
(2008) 05 CHH CK 0010
In the Chhattisgarh High Court

Viswa Bharathi Institute and Another	APPELLANT
Vs	
State of Chhattisgarh and Another	RESPONDENT

Date of Decision : 05-05-2008

Acts Referred:

Constitution of India, 1950 — Article 162

National Council for Teacher Education Act, 1993 — Section 14, 15, 32, 33

Citation : AIR 2008 Chh 68 : (2008) 4 MPHT 25

Hon'ble Judges : Rajeev Gupta, C.J.;Sunil Kumar Sinha, J

Bench : Full Bench

Final Decision : Dismissed

Judgement

Sunil Kumar Sinha, J.—The petitioners have challenged the validity of Chhattisgarh B.Ed. Pravesh Rules, 2006, framed by the State Government and published under Notification No. F-5-5-20/2006 dated 20-4-2006. The Challenge has been made on the ground of lack of competence on the part of State to make such legislation as the power to frame legislation in this regard has been vested with the Union under Entry 66 List-I of VIIth Schedule of the Constitution. It has also been challenged on the ground that the Parliament has already framed legislation on the subject vide the National Council for Teacher Education Act, 1993 (for short "NCTE Act" or "Act 1993") and the Statutes/Ordinances framed thereunder and no power has been given to the State, therefore, the Rules are ultra-vires of Constitution as also the NCTE Act.

2. Petitioner No. 1 is a Society duly registered under the relevant provisions of C.G. Societies Registrikaran Adhiniyam, 1972. Petitioner No. 2 is the Director of petitioner No. 1 Society. Petitioner No. 1, with an intention to start in their institution B.Ed., D.Ed, and M.Ed. courses, applied to respondent No. 2 and no-objection certificate was granted by respondent No. 2 in favour of the petitioner No. 1. Petitioner No. 1 had also applied for recognition to the statutory body constituted for the purpose of granting recognition to B.Ed., D.Ed. and M.Ed. courses as per the provisions of Sections 14(1) and 15(1) of the NCTE Act and

the National Council for Teacher Education (for short "NCTE") granted recognition to petitioner No. 1. Petitioner No. 1 thereafter made an application for temporary affiliation to Pt. Ravi Shankar Shukla University, Raipur and the said University has also granted affiliation for B.Ed., D.Ed. and M.Ed. for 100 students for the year 2007-2008 to petitioner No. 1.

3. The petitioners have contended that after grant of No Objection Certificate (NOC), recognition and affiliation as above, they are entitled to give admission to 100 students in their institution in B.Ed. course, however, they cannot admit the students on their own since the persons who may be admitted in B.Ed. courses are the persons who have secured position in the merit list of the Pre-B.Ed. examination, that is, an entrance test conducted by the Board and the admission has to be given after counseling in this regard. The State has organized the Pre-B.Ed. examination under the provisions of the Chhattisgarh B.Ed. Pravesh Rules, 2006 (hereinafter referred to as "the Rules 2006") notified on 20-4-2006 which is ultra vires of the Constitution as the State has no authority to make such rules independently on the subject because only the Central Government can make such rules, and therefore, the said rules are ultra vires of the Constitution as also the NCTE Act. Taking all these pleadings the petitioners have prayed for quashing the Rules of 2006 and to issue an appropriate writ permitting the petitioners to admit the students in B.Ed. course as per the norms fixed by the NCTE only, without insisting for appearance in the Pre-B.Ed. examination and participating in compulsory counseling organized by the State.

4. Respondents have filed their return. They have contended that in the initial years of the Establishment of NCTE, number of regulations and amendments thereto were issued on various matters, including the norms and standards for various Teacher Education Programmes etc. By notification dated 13-11-2002 consolidating all these regulations, in exercise of the powers conferred under Clauses (f) and (g) of Sub-section (2) of Section 32 read with Sections 14 & 15 of the NCTE Act, 1993, the National Council for Teacher Education made the Regulations namely NCTE (Form of application for recognition, the time limit of submission of application, determination of norms and standards for recognition of teacher education programmes and permission to start new course or training) Regulations, 2002. A copy of the aforesaid notification dated 13-11-2002 along with its Appendix 7 relating to norms and standards for Secondary Teacher Education Programme have been filed by them as Annexure R-2. They have further contended that again NCTE, made the National Council for Teacher Education (Recognition Norms & Procedure) (Amendment) Regulations, 2006 vide notification dated 20-7-2006 published in the Gazette of India dated 21-7-2006 and by the said amendment, Appendix 7 of the norms and standards, which was notified by NCTE Regulations, 2002 and retained in the NCTE Regulations, 2005, was replaced by Appendix 1 to the said amendment and be read as part thereof. They have also filed copy of the notification dated 20-7-2006 along with Appendix-1 as Annexure R-3. They have contended that Appendix-7 of Regulations 2002 clearly provides that admission should be made

