

(1991) 01 KAR CK 0074

In the Karnataka High Court

Case No : Writ Petns. No"s. 16601 of 1990

Tejaswini Patil and etc.

APPELLANT

Vs

Bangalore University and others

RESPONDENT

Date of Decision : 16-01-1991

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 19 (1) (g), 21, 226

Karnataka Educational Institutions (Prohibition of Capitation Fee) Act, 1984 — Section 3, 4 (1), 5, 7, 9

Karnataka State Universities Act, 1976 — Section 37, 53

Citation : AIR 1991 Kar 352 : (1991) ILR (Kar) 387 : (1991) 1 KarLJ 556

Hon'ble Judges : M.M. Mirdhe, J;M. Rama Jois, J

Bench : Division Bench

Advocate : Kashinath Rao Patil, P. Vishwanatha Shetty, for the Appellant;
Dayanand Karant, C. Shivappa, Advocate General, D.R. Rajashekarappa, Govt.
Pleader, S.G. Sundaraswamy, V.A. Mohanarangam and S. Anantha, for the
Respondent

Judgement

Rama Jois, J.—Whether the evil of collection of heavy capitation fee for giving admission to the private medical colleges in the State by them, is really abolished as intended by the Karnataka Educational Institutions (Prohibition of Capitation Fee) Act 1984, ("the Act" for short), or the evil is aggravated on account of the manner in which the Act is implemented by the State Government, in that, while the collection of heavy capitation fee continues unabated as alleged, heavy burden by way of tuition fees added by an order of the State Government issued u/s 5 of the Act? Is the main question of great public importance, which arises for our consideration in these two writ petitions presented by the petitioners who complain that they were dented admission to the private medical colleges concerned, though they had secured higher percentage of marks in the qualifying examination, whereas large number of students who had secured lesser marks than them, have been admitted into the respondent-medical colleges.

I. 2. The gist of the pleadings in Writ Petition No. 16601 of 1990, is as follows :

(i) The petitioner is a citizen of India. She passed the II year pre-university examination held by the Pre-university Board of this State in the month of March/April 1990. Her optional subjects in the pre-university course were Physics, Chemistry, Mathematics and Biology, which constitute the basis for selection for admission to the medical colleges in the State. She applied to the two private medical colleges, namely, Dr. Ambedkar Medical College, Bangalore, and Kempegowda Institute of Medical Sciences, Bangalore. The father of the petitioner approached the Chairman of the Governing Council of Dr. Ambedkar Medical College and he demanded a sum of Rs. 3.5 lakhs for giving the petitioner a seat in the college. The petitioner was also told that as far as the amount of Rs. 3.5 lakhs was concerned, no receipt will be issued. As the petitioner was unable to pay the said amount, she was not given a seat in the said college. The father of the petitioner approached the Principal of Kempegowda Institute of Medical Sciences, to which college also the petitioner had applied and he also contacted the Vice-President of the Committee and the father of the petitioner was told that at least Rs. 3 lakhs should be paid for admitting the petitioner to the 1 year MBBS course of that college. As the petitioner was unable to pay such huge amount, the petitioner was not given a seat. The father of the petitioner in the circumstances addressed a letter to the Vice-Chancellor of the Bangalore university complaining about the collection to the tune of Rs. 5 to 10 lakhs for giving a seat in the private medical colleges. Copy of the letter addressed is produced as Annexure-B. The father of the petitioner also addressed a representation in detail complaining about collection of huge amount for giving seats in private medical and engineering colleges in the State, to the Chancellor of the Universities in the State. Copy of the letter is produced as Annexure-C. After making the general allegations regarding the practice of collection of heavy capitation fee for giving seats in private medical colleges, it was stated in particular, relating to the demand of capitation fee for giving a seat to the petitioner.

(ii) The petitioner has stated that reference to this evil had figured on the floor of the State Legislature also and the Speaker himself had stated on 12-6-1990 on the floor of the Legislature that the private medical colleges in the State were extracting money in the name of education. The petitioner has also alleged that the Members of the State Legislature had criticised the Government in the Legislative Assembly on 13-6-1990 for the failure on the part of the Government to abolish the capitation fee in medical colleges. The petitioner has also produced an article published on 29-7-1990 issue of "Deccan Herald" under the head "Capitation boom", according to which even according to the official estimates, the private colleges in the State were collecting Rs. 70 to Rs. 80 crores every year in the form of donations and fees.

(iii) Apart from the capitation fee, which the management are collecting unauthorisedly, the State Government itself has fixed the tuition fee in respect of

management seats in private medical colleges at Rs. 25,000.00 per annum for Karnataka students, Rs. 60,000.00 per annum for non-Karnataka students and Rs. 80,000.00 per annum for foreigners, though according to the Regulations of the university and the conditions of affiliation, the fees prescribed in affiliated colleges should not be twice the standard fees fixed for the course by the University. The standard fees prescribed in Government colleges and for government seats in private colleges is Rs. 2,000.00 per annum, whereas the tuition fees fixed for management seats was 121/2 times more even in respect of Karnataka students as the fee fixed is Rs. 25,000.00 per annum and it is 30 times for citizens who are non-Karnataka as the fee fixed was Rs. 60,000.00 and for foreign students it was 40 times the fee fixed in Government colleges and government seats in private colleges.

(iv) The petitioner has pleaded that the colleges having been affiliated to the Bangalore University, are instrumentalities of the State and therefore "State" as defined in Art. 12 of the Constitution of India and therefore bound by Art. 14 of the Constitution and therefore selection for admission in these colleges had to be made strictly according to merit. In the alternative, the plea of the petitioner is, even assuming that the private medical colleges and their managements are not "State" as defined in Art. 12 of the Constitution, they are discharging public duties, which are regulated by the Act and the Universities Act, and particularly as the Act prohibits the collection of capitation fee, the private colleges are required to admit students to the colleges strictly according to merit as that is the only intent and purpose of the Act and as that is the only method by which the object and purpose of the Act, namely, prohibition of collection of capitation fee, could be ensured.

3. On the above allegations, inter alia, the petitioner has sought for the following reliefs :

"XXX XXX XXX

(c) to direct the university and the Medical Colleges i.e. respondent Nos. 2-4 herein to fill up all the seats on the basis of merit only;

(d) to direct the respondents not to collect the tuition fee in excess of what has been prescribed by the University;

(e) grant mandamus against the university directing it to enforce the statutes governing the affiliation of the colleges and direct the university to prevent these affiliated colleges from collecting capitation fee and tuition fee at the rate of Rs. 25,000/- per annum and three and half lakhs;

(f) to direct the respondent Nos. 3 and 4 to admit the petitioner to the 1st year MBBS course class of any of the medical colleges."

Thus it may be seen that the petitioner has sought for a writ of mandamus restraining the respondent-colleges from collecting higher rate of tuition fee and also from collecting capitation fee and directing the respondent Medical Colleges

to admit her to the MBBS degree course.

4. Statement of objection has been filed on behalf of the colleges and their managements. In the statement of objection, the allegations made in the petition regarding the demand of an amount of Rs. 3 to 3.5 lakhs as a condition precedent for giving the seat, is stoutly denied. The plea of the respondents is that except regarding the seats earmarked as Government seats to which the candidates are selected by a committee appointed by the State Government strictly according to merit, subject to reservation in favour of backward classes, the management had absolute discretion to select candidates of their choice and there was no obligation on the part of the managements to make selection for admission to the medical colleges strictly according to merit. The allegation of the petitioner that large number of students who have secured lower marks than the petitioner have been selected, is, however, not controverted. In the circumstances, the respondent-colleges had been called upon to furnish the particulars regarding the number of applications received and also the number of candidates admitted and the percentage of their marks in the pre-university examination. These particulars have not been furnished by the Ambedkar Medical College and the learned counsel appearing for the college submitted that the office bearer who was in charge of the particulars was not in station, but however he does not dispute that large number of candidates who had secured lesser marks than the petitioner have been admitted.

5. As regards Kempegowda Institute of Medical Sciences, all the names of applicants and the percentage of marks secured by them in the Pre-university or equivalent examination, have been furnished. The petitioner was one of the applicants. The list of 100 candidates selected for admission to the I year MBBS course during the current academic year, into the said college has been furnished. Out of one hundred intake of the college, 14 are Government seats and 14 candidates were selected by the Government Selection Committee as against those seats. Out of the 86 candidates admitted by the Managing Committee, only 24 candidates have secured more marks than the petitioner and as many as 62 candidates who have secured lower marks than the petitioner have been selected. From the particulars relating to the percentage of marks secured by the selected candidates, it is seen as follows :

percentage of marks Number of candidates selected _____

77% and above 24 76% and below up to 70% 15 69% and below up to 60%
20 59% and below 27 _____

This statement indicates that the management has chosen to select larger number of candidates who have secured lesser marks in preference to candidates

who had secured higher marks, though according to the particulars of the applicants, there were large number of candidates who had secured more marks, were available.

II. 6. The gist of the pleading in Writ Petition 17342 of 1989, is as follows : The petitioner in this case passed the Pre-university examination with Physics, Chemistry and Biology as optional subjects securing 68 per cent of marks in the said subjects, which constituted the basis for selection for admission to the medical degree course. He applied to the M. R. Medical College, Gulbarga, established and managed by the H.K.E. Society, Gulbarga, who are impleaded as respondents 1 and 2 to this petition seeking admission to the MBBS course during the academic year 1989-90. The petitioner has alleged that candidates who have secured lower marks than the petitioner, as low as even 50%, have been selected for admission. The petitioner alleges that the selection made is arbitrary and discriminatory. The petitioner has also given the names of candidates who have secured lesser marks than the petitioner who have been admitted to the I year MBBS degree course in the first respondent-college. The plea regarding the applicability of Art. 14 and obligation to admit students according to merit, in view of the provisions of the Act made in this petition is similar to those made in W. P. No. 16601 of 1990.

