MODERN DENTAL COLLEGE & RESEARCH CENTRE & ORS. A

*v.*

STATE OF MADHYA PRADESH & ORS.
(Civil Appeal No. 4060 of 2009)

MAY 27, 2009 B

**[MARKANDEY KATJU AND DEEPAK VERMA, JJ.]**

*Madhya Pradesh Niji Vyavsayik Shikshan Sansthan (Pravesh Ka Viniyaman Evam Shulk Ka Nirdharan) Adhiniyam, 2007:* C

*Admissions in private unaided Medical/Dental Colleges – Extent of control and regulation by State – Held: Prima facie the 2007 Act appears to handover the entire admission process for under-graduate, graduate and post-graduate medical/dental colleges and fee fixation to the State Government or the agencies appointed by it – This, prima facie, appears to be contrary to, and inconsistent with the observations made by the 11 Judge Bench decision of this Court in T.M.A. Pai's case, and, thus the 2007 Act would become unconstitutional if it is read literally – Therefore, the 2007 Act and Rules will have to be read down to make them constitutional – A balance has to be struck between the interest of State Government and private unaided institutions who have to generate their own resources and funds and consequently they must have a larger degree of autonomy as compared to the aided or Government institutions, besides keeping the interest of the students in mind – It is, therefore, directed that admissions in the private unaided madical/ dental colleges in the State of Madhya Pradesh will be done by first excluding 15% N.R.I. seats (which can be filled up by the private institutions as per para 131 of Inamdar's case), and allotting half of the 85% seates for admission to the under-graduate and post-graduate course to be filled in by an open*

D E F G

 H

A *competitive examination by the State Government, and the remaining half by the Association of the Private Medical and Dental Colleges – Both the State Government as well as the Association of Private Medical and Dental colleges will hold their own separate entrance examination for this purpose. As* B *regards the 'NRI Seats', they will be filled as provided under the Act and Rules, in the manner they were done earlier – It is made clear that these directions will for the time being only be applicable for the academic year 2009-10 – It is also made clear that if there are odd number of seats then it will be* C *rounded off in favour of the private institutions – In Specialities in P.G. courses also half the seats will be filled in by the State Government and half by the Association of Private Medical/ Dental Colleges and any fraction will be rounded off in favour of the Association – Capitation fee is prohibited, both to the State Government as well as the private institutions by* D *Inamdar's case – Both the State Government and the Association of Private Medical/Dental Colleges will separately hold single window examinations for the whole State – Although this order is only for the academic year 2009-10, it is recommended that it may also be considered* E *for future sessions – Interpretation of Statutes – Principle of reading down – Constitution of India, 1950 – Article 19(1)(g) – Interim Order – Educational Institutions – Admissions to.*

*T.M.A. Pai Foundation vs. State of Karnataka* **(2002) 8** F **SCC 481;** *Islamic Academy of Education vs. State of Karnataka* **(2003) 6 SCC 697;** *P.A. Inamdar & Ors. vs. State of Maharashtra & Ors.* **(2005) 6 SCC 537;** *Unni Krishnan vs. State of A.P.* **(1993) 1 SCC 645 and** *Kedarnath vs. State of Bihar* **AIR 1962 SC 1995, referred to.**

G *'Principles of Statutory Interpretation'* **(Ninth Edn. P. 496) by G.P. Singh, referred to.**

**Case Law Reference:**

| | | |
|---|---|---|
| **(2002) 8 SCC 481** | **referred to** | **Para 9** |

H

| | | |
|---|---|---|
| **(2003) 6 SCC 697** | **referred to** | **Para 10** |
| **(2005) 6 SCC 537** | **referred to** | **Para 11** |
| **(1993) 1 SCC 645** | **referred to** | **Para 18** |
| **AIR 1962 SC 1955** | **referred to** | **Para 28** |

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4060 of 2009.

From the Judgment & Order dated 15.05.2009 of the High Court of Madhya Pradesh at Jabalpur in Writ Petition No. 2732 of 2009.

WITH

C.A. Nos. 4061, 4062, 4063, 4064, 4065 of 2009.

Abhishek Manu Singhvi, Vivek K. Tankha, Ravi Shankar Prasad, S.K. Dubey, Indu Molhotra, Sushil Kumar Jain (NP), Pratibha Jain (NP), B.K. Satija, Siddharth Gupta, Ratna Kaul, Anubha Singh, Prashant Kumar, Ratna Kaul (for Ap & J Chambers), Pragati Neekhra, Suryanarayana Singh, B.S. Banthia, Prachi Mishra, Nishakant Pandey, Kavita Wadia and Sanjay K. Agrawal for the appearing parties.

