

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 26th April, 2011

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W.P.(C) 1986/2011

MEDICAL COUNCIL OF INDIA

..... Petitioner

Through: Mr. A. Sharan, Sr. Adv. with
Mr. Amit Kumar, Mr. Somesh
Chandra Jha & Mr. Jawahar Lal,
Advocates.

Versus

AL KARIM EDUCATIONAL TRUST & ANR Respondents

Through: Mr. Sudhir Nandrajog, Sr. Adv. with
Mr. Mohit Kumar Shah,
Mr. D. Mishra & Mr. Ravi Bhushan,
Advocates for R-1.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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| 1. | Whether reporters of Local papers may
be allowed to see the judgment? | Yes |
| 2. | To be referred to the reporter or not? | Yes |
| 3. | Whether the judgment should be reported
in the Digest? | Yes |

RAJIV SAHAI ENDLAW, J.

1. The petition impugns the order dated 15th September, 2010 of the
National Commission for Minority Educational Institutions (hereinafter

referred to as the National Commission) declaring “that the Competent Authority of the Government of Bihar is deemed to have granted the Essentiality Certificate” to the respondent no.1 Trust for increasing intake capacity of MBBS course from 60 to 150. Though the petitioner Medical Council of India (MCI) was not a party to the proceedings before the National Commission but since the respondent no.1 Trust on the basis of the said order approached the petitioner MCI to evaluate the proposal of the respondent no.1 Trust for increase in seats and instituted proceedings before the National Commission for direction to the petitioner MCI to implement the order dated 15th September, 2010 (supra), the present petition impugning the said order has been preferred. The counsel for the respondent no.1 Trust being on Caveat appears. Since the applications for increase in seats to the MBBS course have to be decided in a fixed time, with the consent of the senior counsels for the petitioner MCI and for the respondent no.1 Trust and on the submission that the issue involved is purely legal, they were heard finally on the writ petition.

2. The factual matrix in which the legal questions urged have arisen is as under.

3. The respondent no.1 Trust has set up a Medical College in the name and style of Katihar Medical College, Katihar in the State of Bihar with an intake capacity 60 students for the MBBS course. The Central Government under the cover of its letter dated 29th September, 2006 to the petitioner MCI, forwarded an application of the respondent no.1 Trust along with the letter dated 2nd March, 2006 of the Government of State of Bihar (respondent no.2 herein) essentially certifying the Medical College of the respondent no.1 Trust for increase of seats in the MBBS course from 60 to 100. The petitioner MCI inspected the teaching and training facilities available at the Medical College of the respondent no.1 Trust for the proposed increase of seats in the MBBS course from 60 to 100 and inspection report was considered by the Executive Committee of the MCI in the meeting held on 13th & 14th June, 2007 when a decision was taken to return the application recommending disapproval to the Central Government for increase of seats from 60 to 100. The Central Government

was accordingly notified. Yet another application for increase in seats from 60 to 100 was moved in the year 2008 and which was also unsuccessful for the reason of the deficiencies found. In the meanwhile, the petitioner MCI vide Indian Medical Council (Amendment) Ordinance, 2010 was superseded by the Board of Governors who were also empowered to exercise the powers of the Central Government. The respondent no.1 Trust yet again on 29th September, 2010 applied to the said Board of Governors for increase in seats for MBBS course from 60, this time to 150. However since the said application was not accompanied with the Essentiality Certificate, as required to be submitted under the Regulations for/qua establishment of Medical Colleges, the Board of Governors of the petitioner MCI vide their letter dated 21st November, 2010 asked the respondent no.1 Trust to submit the Essentiality Certificate. It was in response to the said request that the respondent no.1 Trust, instead of the Essentiality Certificate submitted the order dated 15th September, 2010 (supra) of the National Commission impugned in this petition, to the Board of Governors of the petitioner MCI.

4. Section 10A of the Indian Medical Council Act, 1956 (Medical Council Act) prohibits establishment of a Medical College or opening of a new or higher course of study or training or increase in admission capacity in any course of study by a Medical College except with the previous permission of the Central Government obtained in accordance with the provisions of Section 10A. Sub-Section (2) requires application for permission to be submitted in accordance with the prescribed scheme to the Central Government.