7. Statement of objection has been filed on behalf of respondent No. 1-medical college and respondent No. 2-the management of medical college. The stand taken by the respondents is that the respondents have absolute liberty of admitting students of their choice. Respondents 1 and 2 are not "State" as defined in Art. 12 of the Constitution and therefore the petitioner cannot rely upon Art. 14 of the Constitution and say that the said Article is violated. Respondents 1 and 2 being private bodies, have absolute right and discretion to make admission according to their choice and except the prohibition of collection of capitation fee, it is not the requirement of the Act that admissions should be made according to merit. As far as factual allegation that large number of students including those, whose names are furnished in para 21 of the petition, who had secured much less percentage of marks than the petitioner in the qualifying examination have been admitted to the college, is concerned, the same is not disputed.

8. Having regard to the great public importance involved, these petitions have been referred to Division Bench by the learned Judge before whom the matter had come up earlier. Thereafter, the petitioner in W.P.No. 16601 of 1990 also made an application under O.1, R. 8 of the CPC seeking permission to prosecute the writ petition in a representative capacity. Accordingly, permission was granted by our order dated 11-9-1990 and the requisite notice was published in "Deccan Herald" -- English daily.

9. Sri Kashinatharao Patil, the father and natural guardian of the petitioner in W. P. No. 16601 of 1990, appeared in person and argued the case and Sri P. Vishwanatha Shetty, the learned Counsel, addressed arguments for the petitioner

in W. P. No. 17342 of 1990. Sri S. G. Sundaraswamy, Senior Counsel, argued for the respondents 1 and 2 -- the M. R. Medical College, Gulbarga, and its management in W. P. No. 17342 of 1990 and Sri V. A. Mohana Rangam, learned Counsel, appeared for Dr. Ambedkar Medical College and its management and Sri S. Anant, learned Counsel, appeared for the Kempegowda Institute of Medical Sciences and its management. The learned Advocate General appeared for the State in both the petitions and Sri Srinivas Anand, the learned Counsel, appeared for the Bangalore University. Sri K.R.D. Karanth, learned Counsel for the intervener in W. P. No. 17342 of 1990, The T.M.A. Pai Foundation; who is the Management of two Private Medical Colleges at Udupi and Mangalore, adopted and supported the contentions urged by the learned Counsel for respondents-1 and 2 in that petition.

10. The learned counsel for the petitioners urged the following contentions :

(i) The private medical colleges, which are affiliated to any of the Universities established under the Karnataka State Universities Act, 1976 ("the Universities Act" for short), and which are governed by the provisions of the said Act, and their managements are instrumentalities of the State and fall within the definition of the word "State" as defined in Art. 12 of the Constitution, and therefore bound by the injunction to accord equal treatment to all persons as required under Art. 14 of the Constitution and consequently they were bound to make selection among eligible applicants strictly according to merit and as the petitioners had secured more marks than the candidates selected and admitted, they were entitled to the issue of a writ of mandamus to the college and the management to select them and admit them to the I year MBBS course.

(ii) Even on the basis that the private medical colleges and the managements do not fall within the definition of the word "State" as defined under Art. 12 of the Constitution, they being persons discharging public duties of importing education and being bound by the provisions of the Act and the Universities Act, are amenable to writ jurisdiction of this court under Art. 226 of the Constitution.

(iii) Having regard to the provisions of the Act, the private medical colleges are bound to make selection for admission to the course according to merit and as the same has not been done by the respondent-medical colleges, the petitioners are entitled to the issue of a direction to the respective respondents to select and admit the petitioners to the 1 year MBBS course to which they had applied for, at the hands of this court under Art. 226 of the Constitution of India.

11. Per contra, it is the contention of the learned counsel appearing for the private medical colleges and the respective managements that they do not fall within the definition of the word "State" as defined in Art. 12 of the Constitution and therefore they are not bound by the fundamental rights set out in Part-III of the Constitution. They also contended that they being purely private bodies, no writ can be issued to them under Art. 226 of the Constitution. They also contended that there was nothing in the provisions of the Act, which requires the

management to make selection for admission to the medical colleges according to merit. On the other hand, except such number of seats as are earmarked as Government seats as a result of the agreement reached between the Government and the management of the private colleges concerned, in respect of rest of the seats, the management had absolute right to select candidates of their choice and therefore the petitioners have no manner of right to claim admission to the private medical college just because they have secured more marks in the pre-university examination and therefore no writ can be issued to them under Art. 226 of the Constitution of India.

12. No statement of objection has been filed either on behalf of the State or on behalf of the University. Sri C. Shivappa, the learned Advocate General, appearing to the State fully supported the contention of the petitioners. He said that when under the Act capitation fee is abolished, the only course open to the private medical colleges and their managements was to make admissions according to merit, as otherwise it would result in clandestine collection of capitation fee. The learned counsel for the Bangalore university also supported the submission made by the learned Advocate General.

13. We proceed to consider the second and the third contentions together, as in our opinion, they are interconnected, for the reason, if the private medical colleges affiliated to any of the Universities established under the Karnataka State Universities Act, are discharging public duties particularly in relation to admission to the medical colleges and if having regard to the provisions of the Act they are under a statutory obligation to make selection for admission according to merit, such an obligation on the part of the respondents itself would constitute the basis for the exercise of jurisdiction by this court under Art. 226 of the Constitution and give the relief sought for by the petitioners even on the basis that they are not instrumentalities of State and therefore not "State" as defined in Art. 12 of the Constitution.

14. In the first instance, we proceed to analyse the provisions of the Act. As the title of the Act indicates, the Act was enacted by the Legislature with the object of prohibiting the collection of capitation fee. The Preamble to the Act reads :

"An Act to prohibit the collection of capitation fee for admission to educational institutions in the State of Karnataka and matters relating thereto.

Whereas the practice of collecting capitation fee for admitting students into educational institutions is wide-spread in the State;

And whereas this undesirable practice beside contributing to large scale commercialisation of education has not been conducive to the maintenance of educational standards;

And whereas it is considered necessary to effectively curb this evil practice in public interest by providing for prohibition of collection of capitation fee and matters relating thereto;"

The expressions "capitation fee", "educational institution", "government seats" and "management" are defined under the Act. They read :

"(b) "Capitation fee" means any amount by whatever name called, paid or collected directly or indirectly in excess of the fee prescribed u/s 5, but does not include the deposit specified under the proviso to section 3;"

(c) "Educational institution" means any institution by whatever name called, whether managed by Government, private body, local authority, trust, university or any other person carrying on the activity of imparting education in medicine or engineering leading to a degree conferred by a university established under the Karnataka State Universities Act, 1976 (Karnataka Act 28 of 1976) and any other educational institution, or class or classes of such institution, as the Government may, by notification specify"

(e) "Government seats" means such number of seats in such educational institution or class or classes of such institutions in the State as the Government, may from time to time specify for being filled up by it in such manner as may be specified by it by general or special order on the basis of merit and reservation for Scheduled Castes, Scheduled Tribes, Backward Classes and such other categories, as may be specified, by the Government from time to time, without the requirement of payment of capitation fee or cash deposit."

(f) "management" means the managing committee or the governing body, by whatever name called, of an educational institution to which the affairs of the said institution are entrusted and where such affairs are entrusted to any person, whether called by the name of Secretary correspondent or by any other name includes also such person."

Section 3 of the Act prohibited the collection of capitation fee by any educational institution or by any person who is in charge or responsible for the management of such institution, but the proviso authorised the Government to regulate collection of capitation fee during a period up to five years in respect of institutions established earlier to the commencement of the Act. The Section reads :

"3. Collection of capitation fee prohibited.-- Notwithstanding anything contained in any law for the time being in force, no capitation fee shall be collected by or on behalf of any educational institution or by any person who is in charge of or is responsible for the management of such institution :

Provided that subject to such rules as may be prescribed or such conditions as may be specified by general or special order, from time to time, the Government may, notwithstanding anything contained in this Act permit any educational institution established before the date of commencement of this Act and maintained or developed solely or substantially out of amounts collected as capitation fee or any class or classes of such institutions, to continue to receive such capitation fee or cash deposits in such manner, to such extent and for such

period as the Government may, by order, specify, so however that such period shall not in any case extend beyond five years from such date."

Section 4(1) provides for regulation of admission into educational institution. The relevant portion of the section reads :

"4. Regulation of admission to educational institutions etc.-- Subject to such rules, or general or special orders, as may be made by the Government in this behalf and any other law for the time being in force-

(1)(a) the minimum qualification for admission to any course of study in an educational institution shall be such as may be specified by -

(i) the University, in the case of any course of study in an educational institution maintained by or affiliated to such University;

Provided that the Government may, in the interest of excellence of education, fix any higher minimum qualification for any course of study;

(ii) the Government, in the case of other courses of study in any other educational institution;

(b) the maximum number of students, that could be admitted to a course of study in an educational institution shall be such as may be fixed by the Government from time to time."

There is no dispute that the proviso to S. 3 and sub-section (2) of S. 4 were transitory provisions applicable during a period of five years from the date of commencement of the Act during which period collection of capitation fee at the rates prescribed by the Government was permitted by the Government and therefore they have ceased to operate. Section 5 of the Act provides for regulation of fees chargeable by the educational institution. It reads :

"5. Regulation of fees etc.-- (1) It shall be competent for the Government, by notification, to regulate the tuition fee or any other fee or deposit or other amount that may be received or collected by any educational institution or class of such institutions in respect of any or all class or classes of students.

(2) No educational institution shall collect any fees or amount or accept deposits in excess of the amounts notified under subsection (1) or permitted under the proviso to section 3.

(3) Every educational institution shall issue an official receipt for the fee or capitation fee or deposits or other amount collected by it.

(4) All monies received by any educational institution by way of fee or capitation fee or deposits or other amount shall be deposited in the account of the institution, in any scheduled Bank and shall be applied and expended for the improvement of the institution and the development of the educational facilities and for such other related purposes and to such extent and in such manner as may be specified by order by the Government.