The following Order of the Court was delivered

**ORDER**

The Impleadment and Intervention applications are allowed.

Leave granted.

Heard learned counsel for the parties.

Since this is a batch of several appeals involving common questions, we are taking the facts from Civil Appeal arising from Special Leave Petition No. 13111 of 2009.

A This Appeal has been filed against the impugned judgment and order dated 15.05.2009 of the High Court of Madhya Pradesh at Jabalpur in Writ Petition No.2732 of 2009.

B In this case, we had earlier passed an order dated 21st May, 2009 but we are substituting that interim order by this interim order which we are passing now.

The appellants in these appeals are Private Unaided Medical and Dental Colleges or Association of such Colleges in the State of Madhya Pradesh.

C The common question arises for consideration in this batch of appeals is "How far is it permissible under the Constitution for the State to control and regulate admission and fee in Private Unaided Professional Educational Institutions in the State of Madhya Pradesh".

D The matter was first considered by an Eleven Judge Bench of this Court in *T.M.A. Pai Foundation vs. State of Karnataka* (2002) 8 SCC 481.

E Since, there were some doubts or some questions remained unanswered in the aforesaid judgment, the matter was referred to a Five Judge Bench of this Court which decided it in *Islamic Academy of Education vs. State of Karnataka* (2003) 6 SCC 697.

F Despite the judgment in *Islamic Academy of Education's* case (supra), still there were some doubts and the matter was again referred to a Seven Judge Bench of this Court which decided it in *P.A.Inamdar & Others vs. State of Maharashtra & Others* (2005) 6 SCC 537.

G In paragraph 153 of *P.A. Inamdar's* case (supra), it has been stated:

H "....There are several questions which have remained unanswered and there are certain questions which have

cropped up post Pai Foundation and Islamic Academy. To the extent the area is left open, the Benches hearing individual cases after this judgment would find the answers."

Thus, it is evident that even in *Inamdar's* case (supra), it has been observed that there are still some doubts or grey areas in relation to the question of extent of State control over the Private Unaided Institutions imparting professional education.

We have gone through the aforesaid decisions with great care.

In para 91 of *Inamdar's* case (supra), it has been observed:

"The right to establish an educational institution, for charity or for profit, being an occupation, is protected by Article 19(1)(g) of the Constitution..."

Thus, it is clear that the right to establish and run an educational institution is a fundamental right guaranteed under Article 19(1)(g) of the Constitution. Of course, under Article 19(6) of the Constitution, reasonable restrictions can be placed on such a fundamental right, and hence we have to examine whether such restrictions are reasonable or not.

Before dealing with this issue we may refer to some observations made in the decision of this Court in the *TMA Pai Foundation* case (supra).

In paragraphs 37-45 of the aforesaid decision this Court held that the decision of this Court in *Unni Krishnan vs. State of A.P.* (1993) 1 SCC 645 in so far as it relates to the schemes of admission and fee were not correct.

Paragraphs 35-41 of the aforesaid decision in the *TMA Pai Foundation* case (supra) reads as follows:

A "35. It appears to us that the scheme framed by this Court and thereafter followed by the governments was one that cannot be called a reasonable restriction under Article 19(6) of the Constitution. Normally, the reason for establishing an educational institution is to impart B education. The institution thus needs qualified and experienced teachers and proper facilities and equipment, all of which require capital investment. The teachers are required to be paid properly. As pointed out above, the restrictions imposed by the scheme, in Unni Krishnan's C case, made it difficult, if not impossible, for the educational institutions to run efficiently. Thus, such restrictions cannot be said to be reasonable restrictions.

36. The private unaided educational institutions impart education, and that cannot be the reason to take away their D choice in matters, inter alia, of selection of students and fixation of fees. Affiliation and recognition has to be available to every institution that fulfills the conditions for grant of such affiliation and recognition. The private institutions are right in submitting that it is not open to the E Court to insist that statutory authorities should impose the terms of the scheme as a condition for grant of affiliation or recognition; this completely destroys the institutional autonomy and the very objective of establishment of the institution.

F

37. Unni Krishnan judgment has created certain problems, and raised thorny issues. In its anxiety to check the commercialization of education, a scheme of "free" and "payment" seats was evolved on the assumption that the G economic capacity of the first 50% of admitted students would be greater than the remaining 50%, whereas the converse has proved to be the reality. In this scheme, the "payment seat" student would not only pay for his own seat, but also finance the cost of a "free seat" classmate. When one considers the Constitution Bench's earlier statement

H

that higher education is not a fundamental right, it seems unreasonable to compel a citizen to pay for the education of another, more so in the unrealistic world of competitive examinations which assess the merit for the purpose of admission solely on the basis of the marks obtained, where the urban students always have an edge over the rural students. In practice, it has been the case of the marginally less merited rural or poor student bearing the burden of a rich and well-exposed urban student.