either on the basis of marks obtained in the qualifying examination or in the entrance examination conducted by the University/State Government, as per the Policy of the State Government/University, to which the institution is affiliated. Likewise Appendix 1, vide Regulation No. 3.3 also provides that admissions shall be made on merit on the basis of marks obtained in the qualifying examination and/or in, the entrance examination or any other selection process as per the policy of the State Government/U.T. Therefore, the State Government, in the Department of School Education, as a policy, and, in exercise of its executive powers has framed and notified the rules namely Chhattisgarh B.Ed. Pravesh Rules, 2006 and the source of power to frame policy captioned as rules have been traced under Clause 3 of Appendix 7 of the Statutory Regulation framed by the National Council for Teacher Education under the NCTE Act, 1993. They have also pleaded that such decision was taken in a meeting of High Power Committee which was held on 03-04-2006 and looking to the irregularities in the admissions by the private educational institutions and the state of mismanagement, it was decided to conduct Pre-B.Ed. examination for B.Ed. admission through the Chhattisgarh Vyavasayik Pariksha Mandal as the examination conducting authority and then under the executive power of the State, Chhattisgarh B.Ed. Pravesh Rules, 2006 were notified.

5. We have heard Mr. B.P. Sharma, learned Counsel for the petitioners and Mr. Prashant Mishra, learned Advocate General with Mr. A.S. Gaharwar, learned Addl. Advocate General for the State/Respondents.

6. Mr. B.P. Sharma contended that since the State Government was not having any authority of law to make such rules, therefore, the rules were ultravires of the Constitution and the NCTE Act, 1993. He also contended that such rules cannot be framed under the garb of executive instructions in exercise of powers conferred under Article 162 of the Constitution. He argued that the rule making power or any power to make statute was vested with the Central Government or the Parliament and there was already a legislation, therefore, there was no necessity of framing any such Rules. He relied on the decisions of the Apex Court rendered in the matters of State of Maharashtra Vs. Sant Dnyaneshwar Shikshan Shastra Mahavidyalaya and Others, and G.J. Fernandez Vs. State of Mysore and Others, . He also referred to the decision of the Apex Court rendered in the matter of Government of Andhra Pradesh and Ors. v. Smt. P. Laxmi Devi 2008 AIR SCW 1826.

7. Per contra, Mr. Prashant Mishra contended that the Rules of 2006 are in fact the policy decision of the Government and in exercise of its executive powers it has notified them and the source of power to frame policy, captioned as Rules have been traced under Clause 3 of Appendix 7 of the Statutory Regulations framed by the NCTE under the NCTE Act 1993. He vehemently argued that the Government is competent to pass executive orders/policy under Article 162 of the Constitution. He relied upon the decisions rendered by the Apex Court in the matter of State of Madhya Pradesh and Another Vs. Kumari Nivedita Jain and

Others, and Dr. Ambesh Kumar Vs. Principal, L.L.R.M. Medical College, Meerut and Others, . In nut shell, his submission was that in fact the policy of the State Government termed as B.Ed., Pravesh Pariksha Rules, 2006 have been framed under Article 162 of the Constitution and the subject matter is covered by the field of legislation under Entry 25 of List-III, VIIth Schedule of the Constitution. Supporting the rules on its reasonability and necessity, he referred to the decision of P.A. Inamdar v. State of Maharashtra (2005) 6 SCC 537.