5. The Establishment of New Medical Colleges, Opening of Higher Courses of Study and Increase of Admission Capacity in Medical Colleges Regulations, 1993 prescribed a scheme for applying for establishment of new Medical College or for increase in seats. The “qualifying criteria” prescribed in the said scheme required an Essentiality Certificate regarding the desirability and feasibility of having the proposed Medical College at the proposed location from the State Government or the Union Territory to be submitted. The 1993 Regulations were, as far as increase in intake capacity is concerned, superseded by “The Opening of a New or Higher Course of Study or Training (including Post-graduate Course of Study or

Training) and Increase of Admission Capacity in any Course of Study or Training (including a Postgraduate Course of Study or Training) Regulations, 2000". The same also, as per amendment w.e.f. 29th December, 2009, provides for obtaining the Essentiality Certificate in the prescribed format regarding no objection of the State Government / Union Territory administration for *inter alia* increase of admission capacity in any course of study or training and of availability of adequate clinical material as per Regulations. Vide further amendment dated 6th April, 2010, the proforma of Essentiality Certificate has also been prescribed and as per which proforma the State Government is required to state therein the number of Institutions already existing in the State, the number of seats available in the course in which admission capacity is proposed to be increased, justification therefor and is further required to certify that such increase is in public interest and the increase is feasible and the Hospital attached to the Institution has the requisite beds; the State Government is also to furnish an undertaking taking over the responsibility of the students already admitted in the event of the Institution failing to create the requisite infrastructure.

6. The respondent no.1 Trust, as aforesaid did, along with the applications for increase in seats from 60 to 100, submit the Essentiality Certificate issued by the respondent no.2 State of Bihar. It is the case of the respondent no.1 Trust that they had applied to the respondent no.2 State of Bihar for issuance of Essentiality Certificate for increase in seats from 60 to 150 also but the respondent no.2 State of Bihar despite being reminded, neither granted nor rejected the said application.

7. The respondent no.1 Trust which claims its Medical College to be a “Minority Educational Institution” within the meaning of Section 2(g) of the National Commission for Minority Educational Institutions Act, 2004 (hereinafter called the Minorities Act) and further claims to have been also so declared by the National Commission, instead of taking up the matter with the respondent no.2 State of Bihar, approached the National Commission under Section 10 of the Minorities Act. It transpires that the National Commission issued notice of the application of respondent no.1 Trust to the respondent no.2 State of Bihar but which failed to appear before the National Commission. The National Commission accordingly vide order dated 15th September, 2010 impugned in this petition, made in

exercise of powers under Section 10(3) of the Minorities Act, declared the respondent no.2 State of Bihar deemed to have granted the Essentiality Certificate to the respondent no.1 Trust for increase in seats from 60 to 150.

8. The Minorities Act was enacted to constitute a National Commission for Minority Educational Institutions and to provide for matters connected therewith or incidental thereto. Section 10(1) of the said Act requires any person desirous of establishing a Minority Educational Institution to apply to the “Competent Authority” for the grant of No Objection Certificate (NOC) for the said purpose. The “Competent Authority” is defined in Section 2(ca) of the Act as the authority appointed by the “appropriate Government” to grant NOC for the establishment of any Educational Institution of their choice by the minorities. The “appropriate Government” is defined in Section 2(aa) of the Act as, in relation to an Educational Institution recognized for conducting its programmes of studies under any Act of Parliament, the Central Government and in relation to any other educational institution recognized for conducting its programmes of studies under any State Act, the State Government in whose jurisdiction such

Institution is established. Section 10(2) of the Act requires the Competent Authority to decide the applications expeditiously after giving an opportunity of hearing to the applicant. Section 10(3) (under which the impugned order has been made) provides that where within a period of 90 days from the receipt of the application under Section 10(1) for the grant of NOC, the Competent Authority does not grant such certificate, it shall be deemed that the Competent Authority has granted a NOC to the applicant.