38. The scheme in Unni Krishnan's case has the effect of nationalizing education in respect of important features, viz., the right of a private unaided institution to give admission and to fix the fee. By framing this scheme, which has led to the State Governments legislating in conformity with the scheme, the private institutions are indistinguishable from the government institutions; curtailing all the essential features of the right of administration of a private unaided educational institution can neither be called fair or reasonable. Even in the decision in *Unni Krishnan's* case, it has been observed by Jeevan Reddy, J., at page 749, para 194, as follows:

*"The hard reality that emerges is that private educational institutions are a necessity in the present day context.* It is not possible to do without them because the Governments are in no position to meet the demand – particularly in the sector of medical and technical education which call for substantial outlays. While education is one of the most important functions of the Indian State it has no monopoly therein. Private educational institutions – including minority educational institutions - too have a role to play."

39. That private educational institutions are a necessity becomes evident from the fact that the number of government-maintained professional has more or less remained stationary, while more private institutions have

been established. For example, in the State of Karnataka there are 19 medical colleges out of which there are only 4 government-maintained medical colleges. Similarly, out of 14 Dental Colleges in Karnataka, only one has been established by the government, while in the same State, out of 51 Engineering Colleges, only 12 have been established by the government. The aforesaid figures clearly indicate the important role played by private unaided educational institutions, both minority and non-minority, which cater to the needs of students seeking professional education.

40. Any system of student selection would be unreasonable if it deprives the private unaided institution of the right of rational selection, which it devised for itself, subject to the minimum qualification that may be prescribed and to some system of computing the equivalence between different kinds of qualifications, like a common entrance test. Such a system of selection can involve both written and oral tests for selection, based on principle of fairness.

41. *Surrendering the total process of selection to the state is unreasonable, as was sought to be done in the Unni Krishnan scheme.* Apart from the decision in *St. Stephen's College vs. University of Delhi* [(1992) 1 SCC 558], which recognized and upheld the right of a minority aided institution to have a rational admission procedure of its own, earlier Constitution Bench decisions of this Court have, in effect, upheld such a right of an institution devising a rational manner of selecting and admitting students."

From the above observations it is clear that surrendering the total process of selection in private unaided professional institutions to the State is unreasonable and illegal. The private unaided institutions have a right to devise a rational manner of selecting and admitting students.

The aforesaid decision of the Eleven Judge Bench of this Court in *TMA Pai Foundation* (supra) was no doubt considered in *Islamic Academy* case (supra) and *Inamdar's* case (supra), but those latter two decisions were of smaller Benches and hence cannot be deemed to have overruled or laid down anything contrary to the Eleven Judge Bench decision in *TMA Pai Foundation* (supra). It is well-settled that a larger Bench decision prevails over the decision of a smaller Bench.

We may now examine some observations in *Inamdar's* case (supra).

In para 109 of *Inamdar's* case (supra), it has been observed that "it would be unfair to apply the same rules and regulations regulating admission to both aided and unaided professional institutions". It was also observed, following the decision in TMA Pai Foundation (supra) that greater autonomy must be granted to private unaided institutions as compared to private aided institutions. The reason for this is obvious. The unaided institutions have to generate their own funds and hence they must be given more autonomy as compared to aided institutions, so that they can generate these funds.

However, this does not mean that the private unaided professional institutions have absolute autonomy in the matter. There can validly be a certain degree of State control over the private unaided professional institutions for the reason that recognition has to be granted by the State authorities and it is also the duty of the State to see that high standards of education are maintained in all professional institutions. However, to what degree the State can interfere with respect to private unaided institutions is a matter deserving careful consideration.

In paragraph 137 of *Inamdar's* case (supra), it has been observed:

"......The admission procedure so adopted by a private institution or group of institutions, if it fails to satisfy all or

A any of the triple tests, indicated hereinabove, can be taken over by the State substituting its own procedure."

Thus, it has been held in Inamdar's case (supra) that while ordinarily admissions in private unaided professional B institutions could be done by those institution or association of such unaided professional institutions, the State can interfere if the admission procedure fails to satisfy certain tests. The reason for this is obviously that the State has an interest in maintaining high standards in professional institutions.