8. In Sant Dnyaneshwar Shikshan Mahavidyalaya's case (supra), the Apex Court, referring to the provisions of 1993 Act held that so far as coordination and determination of standards in institutions are concerned, the subject is exclusively covered by Entry 66 of List-I Schedule VII to the Constitution and the State has no power to encroach upon the legislative power of Parliament. It is only when the subject is covered by Entry 25 of List-III of Schedule VII of the Constitution that there is a concurrent power of Parliament as well as State Legislatures and appropriate Act can be made by the State Legislative subject to limitations and restrictions under the Constitution. With reference to the case on hand, the Apex Court further observed that the preamble of NCTE Act, 1993 provides for establishment of National Council for Teacher Education (NCTE) with a view to achieving planned and coordinated development of the teacher-education system throughout the country, the regulation and proper maintenance of norms and standards in the teacher-education system and for matters connected therewith and with a view to achieving that object, the National Council for Teacher Education has been established by the Central Government, therefore, the field was completely occupied by an Act of Parliament covered by Entry 66 of List-I of Schedule VII. The Apex Court said that therefore, it was not open to the State Legislature to encroach upon the said field and the Parliament alone could have exercised the power by making an appropriate law. Saying all this, the Apex Court held that it was not open to the State Government to refuse permission relying on a State Act or on policy consideration. It was a case in which recognition was granted by NCTE to the petitioner and then the petitioner applied to the Government of Maharashtra for grant of permission to start the college and/or inclusion of the name of the college in the central admission process for the year 2005-2006 and the State Government refused to grant No Objection Certificate on a policy decision and since under the Maharashtra Universities Act, 1994, B.Ed. college could be opened only after permission from the State Government, the petitioner filed a writ petition in Bombay High Court and ultimately it went to the Supreme Court and the above view was taken. This judgment is not applicable in this case, firstly because it is not a case of refusal by the Government to grant No Objection Certificate in favour of the petitioner or in any manner restraining the petitioner to run their B.Ed. college that is to say that nothing is in the state of conflicting between the Central Government and the State Government so far as the Act 1993 is concerned. Here the Government has only decided to conduct the entrance test for admission to the B.Ed. course and it cannot be said that such a

decision taken by the Government is either overlapping or is encroaching upon the field of Legislation reserved for the Central Government or the Parliament. Rather a perusal of the entire Scheme (Rules) would show that the same has been framed to achieve the goal of the enactment by choosing the most suitable candidates for admission to the B.Ed. courses in the State. Therefore, the argument for setting aside the rules based on this decision cannot be sustained.

9. The other judgment relied upon by Mr. Sharma, in the matter of G.J. Fernandez (*supra*), deals about the provisions of Article 162. Article 162 does not confer any power on the State Government to frame rules and it only indicates the scope of the executive power of the State and under such executive powers, the State can give administrative instructions to its servants how to act in certain circumstances but that will not make such instructions statutory rules which are justifiable in certain circumstances. The Apex Court said that in order that such executive instructions have the force of statutory rules it must be shown that they have been issued either under the authority conferred on the State Government by some statute or under some provision of the constitution providing therefor.

10. Now the question arises as to what is the nature of Rules of 2006 and whether the same can be struck down by this Court for want of competence of the Government to publish and to follow it? In the matter of Ku. Nivedita Jain (*supra*), which relates to admission in the Medical College and its selection procedure, the Apex Court held that by virtue of authority conferred by the Medical Council Act, the Medical Council may prescribe the eligibility of a candidate who may seek to get admitted into a Medical College for obtaining recognized medical qualifications. But as to how the selection has to be made out of the eligible candidates for admission into the Medical College necessarily depends on circumstances and conditions prevailing in particular States and does not come within the purview of the Council. Regulation I which lays down the conditions or qualifications for admission into medical course comes within the competence of the Council u/s 33 of the Act and is mandatory, whereas Regulation II which deals with the process or procedure for selection from amongst eligible candidates for admission is outside the authority of the Council u/s 33 of the Act, and is merely in the nature of a recommendation and is directory in nature. The Apex Court further held that Entry 25 in List-III is wide enough to include within its ambit the question of selection of candidates to Medical Colleges and there is nothing in the Entries 63, 64 & 65 of List-I to suggest to the contrary and since there is no legislation covering the field of selection of candidate for admission to Medical Colleges, the State Government, would, undoubtedly, be competent to pass executive orders in this regard under Article 162.

11. Dealing with the scope of Article 162, in the matter of Ambesh Kumar (*supra*), the Apex Court held that the State Government can in exercise of its executive power under Article 162 make an order relating to matters referred to

in Entry 25 of the Concurrent List in the absence of any law made by the State Legislature and the impugned order (the subject matter of that case) made by the State Government pursuant to its executive powers was valid and it cannot be assailed on the ground that it is beyond the competence of the State Government to make such order provided it does not encroach upon or infringe the power of the Central Government as well as the Parliament provided in Entry 66 of List-I.