9. Though Section 10(3) of the Act deems issuance of a NOC for establishing a Minority Educational Institution, the National Commission in exercise thereof has declared the respondent no.2 State of Bihar to have deemed to have granted the Essentiality Certificate to the respondent no.1 Trust. The National Commission has thus, for the reason of the Medical College of the respondent no.1 Trust being a Minority Educational Institution equated the Essentiality Certificate required under the Regulations aforesaid to be the NOC required under the Minorities Act for establishing a Minority Educational Institution.

10. It was thus enquired from the senior counsel for the respondent no.1 Trust as to how an Essentiality Certificate under the Regulations aforesaid

could be treated as an NOC for establishing a Minority Educational Institution.

11. The senior counsel for the respondent no.1 Trust has contended that the NOC required under Section 10 of the Minorities Act has to be read as any NOC required from Central or State Government under any other law also, for the purpose of establishing an Educational Institution or as in this case for increasing the seats/intake capacity in the said Educational Institution. The senior counsel for the respondent no.1 Trust has urged that no permission was otherwise required for establishing a Minority Educational Institution and the Minority Educational Institution was required to obtain the same permissions/approvals from the Central/State Government as required by a Non-Minority Educational Institution. He contends that the Minorities Act was enacted for facilitating and for the benefit of Minority Educational Institutions and not to create additional impediments in establishment thereof. It is contended that unless the NOC in Section 10 of the Act is read as the NOCs/permissions/approvals required from the Central/State Government for setting up Educational Institutions, it would amount to introducing an additional permission for

establishment of Minority Educational Institution and which could never have been the intendment of the legislation. It is contended that Section 10 of the Act was enacted to prevent the play of bias against the minorities in the matter of establishment of Educational Institutions by providing that unless reasoned order is passed within 90 days, the concerned NOC/approval/permission shall be deemed to have been granted. The senior counsel for the respondent no.1 Trust has further contended that infact even without the declaration by the National Commission, the deeming provision in Section 10(3) of the Act would come into effect and all parties concerned shall be required to deal with the application for establishment of Minority Educational Institution as if the requisite NOC/permission/approval stood granted.

12. That infact forms the crux of the legal issue to be adjudicated herein i.e. whether the Minorities Act is in supersession of other legislation(s) providing the procedure for setting up of Educational Institutions and prescribing the NOCs/approvals/permissions required therefor, insofar as Educational Institutions belonging to the minorities are concerned.

13. The following questions arise for adjudication:

A. What is the nature of “NOC” provided for in Section 10 of the Minorities Act.

B. Whether the NOC (under Section 10 of the Minorities Act) is to be equated to NOC/approval/permission required under any other Act/Rules/Regulations relating to Educational Institutions.

14. The law makes certain special provisions with respect to Minority Educational Institutions. Such educational institutions are always dealt with separately in all judgments in educational matters including in *T.M.A. Pai Foundation vs. State of Karnataka* (2002) 8 SCC 481 and its corollaries namely *Islamic Academy of Education v. State of Karnataka* (2003) 6 SCC 697 and *P.A. Inamdar v. State of Maharashtra* (2005) 6 SCC 537. Of late, the concept of “minorities” has also undergone a sea change. One may be in minority in one State / region and not in another. The concept of linguistic minority has also come up. The question often arises whether a particular Educational Institution is entitled to be treated as a Minority Educational Institution or not. It thus appears that the legislature deemed it fit to provide for the National Commission where

such institutions would be registered/recorded, so that once the National Commission has issued a certificate declaring a particular institution to be a Minority Educational Institution, such Institution would not be required to prove so before various fora/authorities. Mention may be made of subsequent legislation being the Central Educational Institutions (Reservation in Admissions) Act, 2006 where Minority Educational Institution is defined *inter alia* as an Institution so declared by the Minorities Act.