(5) In order to carry out the purposes of sub-section (4), the Government may require any educational institution to submit their programmes or plans of improvement and development of the institution for the approval of the Government,"

Section 6 provides for regulation of expenditure and maintenance of accounts by the educational institutions and S. 7 provides for imposition of penalties for violation of the . provisions of the Act. Section 9 empowers the Government to enter into the premises of private educational institutions or of their managements and inspect their accounts to ensure that the provisions of the Act are not violated. Section 14 of the Act empowers the Government to frame rules for carrying out all or any of the purposes of the Act.

15. As can be seen from S. 3, though collection of capitation fee was prohibited, the proviso empowered the Government to permit educational institutions established before the date of commencement of the Act, to continue to collect capitation fee at the rate not exceeding the rate prescribed by the Government during a period not exceeding five years. The Act came into force on 11th July 1983. Consequently, the proviso which provided for collection of prescribed capitation fee by educational institution established prior to the commencement of the Act, came to an end by 11-7-1988. Thereafter, it is common ground that no educational institution including the respondent-colleges, to which the Act applies, can collect any capitation fee.

16. The constitutional validity of this enactment had been challenged by several managements of private engineering colleges in the State in the case of Bapuji Educational Association Vs. State, In the said case, it was the contention of the petitioners therein that they had the fundamental right to establish educational institution of their choice and the said right was traceable to Arts. 14, 19(1)(g) and 21 of the Constitution. This contention of the petitioners therein was upheld. In the light of existence of such fundamental right in the petitioners therein, the next question considered by this Court was as to whether the abolition of capitation fee in toto would amount to the violation of the fundamental rights of the petitioners therein to establish and manage the educational institutions of their choice. This Court held that it was impossible for any private individual or body to exercise his/its fundamental right of establishing and managing a private educational institution, in particular, colleges like engineering and medical, without collecting a reasonable amount required for running the colleges, from the students. This Court, however, held that such collection could be only for meeting recurring expenses and not for capital expenditure. It was pointed out that according to S. 53 of the Universities Act every private college had to be established first with buildings, equipments, laboratories etc., before seeking affiliation and it was also held that in acquiring land, buildings, equipments etc., the resources should be got either from public donations or Government grants, but the said burden could not be thrown on the students seeking admission to the college concerned. In the light of the said view, it was held that in view of the

proviso to S. 3 of the Act providing for prescribing the capitation fee which could be collected from the students selected and admitted as against seats reserved to be filled up by management and the fixation of capitation fee at Rs. 40,000/- for admission to private engineering colleges, there was no violation of any of the fundamental rights of the petitioners therein and it was further held that the provisions of the Act might be open for challenge on the ground of violation of fundamental rights guaranteed under Articles 14, 19 and 21 of the Constitution after the expiry of five years from the date of commencement of the Act, if no provision is made by the State to enable the private colleges/ managements to collect fees from the students to the extent necessary for maintaining and managing the colleges.

17. From the above judgment, it is clear that so long as provision is made by the State for collection of fees from the students which is sufficient to meet the recurring expenses required for running the colleges, the management of private educational institutions cannot contend that the provisions are viola-live of Arts. 14, 19 and 21 of the Constitution.

18. The State Government has issued a notification dated 15-5-1985 under S. 2(c) of the Act. It reads :

"In exercise of the powers conferred by clause (c) of Section 2 of the Karnataka Educational Institutions (Prohibition of Capitation Fee) Act 1984 (Karnataka Act No. 37 of 1984), the Government of Karnataka hereby specifies the following educational institutions as Educational Institutions for the purpose of the said Section :

- (i) Pre-Primary Schools
 - (ii) Primary Schools
 - (iii) High Schools
 - (iv) Teacher Training Institutes (T.T.I.)
 - (v) Certificate of Physical Education (C.P.Ed.)
 - (vi) Nursery Teacher Training Institutes
 - (vii) Junior Colleges Teaching Pre-University Education
 - (viii) Degree Colleges
 - (ix) Bachelor of Education College (B. Ed.)
 - (x) Bachelor of Physical Education Col leges (B.P.Ed.)"
- (Underlining by us)

Therefore, it is clear that the respondents -

medical colleges being degree colleges are educational institutions bound by the

provisions of the Act. As stated earlier, though S. 3 prohibited collection of capitation fee by the educational institutions, the proviso to the said Section empowered the Government to fix the rates of capitation fee, which could be collected from each of the student concerned by the educational institution concerned during a period of five years from the date of commencement of the said Act. Accordingly, the Government had fixed the capitation fee which could be collected from the students by the educational institution concerned during the period of five years from the date of commencement of the Act. But after the expiry of five years, even the Government has no power to provide for collection of capitation fee. The resultant position now is, no private engineering or medical colleges can collect any capitation fee. Naturally the managements would have challenged the constitutional validity of the Act and in the absence of any provision for collecting the amount required for running the colleges the Act was liable to be struck down as violative of Arts. 14, 19 and 21 of the Constitution in view of the ratio of the decision in *Bapuji Educational Association Vs. State*. But in order to avoid such a grievance by the managements of medical colleges after the expiry of five years after the commencement of the Act, the State Government after having fixed the Government seats in each of the private medical colleges by agreement between the Government and the Management of the medical colleges concerned and also for extending hospital facilities to them at Government Hospitals has fixed higher rate of tuition fee so as to compensate the managements in view of the prohibition for collecting the capitation fee. The number of seats fixed for the three respondent medical colleges are as below:

Name of the College

Government seats

Management seats

Total intake

M. R. Medical College, Gulbarga

48

135

183

Dr. Ambedkar Medical College, Bangalore

10

70 - General 20 - SC

100

Kempegowda Institute of Medical Sciences

14

The order passed by the State Government under S. 5 of the Act, which empowered the State Government to fix the rates of tuition fee, reads :

" Government of Karnataka

No. HEW 102 MSF 87 Karnataka Govt. Secretariat, M. S. Buildings, Bangalore, dated: 5th June, 1989

NOTIFICATION

In exercise of the powers conferred by subsection (1) of Section 5 of the Karnataka Educational Institutions (Prohibition of Capitation Fee) Act, 1984, the Government of Karnataka hereby fix the tuition fee and other fees and deposits that may be collected by the private medical colleges in the State with effect from the academic year 1989-90 and until further orders as follows :

(a) Candidates admitted to seats in Government Medical Colleges shall be charged a tuition fee of Rs. 2,000/- each per annum (Rupees two thousand only);

(b) Candidates admitted against Government seats in private medical colleges shall be charged a tuition fee of Rs. 2,000/- each per annum (Rupees two thousand only). For this purpose "Government seats" shall mean Government seats as defined by Section 2(e) of the Karnataka Educational Institutions (Prohibition of Capitation Fees) Act, 1984;

(c) Karnataka Students (other than students admitted against Government seats as at (b) above) admitted by private medical colleges shall be charged tuition fee not exceeding Rs. 25,000/- each per annum (Rupees twenty five thousand only);

(d) Indian students from outside Karnataka admitted by private medical colleges shall be charged tuition fee not exceeding Rs, 60,000/- each per annum (Rupees sixty thousand only);

(e) Foreign students and non-resident Indian students admitted by private medical colleges shall be charged tuition fee not exceeding Rs. 80,000.00 per annum (Rupees eighty thousand only).

2. Besides the tuition fee as aforesaid, "other fees" that may be collected by the private medical colleges in the State from every student admitted by them shall not exceed the following rates:

1.

Registration fee

Rs. 10-00

2.

Admission fee

Rs. 50-00

3.

Laboratory fee

Rs. 200-00 p.a.

4.

Sports fee

Rs. 50-00 p.a.

5.

Library and Reading Room fee

Rs. 1000-00 p.a.

6.

Magazine fee

Rs. 10-00 p.a.

7.

Identity Card fee

Rs. 10-00

8.

Calendar fee

Rs. 10-00 p.a.

9.

Medical examination fee

Rs. 10-00 p.a.

10.

Refundable caution Money deposit

Rs. 1000-00

3. The private medical colleges are also permitted to collect any other fees prescribed by the Li university to which they are affiliated.

4. The fees, subject to ceiling as aforesaid may be collected on a "per year" basis.

5. The private medical colleges are also permitted to obtain bank guarantees for

the full course fee from Indian students who are from outside Karnataka (excluding students admitted against Government seats) and from foreign and non-resident Indian students. The students admitted against Government seats and Karnataka students admitted against Management quota shall not be required to furnish bank guarantees as aforesaid.

6. The private medical colleges are also permitted to collect tuition fee from repeaters in proportion to the subject/subjects repeated viz.,

Tuition fee per annum	x	No. of subjects repeated	Total	No. of subjects taught in that year

7. The total intake percentage of Government seats for Karnataka students, seats for Indian students from outside Karnataka and seats for foreign and non-resident Indian students shall be as may be notified by Government by order from time to time.

8. The fees at the aforesaid rates may be collected only from students joining first year MBBS during 1989-90. In respect of students who have already joined MBBS course earlier to the academic year 1989-90, the fees to be charged shall be the fee that was in vogue at the time of their admission to the course.

9. The fee structure as ordered by this Notification shall apply for the 4 1/2 year study period of students admitted during the academic year 1989-90.

10. The Private Medical Colleges are at liberty to charge less than the fees prescribed at 1(c), 1(d), and 1(e) above in respect of the different categories mentioned therein.

11. The Private Medical Colleges are also permitted to collect Rs. 2,500/- from every student admitted to I MBBS during the academic years 1989-90 in terms of G.O. No. HFW 165 MME 8 dated 17-1-84 and G.O. No. HFW 4 MME 88 dated 14-3-88 until further orders of the Government in this regard. This amount shall be kept in a separate account in a scheduled bank by the concerned private medical college.

12. Every private medical colleges shall issue an official receipt for the fee or deposit collected by it, which shall be deposited in the account of the Institution in a Scheduled Bank as required by sub-section (4) of Section 5 of the Karnataka Educational Institutions (Prohibition of Capitation Fee) Act, 1984.