12. Article 162 of the Constitution deals with the extent of executive power of the State. It provides that subject to the provisions of the Constitution the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws; provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by the Constitution or by any law made by Parliament upon the Union or authorities thereof. If we examine the validity of Rules 2006 in light of the provisions of Article 162 of the Constitution as also in light of the provisions of the Act of 1993 and the regulations framed thereunder, it would appear that the object and reasons for enactment of NCTE Act 1993 is to achieve and maintain the standards of teacher-education and to enable the NCTE to guide the system of teacher education by conferring it with statutory status, with the objective of determination, maintenance and coordination of standards in teacher education, laying down norms and guidelines for various courses, promotion of innovation in this field and establishment of a suitable system of continuing education of teachers. It was enacted to empower the Council to make qualitative improvement in the system of teacher education by phasing out substandard institutions and courses for teacher education with a further power to NCTE to grant recognition to institutions for teacher education and permission to recognized institutions for new course or training in teacher education. If we look into the norms and standards for secondary teacher education programme (Appendix 7) referred to above, Clause 3 of Appendix 7 deals with the eligibility which reads as follows:

3. Eligibility:

(a) Candidates with atleast 45% marks in the Bachelor's/ Master's Degree with at least two school subjects at the graduation level are eligible for admission.

(b) Admission should be made either on the basis of marks obtained in the qualifying examination or in the entrance examination conducted by the University/State Government, as per the policy of the State Government/University, to which the institution is affiliated.

(c) There shall be reservation of seats for SC/ST/OBC, Handicapped, Women, etc., as per the rules of the concerned State Government.

Sub-clause (b) of Clause 3 of Appendix 7 clearly provides that an admission to the B.Ed. course has to be done either on the basis of marks obtained by a

candidate in the qualifying examination or in the entrance examination which may be conducted by the University or the State Government as per the policy of the State Government or the University to which the institution is affiliated. This clearly indicates the intention that whenever the University or the State Government feel that an entrance examination is necessary for admission to the B.Ed. courses, they may conduct the same in accordance with the policy framed by them. If the entrance examination is decided to be conducted by the State Government, certainly the policies with reference to the entrance examination has to be determined by the State Government and then only it would be possible to organize the entrance examination for the purpose of admission to the B.Ed. courses. There is no dispute about the fact that the NCTE Act, 1993 or the statutes/ ordinances framed thereunder did not lay down any procedure for conducting the entrance examination for the purpose of admission to the B.Ed. courses and Clause 3 of Appendix 7 has left this field open for the State in case of entrance examination has to be conducted and a policy decision of the State has been taken in this regard. In the State of Chhattisgarh, prior to the commencement of the Rules of 2006, there was no procedure laid down for admission to the B.Ed., course by the State. It is for the first time, in the year 2006, on the basis of past experiences, the State Government framed these rules captioned as B.Ed. Pravesh Pariksha Rules, 2006 that means the Government in all its wisdom using source of Sub-clause (b) of Clause 3 of Appendix 7 took a policy decision as to how the admission should be given to the candidates in B.Ed. courses and then it published its decisions in form of Rules 2006 in the official Gazette on 20-4-2006. A perusal of the rules would show that the rules deal with the provisions for admission to the B.Ed. course; qualifications for appearing in Pre-B.Ed. examination; reservation of seats in B.Ed. course; Pre-B.Ed. examination; cancellation of admission and fee of the colleges etc. As held in the matters of *Ku. Nivedita Jain* and *Dr. Ambesh Kumar* (supra), the State Government in exercise of its executive power under Article 162 can make an order or can take a decision relating to the matters referred to in Entry 25 of the Concurrent List of the Constitution in the absence of any law made by the State Legislature, the State Government pursuant to its executive power was competent to do so and it cannot be assailed on the ground that it was beyond competence of the State Government to take such decision or to make such policy provided it does not encroach upon or infringe the power of Central Government as well as the Parliament provided in Entry 66 of List-I. Entry 25 in List-III is wide enough to include within its ambit the question of selection of candidates to the B.Ed, courses and in absence of any enactment or statutes therefor, there is nothing to suggest to the contrary. If the provisions of the Rules 2006 are examined in light of the provisions of the Act of 1993 and the provisions of Clause 3 of Appendix 7 it would be clear that the field regarding procedure for admission was totally untouched by the enactment and the statutes/ordinances and it was left open to the Government to take appropriate steps in this regard, therefore, the competence of the Government to take a decision laying down the procedure for admission to the B.Ed. courses cannot be

challenged on this ground. The source of taking such decision and the competence of the Government are traceable from the provisions of Clause 3 (b) of Appendix 7 as also Article 162 of the Constitution and the arguments advanced by Mr. B.P. Sharma regarding lack of authority to take such a decision by the Government and the field being an area of occupied legislation cannot be accepted.

