

(2009) 11 J&K CK 0011

In the Jammu And Kashmir High Court

Case No : LPA (OW) No's. 35, 38 and 43 of 2009 and CMP No's. 80, 84, 92 and 95 of 2009

State of Jammu & Kashmir and Another

APPELLANT

Vs

Tawi Educational Trust and Another

RESPONDENT

Date of Decision : 16-11-2009

Acts Referred:

All India Council for Technical Education Act, 1987 — Section 10
Constitution of India, 1950 — Article 248

Citation : (2010) 2 JKJ 328

Hon'ble Judges : Barin Ghosh, C.J; Gh. Hasnain Massodi, J

Bench : Division Bench

Final Decision : Allowed

Judgement

1. In terms of the provisions contained in the Constitution of India, the Parliament is entitled to make laws enumerated in List I, whereas the State

Legislatures are entitled to make laws enumerated in List II. The matters enumerated in List III are such matters on which the Parliament as well as

State Legislatures are competent to make laws. In the event laws are made by the Parliament as well as State Legislators on any of the matters

enumerated in List-III and it transpires that the law made by a State Legislature is repugnant to the provisions of the law made by the Parliament,

whether passed before or after the law made by the State Legislature, the law made by the Parliament shall prevail and, to that extent, the law

made by the Legislature of the State will be void. The exception is when the law made by the State Legislature has received assent of the

President, in which event, law so made will prevail in the State.

2. Item 66 of the List I is as follows:

66. Co-ordination and determination of standards in institutions for higher education or research and scientific and. Technical institutions.

Entry 11 in List II before January 3, 1977 was as under:

Education including University subject to provisions of Entries 63, 64, 65 and 66 of List I and Entry 25 of List III.

At that time Entry 25 of List III was as follows:

Vocational and technical training of labour.

With effect from January 3, 1977, while Entry 11 in List II was removed, Entry 25 of the List III was substituted as follows:

Education, including technical education, medical education and Universities, subject to the provisions of Entries 63, 64, 65 and 66 of List I;

vocational and technical training of labour.

3. On March 28, 1988, Parliament made the All India Council for Technical Education Act, 1987. The purpose of enacting the said Act was to

provide for establishment of All India Council for Technical Education with a view to do proper planning and co-ordinated development of

technical education system throughout the country, 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 matters connected therewith.

Section 3 of the said Act authorised the Central Government to establish a Council by the name of All India Council for Technical Education.

Section 10 of the said Act specified the functions of the Council. Clause (k) thereof gave authority to the Council to grant approval for starting new

technical institutions and for introduction of new courses or programmes in consultation with the agencies concerned.

4. On December 20, 2002, The Jammu and Kashmir Private Colleges (Regulation and Control) Act, 2002, came into force. Sub-section (1) of

Section 3 of the said Act provides that no private college shall be established or run without prior permission in writing of the Government or the

competent authority. Sub-section (5) of Section 3 of the Act authorised the Government to prescribe the procedure to be followed for grant of

permission to establish and run a private college. Clause (g) of Section 2 of the said Act defines 'prescribed' as prescription's by Rules made under

the Act.

5. In exercise of powers conferred by Section 23 of the State Act, the Government made The Jammu and Kashmir Private Colleges (Regulation and Control) Rules, 2005. The said Rules, amongst others, prescribes a format by which an application is to be made for grant of permission. Sub rule (1) of Rule 3 thereof repeats what has been provided in Sub-section (1) of Section 3 of the Act. Sub-rule (2) of Rule 3 of the said Rules provides that norms for assessment of need for establishing a new private institution shall be manpower requirement of the State in the field of study; and, the area where establishment of such institution shall prove more productive and useful to the society at large. Sub-rule (3) of Rule 3 of the said Rules grants prerogative to the Government to grant permission to an educational agency for opening any type of course in a field of study in such institution and declares that the decision of the Government on such subjects shall be final. It also authorises the Government to reserve the right to revise, from time to time, the list of courses for which it can consider grant or permission to educational institution. At this stage, it may be kept in mind that the Act and the Rules deal with colleges for imparting education above higher Secondary (10+2) level and upto Bachelor/Hesters degree affiliated to the university of Kashmir or the University of Jammu, including B.A, B.Sc., B.Com, BCA, BBA, LIB, Bed and BRED courses and any other courses for which affiliation can be granted by the University of Kashmir or University of Jammu. They do not deal with, in so many words, technical education to be imparted by colleges or institutions. As an institution imparting technical education requires the privilege of University of Kashmir or University of Jammu for the purpose of conferment of Degrees to be awarded to successful students after completion of the courses, it may be contended that even for such courses the State Act and the Rules framed there under are applicable.