13. In exercise of the powers conferred by sub-section (2) of Section 6 of the aforesaid Act, the Government hereby direct that every private medical college shall submit quarterly-returns in respect of its income and expenditure in the same form as its Budget estimates and income and expenditure statements are drawn up. For this purpose, the quarters shall be the quarters ending with 31st March, 30th June, 30th September and 31st December of every calendar year. Each private medical college shall also submit to Government 2 copies of its

budget estimates within 3 days after the budget estimates are placed before competent authority for approval. Each private medical college shall also submit within 3 days of placing its annual accounts for approval before the general body, 2 copies of such audited statement of accounts and annual report along with the resolution of the general body thereon."

As can be seen from the above order, in respect of Karnataka students, whereas the normal tuition fee for whole year is Rs. 2,000/-in Government colleges and in respect of Government seats in private medical colleges, it has been increased to Rs. 25,000.00 per annum for management seats. The resultant position is, for a period of four and half years every Karnataka candidate admitted to management seats in a private medical college has to pay a total tuition fee of Rs. 1,12,500.00 as against only an amount of Rs, 9,000.00 which a candidate is required to pay, but for the above order. By this method every private medical college is allowed to collect Rupees 1,03,500.00 from each student admitted against the management quota, if he happens to be a bona fide resident of Karnataka, though it is required to be paid in instalments, that is, every year. In respect of non-Karnataka students, the tuition fee fixed is Rupees 60,000.00 per annum which comes to Rupees 2,70,000.00 for four and half years and it is Rupees 80,000.00 per annum in respect of foreign students, which comes to Rupees 3,60,000.00 per student for the whole course.

Thus, it is clear what the Government has really done under S. 5 of the Act is to compensate the private medical colleges by permitting them to collect the entire money required for their recurring expenses, which they were entitled to collect from the students, as held in *Bapuji Educational Association Vs. State*, in the form of tuition fee. In other words, what the Government has done is, that the same amount which the Government could have permitted the private medical colleges to collect as capitation fee under the proviso to S. 3 of the Act, has now been permitted to be collected in the form of tuition fee by fixing the tuition fee at a very high rate compared to the normal amount of tuition fee fixed in respect of Government colleges and Government seats in private medical colleges.

19. From the provisions of S. 3 read with the definition of "capitation fee" and Section 5 of the Act, it is clear that both educational institution concerned and its management are prohibited from collecting any amount in addition to the fees prescribed under S. 5 of the Act, But as stated earlier, the allegations made in Writ Petition No. 16601 of 1990 is that in addition to the exorbitant rate of tuition fee fixed by the State Government under S. 5 of the Act which is an authorised collection which the medical colleges are making, the management of the private colleges are continuing to collect the capitation fee of Rs. 3 to 10 lakhs from candidates or their parents, unauthorisedly without passing on receipts and after an applicant is selected by the managements for admission after receiving the capitation fee, instructions are being issued to the Principals of the colleges to admit the student after collecting the prescribed fee. If what the petitioners have stated are true, the abolition of capitation fee is only in name and a propaganda

meant to be believed by the members of the general public, other than those who have paid the capitation fee and got the seats and those like the petitioners who have failed to get the seats for non-payment of capitation fee, and actually the result brought about is that after the coming into force of the Act prohibiting the collection of capitation fee, the evil has aggravated, in that, earlier the managements were only collecting capitation fee, whereas the tuition fee was very low, and now in addition to the exorbitant rate of tuition fee of Rs. 25,000.00 per annum which the managements are entitled to collect and are collecting against receipts, the managements are without any inhibition collecting capitation fee in the same manner in which they were collecting capitation fee earlier clandestinely. If this is the real situation brought about by the Act and the Government order fixing exorbitant tuition fee, the managements are certainly placed in a better position than they were before the coming into force of the Act.

20. We shall consider as to whether the allegation that the managements have been collecting heavy amounts as capitation fee clandestinely, is substantiated, later. In the first instance we proceed to consider as to whether the contention of the petitioners that in view of the provisions of the Act it is obligatory for the managements to make selection according to merit. The point is not *res integra*. In the case of *Bapuji Educational Association Vs. State*, , this Court considered as to whether mere fixing of certain number of seats as free seats and the prescribing of capitation fee by the Government, was sufficient to achieve the objects of the Act, and it was held that it was not. The relevant portion of the judgment reads :

"54..... unless Rules are framed not only to ensure that no amount is collected in respect of number of seats for which the collection of capitation fee is prohibited, but also to ensure that no amount in excess of the maximum amount of Capitation Fee is collected in respect of other seats the evil would continue unabated and clandestinely and might get aggravated. Therefore, I am unable to agree that declaration of Government seats and the taking over of reservation in respect of those seats are essential for achieving the object of the Act. I do agree that by mere declaration of certain number of seats as free seats and by fixing the maximum rate of capitation fee in respect of other seats, the evil cannot be eradicated. But, as pointed out above, in addition to such declaration, it is absolutely essential for the Government to frame rules for effective implementation of the Act. Therefore, the Government should frame rules for the purposes of the Act requiring the management of the institutions :

(1) To submit to the State Government the rules or policy made by them if they so desire for the purpose of ensuring that the availability of substantial number of seats both free and with Capitation Fee in favour of candidates of the region or the classes for whose benefit the institutions had been established.

(2) To require the management to make selections within the group or class of persons in whose favour the management concerned is desirous of giving a seat strictly according to merit. This should be not only in respect of those who are

seeking selection against free seats but also for those who are seeking selection against other seats on payment of only the prescribed amount of Capitation Fee.

Once the statutory Rules assure the selection on the basis of merit, among the applicants to a College and belonging to a particular class, no candidate would pay or feel compelled to pay any amount in respect of free seats or more amount in respect of other seats".

Thus it may be seen that this Court held that it was necessary for the Government to frame Rules requiring the private medical colleges to make selection according to merit.

21. As far as Government seats are concerned, selections are made by the Selection Committee constituted by the Government and no capitation fee could be collected from the students and the tuition fee for them is also only Rs. 2,000.00 per annum. As regards the number of Government seats, it is common ground that it is fixed by agreement, having due regard to the hospital facility in Government Hospitals extended to the college concerned, without which the college cannot function, and also having due regard to the provision for higher rate of tuition fee prescribed in respect of management seats so as to compensate for the loss of capitation fee after the proviso to S. 3 of the Act ceased to operate.

22. It is not even the case of the respondent-colleges and their managements that they are entitled to collect any money other than the fee prescribed by the Government Order made under S. 5 of the Act. The allegation, however, is that they are collecting capitation fee clandestinely. The State Government, having fixed the tuition and other fees, in not framing the Rules under S. 14 of the Act providing for selection of candidates against management seats strictly according to merit, in each of the categories of applicants, if the management of any college had earmarked seats for any class of persons for whose benefit the institution was established, if not strictly according to merit among all the applicants, has failed in its duty and this is the cause for the aggravation of the evil, as alleged by the petitioners. The question, however, for consideration is whether even in the absence of such rules, whether the Act creates an obligation on the part of the managements to admit students to the medical colleges according to merit. The contention of the petitioner is that the necessary implication flowing from the sole object and purpose of the Act, namely, the prohibition of the collection of capitation fee is that the management of private educational institutions are bound to make selection for admission in accordance with merit. This submission of the petitioners is fully supported by the learned Advocate General appearing for the State and also the learned counsel appearing for the University. They submitted that the necessary implication flowing from prohibition of collection of capitation fee was that the private medical colleges were bound to make selection in accordance with merit, for, if not the whole and sole object and purpose of the Act would be defeated and it has actually happened so, in that, the medical colleges are not only collecting tuition fee at

the rates fixed which is 121/2 times more than the normal tuition fee, but also they have been able to collect unlimited capitation fee clandestinely. The learned counsel for the petitioners and the learned counsel for the State and the university therefore submitted that having regard to the purpose of the Act even in the absence of framing of the Rules, the private medical colleges and their managements were under an obligation to make selection for admission strictly according to merit.

23. It was, however, contended by the learned counsel for the management that in the absence of any Rules framed under S. 14 of the Act requiring the medical colleges and their managements to make selection strictly according to merit, there was no obligation on their part to make selection according to merit.

24. As expressly stated in the Preamble, the object of the Act is to prohibit the undesirable practice of collection of capitation fee which had resulted in large scale commercialisation of education as the same was not conducive to the maintenance of educational standards. To achieve this object the provisions of the Act prohibited the collection of capitation fee openly or clandestinely by the college or the management in any form. Section 5(2) expressly prohibits collection of any fee or amount other than the fee permitted under S. 5(1). Therefore, the acceptance of the contention of the management totally frustrates the provisions of the Act. After giving careful consideration to the rival contentions, we are of the view that as the object and purpose of the Act in prohibiting the collection of capitation fee is in the interest of maintaining educational standards, there being no other method except the insistence on making selection according to merit to implement the object and purpose of the Act and the only visible safeguard against the violation of the Act, we hold that the respondent-medical colleges and their managements and all other similar educational institutions are bound to make selection for admission according to merit. This is a statutory duty imposed by the Act on them.

25. We shall, now proceed to consider the status of an affiliated college under the provisions of the Karnataka State Universities Act, 1976. The expressions "college", "principal" and "teacher" are defined under the said Act. They read :

"(2) "college" means an institution maintained by the university as such and includes an institution admitted to the privileges of the university as an affiliated college of the university in accordance with the provisions of this Act.

(4) "Principal" means the Head of a college;

(7) "teachers" includes Professors, Readers, Lecturers and other persons imparting instruction in any affiliated college".

There is a special Chapter, namely, Chapter IX which prescribes the conditions, to which the affiliated colleges have to be subjected to. The relevant Section in that Chapter reads :

"53. Affiliation of Colleges -- (1) Colleges within the university Area may, on

satisfying the conditions specified in this Section, be affiliated to the university as affiliated colleges by the State Government.