15. The nature of the NOC under Section 10 of Minorities Act is further apparent from Explanation (b) to Section 10 where the said NOC has been defined as meaning a certificate stating that the Competent Authority has no objection for the establishment of a Minority Educational Institution. Thus the only enquiry preceding issuance of such certificate, contemplated is, whether the proposed Institution is being established by a community which is in minority in the State/region and entitled to tag of a Minority Educational Institution and to be dealt with accordingly. Refusal of the State Government/Union Territory to grant such certificate is appealable under Section 12A(1) before the National Commission. However if the

State Government/Union Territory neither grants such certificate nor refuses, the deeming provision under Section 10(3) comes into play and the NOC is deemed to have been granted. However, such NOC, whether granted or deemed to be granted will only mean that the Educational Institution qualifies as a Minority Educational Institution and State Government/Union Territory has no objection to its establishment. The Division Bench of the Bombay High Court also in ***Rekha Lakhi Totlani v. Sind Brahma Sikhya Sammelan*** 2006 (6) BomCR 626 held that the NOC under Section 10 (supra) is for determination as to which Institution is a Minority Institution.

16. There is nothing in Section 10 of the Minorities Act to suggest that the NOC required therein is the NOC / permission / approval required by an Educational Institution under any other legislation. Had it been so, nothing prevented the law makers to have provided so. While the NOC under Section 10 concerns only the character as a “minority”, the NOC/approval/permission under other legislations including the Regulations aforesaid, concern the character as an “Educational Institution” and having necessary infrastructure and capacity to impart

education in a course or subject. There is nothing in the Minorities Act to suggest that the NOC under Section 10 is intended in supersession of NOC/approval/permission required for setting up an Educational Institution or for imparting education in a course or subject. Rather Section 10(4) provides that on grant / deemed grant of NOC, the applicant shall be entitled to proceed with the establishment of Minority Educational Institution “in accordance with the rules and regulations, as the case may be, laid down by or under any law for the time being in force”; recognizing thereby that grant of NOC does not obviate compliance with other laws / rules / regulations for establishment of an Educational Institution.

17. I find that this Court in *University of Delhi v. Bombay Patel Welfare Society* MANU/DE/2432/2010 was also concerned with the challenge to the order of the National Commission directing the Delhi University to grant affiliation to a Minority Educational Institution. It was observed that Section 10(1) of the Minorities Act though prior to the amendment of the year 2006 opened with a *non obstante* clause but which had been dropped by the said amendment and Section 10A introduced. It was thus held that Section 10 was subject to affiliation being permissible

under the Act under which the affiliating University was established and that after the amendment of the year 2006 to Section 10, it was subject to the other laws. Accordingly, the order of the Minorities Commission was set aside.

18. I may add that Section 10(1) has since been amended further vide amendment Act, 2010 w.e.f 1st September, 2010. The same as it stands is as under :

“10. **Right to establish a Minority Educational Institution** -
(1) Subject to the provisions contained in any other law for the time being in force, any person, who desires to establish a Minority Educational Institution may apply to the competent authority for the grant of no objection certificate for the said purpose.”

In my opinion, the insertion of the words “subject to the provisions contained in any other law for the time being in force” prefacing Section 10(1) further places the matter beyond any pale of controversy. The Application for NOC under Section 10(1) cannot be said to be in supersession of any other law prescribing NOC/approval/permission for setting up of an Educational Institution.

19. The senior counsel for the respondent no.1 Trust has however invited attention to Section 22 of the Act providing for the provisions of the Minorities Act to have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. He contends that the said provision gives a superseding effect to the Minorities Act over other laws applicable to Educational Institutions.

20. I am unable to agree. The other Acts / Rules / Regulations prescribing NOC / approval / permission for establishment of Educational Institution cannot be said to be inconsistent with Section 10 (supra) providing for NOC. As aforesaid, while the NOC under Section 10 is concerned only with the minority character, the approval / permissions / NOC under other Acts / Rules / Regulations are concerned with the very existence as an Educational Institution. Without qualifying as an “Educational Institution” there can be no tag of “minorities” by way of issuance of NOC under Section 10. It is not as if the Regulations aforesaid requiring Essentiality Certificate from the State Government / Union Territory come in the way of issuance of the NOC under Section 10.

Without inconsistency, Section 22, relied upon by the senior counsel for respondent No.1 Trust, is not attracted.