6. Writ Petitioners-Respondents in these appeals filed a writ petition, which has resulted in passing of the principle judgment and order under appeal in two appeals, whereby the writ petition has been allowed. The State Government is aggrieved by the judgment and order inasmuch as a part of the Rule, made by the State under the State Act, referred to above, has been struck down. The University is aggrieved, inasmuch as, a direction stands issued upon it, without the University being a party to the writ petition. There is an order passed on review which does not

substantially alter the original order passed while allowing the writ petition. The University is aggrieved by that review order, inasmuch as, thereby

University has been directed to give affiliation to the writ Petitioner institution.

7. The undisputed facts of this case are that the Petitioner institution applied to the State Government for permission to set up a technical institution

for the purpose of imparting technical education to the students who would be pursuing Bachelor of Engineering Course. The State Government

after receipt of the application, sat over the matter and gave no reply thereto. This application, however was not in the format prescribed in the

aforementioned State Rules. The writ Petitioner institution then made an application to the All India Council for Technical Education (herein after

referred to as the Said Council) appointed by and under the aforementioned Central Act. The said Council carried out inspection of the facilities of

the writ Petitioner institution. The team comprising of the inspectors also included a representative of the State Government. There upon a letter of

intent was issued by the Council in favour of the writ Petitioner. After that, the writ Petitioner wanted the Board of Professional Entrance

Examinations (BOPEE) to allot students to be admitted in the Petitioner institution. The Board of Professional Entrance Examinations refused to

allot students to the Petitioner institution on the ground that the Petitioner institution has been established without permission of the State

Government. At that stage, the Petitioner institution approached the writ Court by filling the writ petition.

8. In terms of the Regulations made by the Council, it is obligatory on the part of its Regional Office to forward the proposal of the applicant to the

State Government and to the affiliating University for obtaining their views within 30 days. According to the writ Petitioner, the Regional Office of

the Council did forward the proposal both to the State Government and to the University of Jammu. However, the State Government and the

University are contending that the same was not forwarded to them.- Neither the Council nor its Regional Office is party to the writ petition or to

these appeals, as a result it would not be possible for this Court to find out whether, in fact, the same was forwarded or not.

9. The learned Judge who dealt with the writ petition held that the Rule requiring a prior permission of the State Government to establish a technical

institution is invalid, as the same is repugnant to the Central Act and the regulations framed by the Council in term of power granted to it by the Act.

10. The State Government, in its appeal, is contending that what has been provided in Sub-rule (1) of Rule 3 of the State Rules has also been provided in Sub-section (1) of Section 3 of the State Act and none of them can be said to be repugnant to the provisions of the Central Act.

11. We have heard learned Counsel for the parties and considered the materials on record.

12. Insofar as the State of Jammu and Kashmir is concerned, List II of the Constitution of India, i.e. the State List Is not applicable to it. In other words, the Legislative power of this State is sovereign and unlimited, except to, the extent curtailed by List I and to some extent by List III, since in respect thereof, the Parliament is also competent to legislate and legislation made by Parliament has supremacy to the extent as mentioned above.

However, the amendment effected to Entry 25 of List III w.e.f. January 3, 1977, has no application in so far as this State is concerned. Therefore, even now Entry 25 of List III applicable to this State is as follows:

Vocation of and technical training of labour.

13. That being the situation if Entry 66 of List I covers the field pertaining to grant of permission to establish a technical institution, then the State law and the Rules framed there under must be deemed to be in excess of legislative power to the extent it deals with colleges or institutions to be set up for imparting technical education.

14. The question whether the Central Act referred above was made in exercise of power enumerated in Entry 66 of List I was considered by the Hon'ble Supreme Court in case of State of T.N. and Another Vs. Adhiyaman Educational and Research Institute and Others, . The Hon'ble Supreme Court at paragraph 27 of the judgment held that the said Act can also be deemed to have been enacted under Entry 25 of List III. After having had said so, the Hon'ble Supreme Court said that any law made by the State Legislature repugnant to the provisions of the Central Act should be deemed to be invalid. Having regard to the nature of Entry 25 of List III applicable to this State, it cannot be said that the Central Act had been made or should be deemed to have been made in exercise of powers

granted to the Central Government as well as to the State

Government concurrently by Entry 25 of the concurrent List, being List III of the Constitution of India.

15. In terms of the provisions contained in Article 248 of the Constitution of India read with Entry 97 of List I, residuary legislative power vests in

the Parliament. However, insofar, as this State is concerned such residuary power is also limited to the extent as follows:

97. Prevention of activities.

(a) involving terrorist act directed towards over-awing the Government as by law established or striking terror in the people of any section of the

people or alienating any section of the people or adversely affecting the harmony of different sections of the people;

(b) directed towards disclaiming, questioning or disrupting the sovereignty and territorial integrity of India or bringing about concession of a part of

the Territory of India from the Union, of causing insult to the Indian National Flag, the National Anthem, and the Constitution, taxes on foreign

travel by sea or air, or inland air travel and on postal article, including money orders, phonograms and telegrams Explanation-In this entry, 'terrorist'

act' has the same meaning as in the explanation to Article 248.