(2) A college applying for affiliation to the university shall send an application to the Registrar within the time limit fixed by Ordinances and shall satisfy the Syndicate and the Academic Council-

(a) that it will supply a need in the locality, having regard to the type of education intended to be provided by the college, the existing provision for the same type of education made by other colleges in the neighbourhood and the suitability of the locality where the college is to be established;

(b) that it is to be under the management of a regularly constituted governing body;

(c) that the strength and qualifications of the teaching staff and the conditions governing their tenure of office are such as to make due provision for the courses of instruction, teaching or training to be undertaken by the college;

(d) that the buildings in which the college is to be located are suitable and that provision will be made in conformity with the Ordinances for the residence in the college or in lodgings approved by the college, for students not residing with their parents or guardians and for the supervision and welfare of students;

(e) that due provision has been made or will be made for a library;

(f) where affiliation is sought in any branch of experimental science that arrangements have been or will be made in conformity with the statutes, ordinances and regulations for imparting instruction in the branch of science in a properly equipped laboratory or museum;

(g) that due provision will, as far as circumstances may permit, be made for the residence of the Principal and members of the teaching staff in or near the college or the place provided for the residence of students;

(h) that the financial resources of the college are such as to make due provision for its continued maintenance and efficient working; and

(i) that rules fixing the fees (if any) to be paid by the students have been framed or will be framed."

Thus it may be seen unless a private college established by a private body secures affiliation under the provisions of the Universities Act, it would have no authority to admit students for undergoing a course which confers eligibility on them to appear for the examination to be conducted by the University. From the provisions of S. 53 it is also clear that the affiliated colleges are bound by the relevant academic ordinances and other Regulations. The relevant Ordinances of the Bangalore university which have a bearing on fees is produced. It is seen from the said provision, private colleges cannot charge tuition fee which is more than double the amount prescribed for the corresponding university colleges.

According to this Ordinance a private medical college cannot charge tuition fee of more than Rs. 4,000.00 per annum. It is because the State Government in exercise of its power under S. 5 of the Act has prescribed the tuition fee at Rs. 23,000.00 " p.a., the private educational institutions are entitled to collect tuition fee of Rs. 21,000/-per annum in excess of what is permitted by the Ordinance. The four and half years it comes to Rs. 94,500.00. As stated earlier, it appears to us that tuition fee at the rate of Rs. 25,000.00 has been fixed having due regard to the views expressed by this Court in Bapuji Educational Association Vs. State, to the effect that any law which prohibits the collection of money required towards recurring expenses would be violative of Arts. 14, 19(1)(g) and 21 of the Constitution. What actually has been done by the Government is, instead of incorporating an amendment to S. 3 to enable the Government to fix the number of free seats and also to prescribe a reasonable amount of capitation fee in the light of the aforesaid judgment, the Government has by its order under S. 5 of the Act made provision for collection of amount required for recurring expenses by raising the tuition fee by 121/2 times in respect of Karnataka students and thereby allowed the management to collect a total sum of Rs. 1,08,000.00 from each of the students though in five instalments.

26. In view of the provisions of the Universities Act and the Ordinances which are binding on the affiliated colleges read with the provisions of the Act, the question for our consideration is, whether or not they are amenable to the writ jurisdiction of this Court under Art. 226 of the Constitution for the purpose of enforcement of the provisions of the Act and the Universities Act.

27. As held earlier, the clear implications flowing from the object and purpose of the Act as set out in the preamble, S. 3 of the Act, which prohibits the collection of capitation fee and S. 5(2) which prohibits collection of any fee in excess of the fee permitted by an order made under S. 5(1) of the Act is, that selection for admission by private medical colleges has to be made strictly according to merit. Therefore, even in the absence of rules made under S. 14 of the Act to that effect, the managements are bound to make selection for admission strictly according to merit. We asked the learned counsel for private medical colleges and the managements to state if really the managements are not collecting the capitation fee at all, why the management pre-ferred to select candidates who have secured much lower marks than the petitioners and others who had secured much higher marks. The learned counsel had no answer at all except asserting that the managements had absolute discretion to make such selection.

28. If as held above, the private medical colleges are under a duty to make admission to the colleges strictly according to merit, having regard to the provisions of the Act, the said duty which is a public as well as statutory duty, can be enforced against the private medical colleges and/or their management under Art. 226 of the Constitution.

29. We are also of the view that there is no substance in the contention of the respondent medical colleges that they are private bodies not amenable to the

writ jurisdiction of this Court, If an educational institution is established by a private individual or private body, which is not affiliated to university and is not recognised by any public law or by the State Government to impart instruction which entitles the students to appear for a public examination leading to the conferment of any certificate, diploma or degree by the Government or a statutory university, it may be that such private educational institutions may be purely a private body not amenable to writ jurisdiction. But an educational institution, though established by a private body, once it secures recognition from the Government of an affiliation to a university established under a public law, namely, the Universities Act and is admitted to the privileges of the University, in that it acquires the privilege of imparting instruction to the students so as to enable them to take the public examination conducted by a Government Department or by the university leading to conferment of certificates, diplomas or degrees by the Government or the university concerned, such an institution cannot be regarded as purely a private body. The recognition or affiliation constitutes the very life breath of such educational institution, without which it cannot exist. If recognition or affiliation is not granted or once granted is withdrawn, no student will get admitted to such an institution. This aspect has been considered by this Court in the case of R.K. Seth Vs. CBCI Society for Medical Education and Another, by one of us (Rama Jois, J.), and it was held that a writ will issue to an affiliated college for enforcement of a statutory duty. The relevant portion of the judgment reads :

"27. Therefore, the real question for consideration is: Whether no writ petition is maintainable against an affiliated college for enforcement of a statutory provision. It should be pointed out in the first instance that a private college is not just like any private individual or establishment doing any business or carrying on any avocation. Education is an obligatory function of the State. Therefore, the State, in discharge of its constitutional obligation under Articles 41 and 48 read with Entry 25 of List of III of Sen. VII of the Constitution provides for the establishment of educational institutions by the Government directly or through any university established under an Act of Legislature. It can also make provision in a Law enacted on the topic of education for grant of affiliation to an educational institution established by private bodies or individuals. The affiliation secured by a private institution under such Law constitutes the life breath of the institution. Without affiliation, institution has no real existence, for, no student desirous of securing university degree would join the institution. Therefore, the function of an educational institution which secured recognition or affiliation under public law, is quasi public in nature and is not just like any private individual doing his business or avocation. Such an institution should conform to the law through which it secures that privilege. While the service rendered to the Nation by the 3rd respondent through the college is laudable and has to be eulogised, it has to conform to the university Act and the statutes made thereunder, for the benefit of teachers, who form the backbone of the institution, which are not violative of Art. 30. If it violates such statutory provisions it would

be amenable to the writ jurisdiction of this Court to that extent. It is a separate matter if the claim made in a writ petition is one not flowing from a provision having the force of law".

The above view gets approval from the decision of the Supreme Court in the case of *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others*, The relevant portion of the judgment reads :

"10. Two questions, however, remain for consideration: (i) The liability of the appellants to pay compensation under Ordinance 120E and (ii) The maintainability of the writ petition for mandamus as against the management of the college.

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11. The essence of the attack on the maintainability of the writ petition under Article 226 may now be examined. It is argued that the management of the college being a trust registered under the Public Trusts Act is not amenable to the writ jurisdiction of the High Court. The contention in other words, is that the trust is a private institution against which no writ of mandamus can be issued.

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14. If the rights are purely of a private character no mandamus can issue. If the management of the college is purely a private body with no public duty mandamus will not lie. These are two exceptions to mandamus. But once these are absent and when the party has no other equally convenient remedy, mandamus cannot be denied. It has to be appreciated that the appellants-trust was managing the affiliated college to which public money is paid as Government aid. Public money paid as Govt. aid plays a major role in the control, maintenance and working of educational institutions. The aided institutions like Government institutions discharge public function by way of imparting education to students. They are subject to the rules and regulations of the affiliating University. Their activities are closely supervised by the university authorities.

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19. The term "authority" used in Article 226, in the context, must receive a liberal meaning unlike the term in Article 12. Article 12 is relevant only for the purpose of enforcement of fundamental rights under Art. 32. Article 226 confers power on the High Court to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. The words "Any person or authority" used in Article 226 are, therefore not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the "body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party. No matter by what means the duty is imposed. If

a positive obligation exists mandamus cannot be denied.

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21. Here again we may point out that mandamus cannot be denied on the ground that the duty to be enforced is not imposed by the statute. Commenting on the development of this law, professor De Smith states : "To be enforceable by mandamus a public duty does not necessarily have to be one imposed by statute. It may be sufficient for the duty to have been imposed by charter, common law, custom or even contract." (Judicial Review of Administrative Act 4th Ed. p. 540). We share this view. The judicial control over the fast expanding maze of bodies affecting the rights of the people should not be put into watertight compartment. It should remain flexible to meet the requirements of variable circumstances. Mandamus is a very wide remedy which must be easily available "to reach injustice wherever it is found". Technicalities should not come in the way of granting that relief under Article 226. We, therefore, reject the contention urged for the appellants on the maintainability of the writ petition."

In view of this pronouncement by the apex court of this country, it can no longer be contended that the relief sought for in the petition against private medical colleges cannot be granted under Art. 226 of the Constitution. The learned counsel for the respondents tried to distinguish the aforesaid decision on the ground that the institution concerned in that case was receiving financial aid from the Government and the respondent colleges are not receiving any financial aid. We are unable to agree. It is true that in paragraph 14 it is stated that the institution concerned in that case was receiving the financial aid from the Government; but that is not the sole ground on which the question of maintainability of a writ against a private educational institution was decided. As can be seen from the same paragraph, the Supreme Court, in support of the view that a private aided college was amenable to the jurisdiction under Art. 226, state that aided institutions like Government institutions discharge public function by way of imparting education to students and they are subject to rules and regulations of the affiliating Universities and their activities are closely supervised by the university concerned. Every one of the above criteria applies to an affiliated college irrespective of its receiving financial aid from the Government. Once we find that the activities of a private educational institutions is regulated by the provisions of the Act and the Universities Act, the mere fact that the institution is not receiving financial aid, makes no difference for the issue of a writ under Art. 226, for the enforcement of public duty and/or the provisions of the Act. This position in law is clearly laid down by the Supreme Court in the case of Miss Raj Soni Vs. Air Officer in Charge Administration and another, . Relevant portion of the Judgment reads :

"10. The recognised private schools in Delhi whether aided or otherwise are governed by the provisions of the Act and the Rules. The respondent-management is under a statutory obligation to uniformly apply the provisions of the Act and the Rules to the teachers employed in the school. When any

authority is required to act in a particular manner under a statute it has no option but to follow the statute. The authority cannot defy the statute on the pretext that it is neither a State nor an "authority" under Article 12 of the Constitution of India."