21. The NOC under Section 10 of the Minorities Act cannot take the place of Essentiality Certificate. While issuing NOC under Section 10 of the Act, as aforesaid, the Central/State Government is required to primarily test the Minority character of the proposed Institution, while issuing the Essentiality Certificate the Government is required to assess the desirability and feasibility of the proposed Medical College at the proposed location and the adequacy of the clinical material available. The senior counsel for the petitioner MCI has in this regard placed reliance on *State of Maharashtra v. Indian Medical Association* (2002) 1 SCC 589 and *Govt. of A.P. v. Medwin Educational Society* (2004) 1 SCC 86 on the relevance of Essentiality Certificate. The Regulations (supra) do not contain any deeming provision and do not provide for the Essentiality Certificate having been “deemed” to have been issued. If the argument of the respondent no.1 Trust were to be accepted, it would tantamount to holding that in the matter of grant of Essentiality Certificate while for Minority

Educational Institutions the deeming provision applies, to non-minority it does not. The same cannot be permitted.

22. The Apex Court in *State of Maharashtra v. Laljit Rajshi Shah* (2000) 2 SCC 699 held that the well known principle of construction is that in interpreting a provision creating a legal fiction, the Court is to ascertain for what purpose the fiction is created but in so construing the fiction it is not to be extended beyond the purpose for which it is created. It was further held that a legal fiction enacted for the purposes of one Act is normally restricted to that Act and cannot be extended to cover another Act. Similarly in *State of Orissa v. Harapriya Bisoi* (2009) 12 SCC 378, it was held that if a statute has been passed for some one particular purpose, its operation cannot be extended to something else which is quite foreign to its object and beyond its scope.

23. The deeming provision in Section 10 cannot thus be extended to grant of Essentiality Certificate under the Regulations framed under the Medical Council Act. The senior counsel for respondent No.1 Trust invited attention to *G. Vishwanathan Vs. Hon'ble Speaker, Tamil Nadu Legislative Assembly* (1996) 2 SCC 353 holding that a deeming provision

is an admission of the non existence of the fact deemed and legislature is competent to enact a deeming provision for the purpose of assuming the existence of a fact which does not even exist. Reference was also made to ***East End Dwellings Co. Ltd. Vs. Finsbury Borough Council*** (1951) 2 All ER 587 laying down that when one is bidden to treat on imaginary state of affairs as real, he must surely unless prohibited from doing so, also imagine as real the consequences and incidents which inevitably have flowed from it - one must not permit his imagination to boggle when it comes to the inevitable corollaries of that state of affairs. However, while the said settled propositions cannot be disputed, the same for the reasons aforesaid, are not found attracted in the present case.

24. I had during the hearing also posed to the senior counsel for the respondent no.1 Trust whether the Constitution or any other law provides for relaxation of the norms laid down for establishing an Educational Institution in the case of minorities. The laws regulating establishment of Educational Institutions are concerned with ensuring that the institutions before they commence admitting students have the necessary infrastructure to provide the educational growth required/promised to the students. Such

laws are for the benefit of the students and to my knowledge there is no principle suggesting that the test/bar which such Educational Institutions are required to meet/pass before being entitled to admit students is lower for Minority Educational Institutions than that qua others. None of the judgments providing for the rights of minorities to establish Educational Institution also provides that the infrastructure available in such institutions can be lower in standard than in others. Article 30 of the Constitution of India only protects the right of minorities to retain the colour of minority to their Educational Institution and grants them certain privileges in the matter of administration thereof. However it is not as if while a Non-Minority Educational Institution would require say 10 acre of land for establishment, a Minority Institution would be entitled to establish the same in 1 acre only. Article 30(2) also prohibits discrimination in the grant of aid. Else, an Educational Institution established by the minority has to be as good as an Educational Institution established by the non-minority. The Minority tag does not give the card to the Institution to provide any lesser facilities and amenities as are required to be provided by a Non-Minority Educational Institution.