C The question, however, arises as to which is the body which can decide whether the private unaided institutions have failed to satisfy the triple tests, referred to in *Inamdar's* case (supra). In *Inamdar's* case (supra), there is no mention as to which is the body which will decide whether the prviate D instituions have satisfied or not satisfied the triple tests, referred to in para 137 of the *Inamdar's* case (supra). Thus, there is a lacuna in *Inamdar's* case (supra).

In our view, it cannot be left to the unilateral decision of the E State Government to say that the private institutions have failed to meet with the triple tests mentioned in *Inamdar's* case (supra), because that will be giving unbridled, absolute and unchecked power to the State Government. In our prima facie opinion, the M.P. Niji Vyavsayik Shikshan Sanstha (Pravesh Ka F Viniyaman Avam Shulk Ka Nirdharan) Adhiniyam, 2007 (for short 'the Act of 2007'), appears to handover the entire selection process to the State Government or the agencies appointed by the State Government for under-graduate, graduate and post-graduate medical/dental colleges and fee fixation. This, in our prima facie opinion, is contrary to, and inconsistent with the G observations (quoted above) made by the 11 Judge Bench decision of this Court in *T.M.A. Pai's* case (supra), and hence the 2007 Act would become unconstitutional if it is read literally. We have therefore to read down the 2007 Act and Rules to make them constitutional. Such reading down of a statute is H permissible, since it is well settled that the Court should make

A all efforts to sustain the validity of a statute, even if that involves reading its language down vide G. P Singh's 'Principles of Statutory Interpretation' Ninth Edition, 2004 pp. 496-503. Thus, while considering the validity of the Hindu Women's Right to Property Act, 1937, the Federal Court construed the word B 'property' as meaning 'property, other than agricultural land', vide In re Hindu Women's Right to Property Act AIR 1941 F.C. 72 (75), otherwise the Act would have become unconstitutional.

Similarly, in *Kedarnath vs. State of Bihar,* AIR 1962 SC 1955, this Court while interpreting Section 124A I.P.C read C down the words "by words, either spoken or written or by signs or visible representations, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards the Government established by law". This Court held that to avoid violation of Articles 19 (1)(a) and 19(2) D of the Constitution, Section 124A must be limited in its application "to acts involving intention or tendency to create disorder or disturbance of law and order or incitement to violence".

E In our view, a balance has hence to be struck because while on the one hand, the State Government does have an element of interest in the private unaided professional institutions, this does not mean that there will be no autonomy to the private unaided institutions. After all, the private unaided F institutions have to generate their own resources and funds and consequently they must have a larger degree of autonomy as compared to the aided institutions or the State Governments institutions.

In this situation, we are of the opinion that this Court must G use its creativity and find out a workable, balanced, via media to safeguard the interest of both parties, namely State Government on the one hand, and private unaided institutions on the other, and also to keep the interest of the students in mind.

H

A We, therefore, direct that the admissions in the private unaided medical/dental colleges in the State of Madhya Pradesh will be done by first excluding 15% N.R.I. seats (which can be filled up by the private institutions as per para 131 of Inamdar's case), and allotting half of the 85% seats for B admission to the under-graduate and post-graduate courses to be filled in by an open competitive examination by the State Government, and the remaining half by the Association of the Private Medical and Dental Colleges. Both the State Government as well as the Association of Private Medical and C Dental colleges will hold their own separate entrance examination for this purpose. As regards the 'NRI Seats', they will be filled as provided under the Act and Rules, in the manner they were done earlier.

We make it clear that the aforesaid directions will for the D time being only be applicable for this academic year i.e. 2009-10. We also make it clear that if there are an odd number of seats then it will be rounded off in favour of the private institutions. For example, if there are 25 seats, 12 will be filled up by the State Government and 13 will be filled up by the Association E of Private Medical/Dental Colleges. In Specialities in P.G. courses also half the seats will be filled in by the State Government and and half by the Association of Private Medical/ Dental Colleges and any fraction will be rounded off in favour of the Association. In other words if in any discipline there are, F say, 9 seats, then 5 will be filled in by the Association and remaining 4 will by the State Government. Capitation fee is prohibited, both to the State Government as well as the private institutions, vide para 140 of *Inamdar's* case (supra). Both the State Government and the Association of Private Medical/ G Dental Colleges will separately hold single window examinations for the whole State (vide para 136 of *Inamdar'* case (supra).

We make it clear that the solution we have arrived at may not be perfect, but we have tried to do our best to find out the
H

best via media. Although this order is only for the academic year 2009-10, we recommend that it may also be considered for future sessions.

Six weeks' time is allowed for filing counter affidavit and four weeks thereafter for filing rejoinder.

List these appeals for final hearing in September, 2009. In the meantime, pleadings may be completed by the parties.

R.P. Appeals adjourned.