In the present case not only the respondent-medical colleges are affiliated to a university established under Universities Act, but also in the matter of admission of students into the colleges their rights are regulated by the provisions of the Act. Therefore, once we come to the conclusion that the clear implications of the provisions of the Act is that the managements of private medical colleges are under a duty to make selection according to merit, it follows that on their failure to do so, an appropriate writ will issue under Art. 226 of the Constitution. It is also relevant to point out that in respect of each of the medical colleges, hospital facilities are given at Government hospitals, without which the colleges cannot exist. It may be, the Government is collecting some agreed fee per student, as stated on behalf of M. R. Medical College, Gulbarga. But the fact remains that the colleges are depending on Government hospitals. This is also an aid or assistance which the colleges are receiving from the Government.

30. The learned Counsel for the respondents 1 and 2 in W.P. No. 17342/1989 relied on an unreported Judgment rendered by a learned Judge of this Court in Abraham T. K. v. The Academy of General Education, W.P. No. 22845 of 1980 DD.7/8-9-1981 in support of his contention that no writ can be issued to a private college to admit a student against the management seals. It is seen from the Judgement, the ground on which the relief was sought for was that the private college was State under Art. 12 and that contention was negatived, and the writ petition was dismissed. Therefore the decision is not apposite to the second contention. Further, at that time the Act had not come into force. The learned Council next relied on a Division Bench decision of this Court of which one of us (Rama Jois, J.) was a member in The Registrar Karnataka Medical College v. Selection Committee and Others, W.A. No. 331 of 1981 D/- 30-1-1986 which was presented against an order made by a learned Judge allowing the writ petition presented by re-spondent-3, therein and giving a direction to admit her to the appellant Medical College. The order reads :--

"This Writ Appeal is by the Management of Kasturba Medical College against the order of the learned single Judge directing it to admit the 3rd respondent to the 1st year M.B.B.S. courses.

2. The direction was in respect of the academic year 1981-82. On 5-3-1981, While admitting the appeal, the prayer for staying the admission of respondent-3 to the appellant's College was refused.

3. Therefore, it is clear that during the pendency of the writ appeal, she has joined the college and completed the M.B.B.S. Course. The writ appeal has therefore, become infructuous. The learned Counsel for the appellant, however, submitted that the view taken by the learned single Judge that the appeal which

is an unaided private college was State as defined in Art. 12 of the Constitution in so far it relates to Government seats, relying on the judgment of the Supreme Court in the case of *Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others*, was erroneous, and therefore this erroneous view should be set aside.

4. We agree, that the appellant college which is a private unaided college, cannot be regarded as State as defined in Article 12 of the Constitution. The decision of the Supreme Court in *Ajay Hasia* is no authority to say so. Unless the body is sponsored and/or financed and controlled by the State, it cannot be regarded as an instrumentality of the State. It is not so in the case of the appellant.

As regards Government seats in the appellant college, a writ can issue, if there is violation of Article 14 by the Selection Committee constituted by the Government, But the writ has to issue to the selection committee and not to the college. It may be, when there is a breach of public duty by a private college, a writ will issue notwithstanding the fact that it is not State under Article 12. That is entirely a different matter.

5. In the result, we vacate the findings recorded in the order of the learned single Judge that the appellant is State under Article 12."

As can be seen from the above decision, though it was held that a private college was not State under Art. 12 it was also held that if there were to be a breach of public duty, a writ will issue. This decision actually supports the second contention of the petitioner. This was also a case which arose before Act came into force.

30A. The learned Counsel for the petitioners also submitted that in order to ensure that the object and purpose of the Act is implemented and not circumvented, it was the duty of the State to ensure that the applicants seeking admission to the private medical colleges according to marks, which could and ought to have been done by framing appropriate Rules under S. 14 of the Act, as held by this Court in the case of *Bapuji Educational Association Vs. State*, and failure to do so amounts to violation of Art. 14 of the Constitution by it. In support of this contention, the learned counsel relied on the judgment of the Patna High Court in the case of *Samir Kumar Das and Vs. State of Bihar and Others*, The relevant portion of the judgment reads :

"11.Article 41 of the Constitution commands : "The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education". It is obvious that the right to education in Article 41 includes the right to medical education. And the duty of effectively securing the aforesaid right to medical education, establishment and maintenance of medical colleges or institutions imparting medical education is not enough; provision must also be made for the admission to those institutions of people suitable for admission to those courses, selected on some reasonable principle. The duty of making effective provision for securing the right to education in Article 41, therefore, include the duty of admitting students to the

available seats in the various medical colleges established or maintained or controlled by the State.

12. It is true that the duty imposed upon the State by Article 41 which forms part of the directive principles is not enforceable by any Court. But once the State, either by legislative or administrative action, provides facilities for medical education in performance of the duty imposed upon it by Article 41, it has the legal duty, subject to availability of the seats in the institutions, to make the right to medical education available to every eligible person desirous of exercising the right, selected, in case of limited number of seats, on some reasonable principle."

The ratio of the above judgment fully supports the contention of the petitioners. It is seen from the above judgment that the court decided the case on the basis that the colleges concerned were authority within the meaning of that word used in Art. 12 of the Constitution. But to the extent the view expressed to the effect that the Government is under a duty to ensure admission to medical colleges on rational basis not doing so would be violative of Art. 14 of the Constitution, does support the contention of the petitioners that the Government should have framed rules to regulate admission according to merit among each classes of applicants, in the light of the right exercised by the management concerned to earmark certain number of seats in favour of any specified classes of persons for whose benefit and / or with whose support the college was established. To illustrate, in the case of Dr. Ambedkar Medical College, it has earmarked 20 seats for persons belonging to Scheduled Caste. It has the right to do so as held in Bapuji Education Association's case. In fact, it can earmark any number of seats in favour of scheduled castes. But once that is done, the selection must be according to merit, inter se among them. It is however unnecessary for us to base our decision on Art. 14, as in our opinion, the necessary implication of the provisions of the Act is that selection must be made according to merit and therefore it is obligatory for the Government to frame rules to that effect u/s 14 of the Act on the lines indicated in paragraph 54 of the judgment in Bapuji Educational Association Vs. State, and even in the absence of the rules the respondent-colleges and/or managements are under a public duty to make selection for admission according to merit.

31. Now the next question for consideration is, whether there is any substance in the allegation made by the petitioner in W.P. No. 16601 of 1990 that private medical colleges including the respondents-medical colleges, have been indulging in clandestine collection of capitation fee of Rs. 3 lakhs and even more in many cases, depending on the individual applicant. As stated earlier, this petition is also being prosecuted as a public interest writ petition. The father of the petitioner, who is a practicing Advocate, has filed an affidavit on oath to the effect that the persons incharge of the management of the two medical colleges had demanded the capitation fee of Rs. 3 lakhs for giving a seat to the petitioner. He has also addressed letter complaining about the collection of capitation fees, to the Vice-Chancellor of the Bangalore university on 27-6-1990 (Annexure-B),

As there was no response, he addressed a letter to the Chancellor of the Universities in the State (An-nature --C). The said letter reads :

"The Chancellor of the Universities, Rajbhavan, Bangalore.

Sir,

Sub : Complaint in respect of collection of huge amount by the medical and engineering colleges in the State of Kar-nataka.

It is known to all that private medical and engineering colleges in the State are extracting money (5-10 lakh rupees) in the name of donation (unaccounted, no receipt for the payment) violating all the provisions of the Karnataka Educational Institutions Prohibition of Capitation Fees Act 1984. Even in the Legislative Assembly Speaker S. M. Krishna also charged that these colleges are collecting huge amount. The Government has got powers to stop this but the Ministers are not doing anything. It is necessary to bring to your notice that this Act was passed in the year 1984. According to Section 3 of this Act the Medical and Engineering colleges cannot collect any capitation fee and the capitation fee is defined as any amount by whatever name called, collected directly or indirectly in excess of the fee prescribed u/s 5 of the Act. The procedure prescribed under Sections 3 and 5 of the aforesaid Act are not being followed by any of the private medical and engineering colleges. This Act gave powers to the Government to permit any institution to collect capitation fee or cash deposits for a period of five years only. Therefore, capitation fees cannot be collected without the permission of the Government. The Government has not permitted any institution to collect capitation fee. After a period of five years this provision will not be applicable. It means in the year 1990 the provision of Section 3 of the Act will not help the private institutions. When they cannot charge or collect the capitation fee sub-sec. (2) of Sec. 4 of the Act also will not govern the distribution of seats. The Government cannot specify the number of seats set apart as government seats and number of seats that may be filled up by the management. Now these seats are to be filled on the basis of merit only. I wrote a letter to the Vice-Chancellor of Bangalore university on 27-6-1990 to take action in this regard under the Universities Act against these institutions. Unfortunately I did not receive any reply to this letter. The Vice-Chancellor might have thrown this letter of mine to wastepaper basket treating it as triple matter. Therefore, I am addressing this letter to you who is the Chancellor of all the Universities in the State of Karnataka. Being the head of the Universities of Karnataka, you can exercise power under the Universities Act and take stern action against the private medical and engineering colleges. Every university must have ordinance u/s 37 of the Karnataka State university Act 1976 and that ordinance must provide for the fee to be charged in the university college as well as affiliated colleges. The university has powers of supervision and inspection of colleges affiliated to the university. They can regulate admission of students to the university. Having all these powers under the Universities Act nobody is taking any action to stop the practice of taking 5-10 lakh rupees i.e. selling the medical and engineering

college seats. The Government has also powers to take action under the Karnataka Educational Institutions Prohibition of Capitation Fees Act, 1985, u/s 9 the Government can authorise any high ranking officer to search and inspect the records and other documents of the institutions. Collection of donation and capitation fee is an offence punishable with seven years imprisonment and fine of rupees five thousand.