13. In the matter of Government of Andhra Pradesh v. Smt. P. Laxmi Devi (supra), which has also been relied upon by learned Counsel for the petitioners, the Apex Court vide Paras 32 to 34 held that according to Kelsen, in every country there is a hierarchy of legal norms, headed by what he called as the "Grundnorm" (The Basic Norm) if a legal norm in a higher layer of this hierarchy conflicts with a legal norm in a lower layer the former will prevail (see Kelsen's "The General Theory of Law and State"). The Apex Court observed that in India the Grundnorm is the Indian Constitution, and the hierarchy is as follows:

- (i) The Constitution of India;
- (ii) Statutory law, which may be either law made by Parliament or by the State Legislature;
- (iii) Delegated legislation, which may be in the form of Rules made under the Statute, Regulations made under the Statute, etc.;
- (iv) Purely executive orders not made under any Statute.

14. The Apex further observed that if a law (norm) in a higher layer in the above hierarchy clashes with a law in a lower layer, the former will prevail. Hence, a Constitutional provision will prevail over all other laws, whether in a statute or in delegated legislation or in an executive order. If we apply these principles in the present case, the Rules of 2006 framed under Article 162 of the Constitution of India would be classified under the 4th layer as it is purely the executive order in the nature of policy not made under any statute, but it is made in furtherance to achieve the goal of the statute and in all its examinations it has no conflict with the law or the norm in a higher layer, therefore, it is to prevail for the betterment as also to achieve goals of the main Act 1993.

15. In the end, we would also like to refer to the decision of Apex Court in PA. Inamdar's case (supra). In Para 136 of the aforesaid judgment, the Apex Court referring to the decisions rendered in the matter of Islamic Academy of Education and Another Vs. State of Karnataka and Others, and T.M.A. Pai Foundation and Others Vs. State of Karnataka and Others, observed as under:

Whether minority or non-minority institutions, there may be more than one similarly situated institutions imparting education in any one discipline, in any State. The same aspirant seeking admission to take education in any one discipline of education shall have to purchase admission forms from several institutions and appear at several admission tests conducted at different places on the same or different dates and there may be a clash of dates. If the same

candidate is required to appear in several tests, he would be subjected to unnecessary and unavoidable expenditure and inconvenience. There is nothing wrong in an entrance test being held for one group of institutions imparting same or similar education. Such institutions situated in one State or in more than one State may join together and hold a common entrance test or the State may itself or through an agency arrange for holding of such test. Out of such common merit list the successful candidates can be identified and chosen for being allotted to different institutions depending on the courses of study offered, the number of seats, the kind of minority to which the institution belongs and other relevant factors. Such an agency conducting the common entrance test ("CET" for short) must be one enjoying utmost credibility and expertise in the matter. This could better ensure the fulfillment of twin objects of transparency and merit, CET is necessary in the interest of achieving the said objectives and also for saving the student community from harassment and exploitation. Holding of such common entrance test followed by centralized counseling or in other words, single-window system regulating admissions does not cause any dent in the right of minority unaided educational institutions to admit students of their choice. Such choice can be exercised from out of the list of successful candidates prepared at CET without altering the order of merit inter se of the students so chosen.

16. In view of the above discussions, we hold and conclude as follows:

- (i) The Chhattisgarh B.Ed. Pravesh Pariksha Rules, 2006, though captioned as Rules, are in fact, in the nature of policy decision/norms/executive orders made under Article 162 of the Constitution;
- (ii) They are not in conflict, in any manner, either with the constitutional provisions or with the provisions of the NCTE Act, 1993, therefore, they are not ultravires of the Constitution or the Act 1993;
- (iii) We, therefore, dismiss the petition accordingly with no orders as to costs.