16. In that view of the matter there is also no scope of holding that the Central Act may be deemed to have been made in exercise of its residuary

power. That being the situation and there being no pronouncement or contention that the Central Act, though has been made in exercise of power

enumerated in Item 66 of the List I, any enactment touching the field, i. e. establishment of technical institution, by the State Legislature is in excess

of or without legislative power. On the other hand, the clear pronouncement of the Hon'ble Supreme Court is that the Central enactment should be

deemed to have been made in exercise of the substituted Item 25 of List III. Inasmuch as an enactment made under List III by the Parliament will

prevail upon an enactment made by the State under the same Entry of List III, except where the enactment made by State Legislature has the

assent of the President of India, it was contended by the Petitioner institution that subject State enactment is repugnant. However, in the event the

enactment by Parliament is not in exercise of powers enumerated in List III, unless it is shown that the power exercised by the State is in excess of

the Legislative power of the State or the same has interfered with Legislative power of the Parliament under List I, it cannot be said that the State

Legislation is repugnant to legislation made by the Parliament. No such contention was raised.

17. In the circumstances, we hold in favour of the Appellant State and declare that the judgment and order to that extent is not acceptable.

18. However, while the writ petition was pending, on October 31, 2008, the application made by the writ Petitioner institution was rejected by the

following order:

GOVERNMENT OF JAMMU AND KASHMIR, CIVIL SECRETARIAT

HIGHER EDUCATION DEPARTMENT

Subject: - Establishment of Private Engineering College application made by
Tawi Educational Trust, Akhnoor Road, Jammu.

Government Order: 232-HE of 2008

Dated: -31-10-2008

Whereas, one Sh. Vidhi S. Singh representing himself to be the Chairman cum Managing Director of Tawi Educational Trust approached the then

Hon'ble Minister for Higher Education intimating that the Trust has constructed campus for Yogananda College of Engineering and Technology at

Gurha Brahmana, patoli and applied to AICTE for according necessary approval and the State Government should forward its view to the said

agency to enable further processing of the case by them; Whereas, the application was not made in the format prescribed for the purpose in terms

of rules formulated under the provisions of J&K Private Colleges (Regulations & Control) Act, 2002 and notified vide SRO-339 of 2005;

Whereas, the application so submitted did not even indicate the composition of the Trust, its regulations; site plan or even the scheme of the

financing and other related details;

Whereas, Section 3 of the Jammu and Kashmir Private Colleges (Regulations & Control) Act, 2002 specifically provides that no Private College

in the State shall be established or run without the prior permission in writing, of the Government or the competent authority. It also provides that

the Government shall by notification appoint the competent authority for the accord of permission for purposes of the said Act and as per the

definition of the competent authority, it would mean an officer not below the rank of Principal of a Government Degree College appointed by the

Government for carrying out the purposes of the Act; Whereas, an elaborate set of regulations has been formulated in the rules called the Jammu

and Kashmir Private Colleges (Regulations & Control) Rules, 2005;

Whereas the application was processed in the Higher Education Department and it was observed that the State Cabinet in terms of Cabinet

decision No. 150/13 dated. 14-09-1998 has ordered 'that the requests for setting up of Engineering Colleges be entertained unless detailed

assessment is made in respect of manpower requirement in the concerned field. It was further decided that the Planning and Development

Department shall make the requisite assessment;

Whereas, during the course of processing of the application of the Society, the Planning and Development Department was approached to indicate

the results of the assessment it was required to make in consequence of the referred to Cabinet decision;

Whereas, the Planning and Development Department in terms of communication No;- PD/Edu/Pvt/Eng College/2003 dated 06-08-2008

responded- as under:

...The proposal has been examined in the Planning and Dev, Department and it is felt that it is not feasible to make precise manpower requirement

projection, given the fast changing technological scenario. In the intervening period, rapid globalization has made such (J&K specific) study even

more redundant.