Now the private medical and engineering colleges are selling the seats. There is no selection committee as provided in the Act. There must be a committee members of which are nominated by the Government and the University. Management of these private medical and engineering colleges are selling seats at the rate of 5-10 lakh rupees. There is no selection of students on merit.

When Section 4 of the Act of 1984 ceases to be applicable after a period of 5 years all the seats in the private medical and engineering colleges are to be filled up on the basis of merit only. There is no scope for government quota and the management quota in such selection.

As the vice-Chancellor has not taken any steps in this connection I am writing this letter to you because you are the Chancellor and Head of All the Universities in Karnataka. I hope you will take necessary steps in this matter at the earliest before the commencement of the academic year 1990-91 of these medical and engineering colleges. If I don't receive any response to this letter within a period of 7 days I may file a writ petition against the Universities and medical and engineering colleges in Karnataka before the High Court of Karnataka to stop this sale of seats.

I will give my own experience in this connection. My daughter who passed II year PUC with Science subjects sent application to Dr. Ambedkar Medical College, Bangalore, Kempegowda Medical College, Bangalore and JSS Medical College, Mysore. She scored 77% marks PCB in the Board examination and passed entrance text examination. Private college management told that the marks obtained in the board examination and their performance at entrance test examination will be taken into consideration for selection. Money is the only criteria for selection. They have demanded 31/2 lakh rupees. There are many candidates who came to me and told that 5 lakh rupees was demanded for Karnataka students and 10 lakh rupees for foreigners. All the private colleges are waiting for foreigners, because they are capable of paying more than 10 lakhs. In case students of other countries or States do not come in time they will consider the applications of Karnataka students that too on payment of 31/2 to 5 lakh rupees. I am giving this instance because the Health Minister Smt. Manorama Madhvaraj had stated in the assembly that no specific complaints were brought to her notice though the Speaker himself has stated in clear terms that all these colleges are extracting money. I hope you will do the needful at the earliest.

Thanking you, Yours sincerely, Kashinath Rao Patil."

The contents of the letter are self-explanatory. In the letter he has relied on the

statements made by the Speaker and Members of the Legislature on the floor of the State Assembly on 13th and 14th June 1990, which constituted the news items published in "Indian Express" dated 13-6-1990 and 14-6-1990 (Annexure-D and E) and requested for his intervention in the matter. The official report of the proceedings of the Legislature dated 13-6-90 confirms the news item. The matter had been raised in the course of question No. 143 and the members complained that in addition to the increased tuition fee, donations are being collected as a condition for giving seats in private medical colleges and the Minister said no complaints had been received and if received it will be inquired into. The Speaker remarked that it amounts to self deception of the worst kind. Again on 14-6-90 the members complained that tuition fee together with other fee comes to Rs. 1,30,000-00 for the entire course and donation around Rs. 3 lakhs was being collected, as seen from the official report of the Assembly Debates dated 14-6-1990, in the course of demand for grant of the department of Health and Family Welfare Services (at 65-66A). The petitioner has also produced a copy of an article entitled "The Capitation Boom" published in "Deccan Herald" dated 29th June 1990 (Annexure-J), in which it is stated that the capitation fee charged was sky-racketing despite substantial rise in tuition fee fixed by the Government and the amount so collected by the private colleges in the State is in the order of Rs. 60 to Rs. 80 crores per annum. In the statement of objection filed on behalf of the private medical colleges, the allegation is stoutly denied. But as stated earlier, we asked the learned counsel appearing for the two private medical colleges and the managements to state as to the reason on the basis of which candidates who have secured much lower marks than the petitioner and others were selected for admission and admitted into the two medical colleges, if really they were not collecting the capitation fee clandestinely, as alleged by the petitioners. The learned counsel was unable to give any answer. Apart from this, it appears to us that having regard to the normal course of human conduct, any person or body running a medical college, if really they are collecting only the fee prescribed under S. 5(1) of the Act, they would admit more merited students in preference to the less merited. In our opinion, in view of the undisputed fact, namely, that large number of persons who have secured much lesser marks than the petitioner have been admitted and also other material placed on record referred to earlier and also the absence of any explanation on behalf of the respondent-colleges and their managements as to why applicants securing much lower marks were preferred for admission to the exclusion of more merited applicants, it is reasonable to draw an inference that the allegation made on oath about the demand of capitation fee from the petitioner is true. It should be remembered that in a matter like this, it is difficult to get direct evidence. Moreover, the collection of capitation fee for admission to private college is a notorious social evil as is stated in the preamble to the Act and was the reason for enacting the Act. The facts and circumstances, are in our opinion, sufficient to draw an inference that the allegation made by the petitioners that respondent-colleges and/or their managements are indulging in collection of unauthorised amount as donation, which is capitation fee as defined

in the Act, as a condition for giving the seat, is well founded and that in our opinion is the reason for not making selection according to merit. The extent of collection and the modus operandi of collection could be brought out only by an indepth inquiry into the finances of the managements and the colleges, which are not within the scope of this writ petition.

32. In support of the first contention that the respondent-medical colleges are the managements falling within the definition of "State" under Art. 12 of the Constitution, the learned counsel for the petitioners relied on the decisions of the Supreme Court in *Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others*, and *Somprakash v. Union of India*. AIR 1981 SC 212 (220), in which the criteria for determining as to whether a person or body was an instrumentality of the State and therefore "State" as defined in Art. 12 were laid down and also on the decision of the Supreme Court in *Manmohan Singh Jaitla Vs. Commissioner, Union Territory of Chandigarh and Others*, in which the Supreme Court held that an educational institution receiving financial grants from the Government was "State" as defined in Art. 12. Relying on the ratio of the aforesaid decision the learned Counsel contended that the private medical colleges and their managements being bodies subject to the control of the university concerned and the State Government in respect of various matters including admission into the college, they are "State" as defined under Art. 12 of the Constitution and therefore bound to make selection according to merit in view of Art. 14 of the Constitution. As against this, the learned Counsel for the respondents contended that just because the private colleges are affiliated to a university they are no instrumentalities of the State and therefore not "State" as defined in Art. 12 and the ratio of the aforesaid decisions is not apposite. They relied on the decision of this Court in W.A. No. 331 of 1981 referred to earlier, as also the decision of the Supreme Court in *Tekraj Vasandi alias K.L. Basandhi Vs. Union of India (UOI) and Others*, in which the Supreme Court held that The Institute of Constitutional and Parliamentary Studies, a society registered under the Societies Registration Act was not "State" as defined in Art. 12. In view of our conclusion on the first and second contentions that the respondents-Medical Colleges being colleges affiliated to Universities and are governed by the provisions of the Universities Act and the provisions of the Act. are bound to make selection for admission according to merit and are amenable to writ jurisdiction under Art. 226. we consider it unnecessary to pronounce upon the first contention.

33. The petitioner in W.P. No. 16601 of 1990 who has prosecuted the writ petition as a public interest petition in a representative capacity after securing permission under O. 1, R. 8 of the C.P.C. has questioned the legality of the fixation of tuition fee at Rs. 25000-00 per annum for the course when in respect of students admitted to Government Medical Colleges and Government seats in private medical colleges it was only Rs. 2000/- per annum. The learned counsel for the petitioner contended that the fixation of tuition fee at such exorbitant rate for the students admitted to the private medical colleges as against Management seats, was arbitrary and discriminatory and violative of Art. 14 of the

Constitution. In support of this contention, the petitioner has also relied on the relevant Ordinance framed by the Bangalore University. It reads :

"(g) That the college rules fixing the fees, if any, to be paid by the students will not be so framed as to involve unfair competition with any existing college or Institute in the same place or neighbourhood or as would be injurious to the interests of education, provided that the fee levied by the Institution will not be less than the standard fees prescribed for the course by the university and not, in any case, then twice the standard fees."

Relying on the above Ordinance and also on Art. 14, it was contended for the petitioners that tuition fee fixed in respect of students admitted against management seats in private medical colleges was illegal and arbitrary. He also pointed out that most of the persons not having high income would be unable to pay such high rate of tuition fee and consequently unable to get their children admitted to these colleges and as a result the seats would go only in favour of affluent sections of the society.

34. It is true that on the face of it the tuition fee fixed is exorbitantly high in respect of students admitted as against management seats compared to the tuition fee fixed in respect of Government colleges and Government seats in private medical colleges. But as pointed out earlier, this court in the case of *Bapuji Educational Association Vs. State*, has held that as the right to establish an educational institution is a fundamental right flowing from Arts. 14, 19(1)(g) and 21 of the Constitution and the prohibition of collection of money required for recurring expenses to run the colleges would amount to infringement of the fundamental rights guaranteed under Arts. 14, 19 and 21 of the Constitution, it was necessary for the Government to make provision for collection of capitation fee at the rate prescribed by the Government while fixing the tuition fee at the normal rate as applicable in Government colleges or at the rate fixed for private unaided colleges. As the proviso to S. 3 which gave such power ceased to exist after the expiry of five years from the date of commencement of the Act, the only course open to the Government to do so was by bringing an appropriate amendment to the Act on the lines similar to the proviso to S. 3, as a permanent measure. However, the Government has thought fit not to do so, but to achieve the same object by increasing the tuition fee. In fact and in truth and substance, the tuition fee fixed in the Government Order made under S. 5 of the Act includes a reasonable rate of capital fee also, though it is not called as such, whereby an amount of Rs. 1 lakh is permitted to be collected from each of the students, though in annual instalments, in addition to the normal rate of tuition fee. Without such collection of funds required for recurring expenses of the medical colleges, it would be impossible for the management of private medical colleges to maintain the medical colleges. Therefore, we reject the challenge of the petitioner to the rate of tuition fee fixed by the Government in its order issued under S. 5 of the Act.