25. If it were to be held that the test which an Educational Institution is required to pass before being permitted to admit students is lower for an Educational Institution established by the minorities, it would tantamount to discrimination and would be violative of Articles 14 & 15 of the Constitution of India. This Court in the matter of interpreting any laws would prefer and adopt an interpretation which is in consonance with the principles enshrined in the Constitution of India and reject an interpretation which would lead to the law being declared invalid being *ultra vires* the Constitution of India. Reference may be made to ***Leelabai Gajanan Pansare v. Oriental Insurance Co. Ltd.*** (2008) 9 SCC 720 , ***U.P. Power Corporation Ltd. v. Ayodhya Prasad Mishra*** (2008) 10 SCC 139 and ***M. Rathinaswami v. State of Tamil Nadu*** (2009) 5 SCC 625 laying down that the Courts will place a construction as will save the statute from Constitutional challenge and every effort has to be made to save a statute from becoming unconstitutional.

26. There is another aspect of the matter. Section 10 of the Minorities Act requires only an NOC for “establishment” of a Minority Educational Institution. According to the respondent no.1 Trust, its Educational

Institution already stands established with the permitted intake of 60 students to the MBBS course. What the respondent no.1 Trust is now seeking is to enhance its intake capacity and not to “establish” a new Institution. The Minorities Act does not define “establish”. Ordinarily, the word “establish” conveys setting up for the first time and does not convey commencement of additional courses or increase in intake capacity. There is nothing in the Minorities Act to suggest, (as is the case under some other legislation) that even after NOC for establishing a Minority Educational Institution has been issued, a fresh NOC is required for introducing additional courses or for increase in intake capacity in the course/courses. This is more so, because the character of an Institution as an Educational Institution established by Minority community will not change by introducing additional courses or by increase in admission capacity. Thus, in my opinion, in any case for increase in admission capacity sought by respondent no. 1 Trust, no NOC under Section 10 of the Minorities Act was required and axiomatically, the question of the deeming provision therein applying, also does not arise.

27. Before parting with the case, certain preliminary objections taken by the senior counsel for the respondent no.1 Trust may be noticed. It was contended that the petitioner MCI has no locus to challenge the order of the National Commission. It is contended that the application for Essentiality Certificate was required to be submitted and submitted to the respondent no.2 State of Bihar and it is the respondent no.2 State of Bihar which even as per the order of the National Commission, is deemed to have issued the Essentiality Certificate and the petitioner MCI is merely required to proceed on the basis of such assumption and has no locus to file this petition.

28. I am unable to agree. The petitioner MCI being the repository for sanctioning establishment of medical colleges, definitely has locus to impugn the order of National Commission when the said order is sought to be implemented against it, notwithstanding the fact that the respondent no.2 State of Bihar has not impugned the same. It is the petitioner MCI and not the respondent no.2 State of Bihar which is the guardian of medical education in the country.

29. The senior counsel for the respondent no.1 Trust has further contended that it is not as if by deeming the issuance of the Essentiality Certificate the petitioner MCI is bound to allow the increase in seats; it is contended that the Essentiality Certificate is just one of the criteria and the petitioner MCI is yet to make its own assessment.

30. The said argument also does not find merit with the undersigned. The respondent no.1 Trust cannot claim to have cleared the first test merely because it is required to clear further tests also.

31. The senior counsel for the respondent no.1 Trust has also contended that the respondent no.2 State of Bihar having already in the past issued Essentiality Certificate to the respondent no.1 Trust for increase in seats from 60 to 100, is in the wrong in not issuing the Essentiality Certificate to the respondent no.1 Trust in the year 2010 for increase in seats from 60 to 150.

32. This question does not arise for consideration in the present case and the grievance in this regard if any has to be addressed by the respondent no.1 Trust by impugning the action of the respondent no.2 State of Bihar in not dealing with its application for issuance of Essentiality Certificate.

33. The petition therefore succeeds. The order dated 15th September, 2010 of the National Commission for Minority Educational Institutions is quashed/set aside and it is further declared that the Essentiality Certificate is not deemed to have been granted to the respondent no.1 Trust & its Medical College and the petitioner MCI is not required to proceed with the application of the respondent no.1 Trust by deeming such Essentiality Certificate to have been issued. The matter having been dealt with expeditiously, no order as to costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

April 26th, 2011
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