Quota in self-financing medical colleges even for the students admitted for 2003-04 and continuing the course for this academic year 2004-05. The said order is also not in personum and more particularly, after a second order passed in W.P.(C) 19 of 2005 dated 12.1.2005 filed by Kerala Private Medical College Management Association in which it is specifically stated that "to be heard along with W.P.(C) No. 347/2004. There will be similar interim order in this case, as was passed in the case of MA. Pushpagiri Medical Society". The above two orders of the Supreme Court bind all the parties before this Court in the instant case and following the same, we hold that the writ petitioners are liable to pay the fees at the rate of Rs. 1, 13,000/- per annum for the academic year 2004-05 and time for payment of the same is granted till 31.1.2005.

The Writ Petitions and Writ Appeals are dismissed. No costs.