35. To sum up, our conclusions are as follows:--

(1) Having regard to the object and purpose of the act, which is the prohibition of collection of capitation fee for admission into private educational institutions and the clear implication flowing from S. 3 of the Act prohibiting the collection of capitation fee, directly or indirectly, and the provisions of sub-section (2) of S. 5 of the Act which prohibits the private educational institution and/or their managements from collecting any fees over and above the fees permitted by the Government by an order made under sub-section (1) of Section 5 of the Act, the selection for admission to private medical colleges in the State as against management seats has to be made strictly according to merit among the applicants belonging to any class of persons, if the management of a private college has earmarked certain number of seats in favour of such class of persons, as also among the rest of the applicants or among all the applicants if the management has not chosen to set apart any number of seats in favour of any class of persons.

(2) The private colleges affiliated to a university established under the Universities Act, discharge public duty of imparting education leading to conferment of degrees by the university concerned, and therefore if there is any breach of any provision of the laws regulating their rights, powers and duties or of any public duty on their part, they are amenable to the writ jurisdiction of this court under Art. 226 of the Constitution.

(3) The provisions of the Act by prohibiting the respondent-colleges and/or their managements from collecting any fee, above the fee permitted by the order of the State Government issued under S. 5(1) of the Act, impose a public duty on them to make selection for admission on the basis of merit among all the applicants generally as also among the applicants belonging to any particular class: if the management has in exercise of its right earmarked certain number of seats in favour of such class. Therefore, if in any given case, it is made out that the management of the college concerned has in breach of this public duty denied admission to the applicant who has secured more marks in the qualifying examination and has admitted an applicant who has secured lesser number of marks, such aggrieved person is entitled to seek a writ in the nature of mandamus to the management as well as the college concerned to admit such applicant to the course concerned in the college concerned, under Art. 226 of the Constitution.

(4) On the facts of this case, it is established that the petitioner in Writ Petition No. 16601 of 1990 was entitled to get admission both to Dr. Ambedkar Medical College as also to the Kempegowda Institute of Medical Sciences having regard to the marks secured by her, as it is established that large number of students who have secured lesser marks than her have been admitted to those colleges. The petitioner in W.P. No. 17342 of 1989 was entitled to be admitted to M. R. Medical College, Gulbarga, as admittedly several students who had secured lesser marks than him in the qualifying examination had been admitted to the said college. Therefore, each of the petitioners is entitled for the issue of an

appropriate writ directing the management concerned to admit him to the Medical Degree course in the college concerned and as major part of the academic year is over by now, he is entitled to the issue of a direction for his admission to the medical degree course during the next academic year.

(5) The challenge to the notification dated 5-6-1989 issued by the State Government under sub-section (1) of S. 5 of the Act fixing higher rate of Rs. 25,000/- per annum as tuition fee for the medical degree course for students admitted against management seats in private medical colleges, compared to the fee of Rs. 2,000/- per annum only for students admitted to Government colleges or against government seats in private medical colleges, has to fail, for the reason, as held by this court in the case of Bapuji Educational Association Vs. State, the managements concerned have the fundamental right to establish and run the medical colleges under Arts. 14, 19 and 21 of the Constitution and without collection of a reasonable amount from the students either in the form of capitation fee or in the form of tuition fee, the exercise of that right becomes impossible as it is impossible to run a private medical college by collecting only a tuition fee of Rs. 2,000-00 per annum.

(6) There is substance in the allegations made by the petitioner in W.P. No. 16601 of 1990 to the effect that the managements of private medical colleges are indulging in clandestine collection of capitation fee in addition to the higher rate of tuition fee fixed by the Government, on account of the failure of duty on the part of the State Government in framing Rules under S. 14 of the Act requiring the private medical colleges to make admission strictly according to merit on the lines indicated in paragraph 54 of the judgment of this court in the case of Bapuji Educational Associations cases, instead of the evil of collection of heavy amount as capitation fee for admission into those colleges getting abolished, the evil has aggravated.

36. We, however, make it clear that the inference drawn by us on the basis of facts and circumstances placed before us to the effect that the managements of private medical colleges are including in collection of heavy amount for admission of students against management seats, which is capitation fee as defined in the Act, clandestinely, should not in any way be understood as our holding that the amounts so collected are being misused or as not recognising the valuable service they are rendering in the field of medical education. It is a matter of public knowledge that most of the private medical colleges have been established with service motive with the aid of philanthropists and that some of the private medical colleges are better equipped, better staffed, better administered, in comparison to the university medical colleges or Government Medical Colleges. In fact, on this aspect of the matter, in the case of Bapuji Educational Association Vs. State, it has been stated thus :

"50. In this behalf, in the first instance, it is necessary to bear in mind that the petitioner-institutions are established and maintained by their own funds and they do not receive any financial aid from the State exchequer and therefore if it

is possible to achieve the object of the Act fully without depriving the right of the petitioners to regulate admission to their institutions, the power to declare certain number of seats as Government seats and the take over of the right to make admissions cannot but be regarded as an unreasonable one.

51. There can be no two opinions as to the yeoman service rendered by all those who have devoted their energy, mind and money with an intense desire to provide higher education facilities mainly for the benefit of the needy students belonging to a specified backward region or caste or community and through it the society for whose benefit persons with higher technical education would be available. If, however, any evil practice has come into existence, the service rendered is no ground to prevent the evil. The State is in fact under a duty to eradicate such evil, while upholding Section 3, I have referred to the evil and its magnitude."

At the same time, it is necessary to point out that when law has been canceled by the Legislature considering that charging of capitation fee for giving seats in private colleges is a social evil and its collection is prohibited and the State Government has made an order under sub-section (1) of S. 5 of the Act enhancing the rate of tuition fees so as to enable the managements of medical colleges to collect the necessary resources for meeting the recurring expenses of the colleges, it is their duty not to violate the law. While acknowledging the great and useful service to the cause of medical education rendered by the colleges, we are in duly bound to point out that admission of students who have secured low percentage of marks into the medical degree just because they are in a position to pay heavy amount of capitation fee, contravenes and defeats the object and purpose of the Act and further it would be a positive disservice to the society, for, such admission is not in the interest of supplying men of better professional competence to the society. Further, it results in denial of justice to those who are better in merit and who have the desire and aptitude to join the medical degree course, but have no financial resources to pay heavy amount as capitation fee and results also in the denial of the service of more meritorious doctors to the society. If, in spite of the high rate of tuition fee the managements are short of any funds, they have to raise funds by way of donation from the general public and from those who have been benefited by the college. In such a situation, the State also should come forward to make special financial grants. Whatever that may be, the managements should know that denial of seat to more merited applicants and giving of seats to less merited applicants just because the latter had more money and come forward to pay it is what is tabooed by the Act.

37. Before concluding, we are constrained to express our strong displeasure about the manner in which the Act is implemented which indicates that the State Government and the Universities have remained silent spectators to the evil of collection of capitation fee for admission to the medical and engineering colleges in the State. After total abolition of capitation fee came into force after the expiry

of five years from the date of commencement of the Act, while the Government readily came forward to raise the tuition fee from Rs. 2,000-00 per annum to Rupees 25,000-00 per annum and enabled the private medical colleges to collect such heavy amounts by way of tuition fee, the Government, in spite of the clear guidance given by this court in paragraph 54 of the judgment in Bapuji Educational Association Vs. State, that the only method by which the collection of capitation fee clandestinely could be prevented was by framing Rules under S. 14 of the Act requiring that selection generally among all the applicants or among the applicants belonging to any particular cases in whose favour the management concerned has earmarked certain number of seats in exercise of its right of management should be made according to merit has failed to do so and was merely satisfied in raising the tuition fee. Obviously this situation appears to have been taken advantage of by the private colleges to collect illegitimate capitation fee without issuing receipts for giving seats and thereafter collect the higher rate of tuition fee fixed by the Government by giving proper receipts. It is this situation that has given rise to the question set out in the first paragraph of our order, namely, whether the evil of capitation fee is abolished or aggravated on account of the manner in which the Act is implemented and in view of the facts and circumstances which have been placed before us we are convinced that while an impression is given to the people that evil of capitation fee is abolished, in truth and in practice, it is aggravated, which is known only to those who have secured seats by paying capitation fee and in addition are bearing the heavy burden of tuition fee and to those who have failed to secure seats on account of their inability to pay capitation fee.

38. Now, the question for consideration is the nature of relief that should be granted to the petitioners. The academic year has already commenced and substantial portion of the same is already over in the first case and in the second case it was over during the pendency of the petition. The view taken by this court in such cases (See Kum Asha" v. State of Mysore -- Writ Petition No. 2829 of 1972, DD 28-8-1973), is that a writ should be issued directing to give a seat to the petitioner concerned during the next academic year.

39. Accordingly, we make the following order :

I. W. P. No. 16601 of 1990:

(i) The writ petition is allowed;

(ii) A direction shall issue to the respondents 2 and 6 and also respondents 4 and 7 to admit the petitioner to the 1 year M.B.B.S. course during the next academic year on her intimating the college and/or the management concerned that she is desirous of getting admitted to the said college. Such intimation shall be given by the petitioner in writing within one month from today;

(iii) A direction shall issue to the State Government to take appropriate steps including framing of Rules u/s 4 of the Act in the light of the observations made by this court in the case of Bapuji Educational Association Vs. State, , which is

extracted in paragraph 20 of this order, and in the light of this order, immediately

II. W.F No. 17342 of 1989:

(i) The writ petition is allowed;

(ii) A direction shall issue to the first respondent-college and its management, the second respondent, to admit the petitioner for first year M.B.B.S. course during the next academic year.

40. Petitions allowed.