In view of the above, the undersigned is directed to intimate that Higher and Technical Education Department should itself evolve a suitable policy

for the Development of Technical Institutions in the private sector, keeping in view the national norms and grounds. Such a policy/guidelines would

need endorsement of Cabinet/HEG and individual applications should be processed by the department accordingly"". Whereas, in consequence of

the referred to response from the Planning and Development Department, the statistics of demand and capacity available was obtained from the

Board of Professional Entrance Examination (BOPEE) and it got revealed that the ration of demand for pursuit of Engineering Courses and the

availability of seats in Private and Government managed Engineering Colleges of

the State was significantly low viz-a-viz such proportion for seats filled through AIEEE (All India Engineering 'Entrance Examination). In fact the ratio is so low that it is reflective of a very restrictive competition level;

Whereas, inspite of the statistics dictating otherwise, it has been decided that an expert study with reference to fast changing technological scenario and potential of job markets be got conducted by the National Institute of Technology (NIT) Srinagar;

Whereas, National Institute of Technology (NIT), Srinagar has shared the preliminary assessment made by it independently and the same is under examination by the Higher Education Department; Whereas, the recommendation in the light of analysis of the data so obtained in combination with

other inputs relevant for the purpose are in the process of formulation; and

Whereas, the recommendations so emanating shall be considered by the competent authority in due course of time to firm up a policy view in the matter;

Now therefore, it is ordered that pending finalization of a policy view in the matter, no action on the request of Society is warranted presently and

the same is rejected in the context of policy presently applicable on the subject. By order of Government of Jammu and Kashmir.

Sd/-

Commissioner/Secretary to Government,

Higher Education Department

19. The Government while passing the said order dated 31st October 2008 could reject the application, for the application was not in the

prescribed format. That was not done as the Rules prescribing the format came to be made after the application seeking permission was made.

The Government, while processing the application, could apply its mind whether the area where the establishment of the institution has come up

was or was not more productive and useful to the society at large, but it did not do so. It only concentrated its mind to manpower requirement of

the State in the field of study. While doing so, it took note of Cabinet decision dated September 14, 1998. The same provides, amongst others,

that no request for setting up of Engineering College be entertained unless detailed assessment is made in respect of manpower requirement in the concerned field. All though it took note of the said decision of the Government taken as far as on September 14, 1998, but did not even make an attempt to ascertain if any assessment has been made since then to find out whether there is manpower requirement in the field of engineering in the State.

20. Be that as it may, the Government in its Planning and Development Department examined the matter and found that there is a great shortage of technical educational institutions in the State. That suggested there was demand. The same in turn suggested requirement. It, however, felt that the policy/guidelines in this connection should be processed. The matter was, thereafter, referred to the National Institute of Technology, Srinagar, which is said to have made preliminary assessment, but that assessment has not been disclosed. Ultimately, the order rejecting the request held out that no action on the request is warranted presently pending totalisation of a policy. There is a present policy has been accepted in the said order. The request was rejected in the context of the said policy, but without specifying in the context of which part of the said policy.

21. The order dated October 31, 2008 in clear terms suggests that manpower requirement in the State, in the field of engineering is tremendous. It further suggests that many people are interested to become engineers, but in view of extreme paucity of seats available for them, they are unable to pursue such study. Despite that the Government has rejected the request, which action can only be termed as mala fide on the part of the Government.

22. Everything required in terms of the State Act and the Rules are available with the Petitioner institution, namely it is a registered Trust having at least five original residents of this State as its members, and it has land and building. Since it has building it is not required to make a fixed deposit of Rs. 15 lacs. If the manpower requirement of the State in the field of engineering is a fact established, it goes without saying, that establishment of institutions, competent to make available such manpower, shall prove productive and useful to the society at large. It is true that the area where establishment of such institutions can be more productive and useful to the

society is one of the factors which could be considered, but the order dated October 31, 2008, of the Government suggests that same was not considered at or before rejecting the request. In other words it suggests that establishment of the institution in the area where the same had been proposed to be established shall prove more productive and useful to the society at large, was such a fact that the Government was not required to ponder over the same further.

23. In the circumstances, for all practical purpose, it should be deemed that the Government order dated 21st October 2008 tantamount to grant of permission to the writ Petitioner institution for establishing an institution for imparting technical education. It is made clear that only in the event the Petitioner Institution has been authorised by the Council to take students for admission, it shall be entitled to do so, but not otherwise. It goes without saying, that, in view of declaration given by this Court as regards grant of permission to establish the institution by the State Government, in the facts and circumstances narrated above Jammu University is bound to give affiliation to the writ Petitioner institution; provided however, the writ Petitioner institution has been granted permission by the Council to take students for any specific academic years, unless the permission is for an unlimited period.

24. In view of what has been stated above, the judgment and order under appeal is set aside but the writ petition is allowed to the extent indicated above.

25. In the interest of students of the State we direct the State Government to ascertain from the Board of Professional Entrance Examination (BOPEE) whether the students of the State, who, according to Board of Professional Entrance Examination, are qualified to pursue technical education, but could not be accommodated in any of the technical institutions for non-availability of seats and if so, to notify the Board of Professional Entrance Examination to send those students for counselling to the institution of writ Petitioner provided, however, the writ Petitioner has been authorised by the Council to take students for the present session. Disposed of accordingly.