

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE THE CHIEF JUSTICE MR.ASHOK BHUSHAN

&

THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

MONDAY, THE 1ST DAY OF JUNE 2015/11TH JYAISHTA, 1937

WA.No. 796 of 2015 () IN WP(C).24187/2009

AGAINST THE JUDGMENT IN WP(C) 24187/2009 of HIGH COURT OF KERALA
DATED 17-07-2014

APPELLANT(S)/RESPONDENTS IN WPC :-

1. STATE OF KERALA REP. BY SECRETARY
HEALTH AND FAMILY WELFARE DEPARTMENT
GOVERNMENT OF KERALA, SECRETARIAT, TRIVANDRUM.
2. THE PRINCIPAL AND CONTROLLING OFFICER,
GOVERNMENT HOMOEOPATHIC MEDICAL COLLEGE, TRIVANDRUM.

BY SPL.GOVERNMENT PLEADER SMT.GIRIJA GOPAL

RESPONDENT(S)/PETITIONER IN WPC :-

DR. A.K.B. SADBHAVANA MISSION TRUST,
SARADHA HEALTH CENTRE, KOYILANDY - 673 321
REP. BY ITS MANAGER DR.SANU JOHN KOVOOR
AGED 37 YEARS, S/O.K.A.ELIAS.

BY SRI.BABU KARUKAPADATH

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 01-06-
2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

jvt

**ASHOK BHUSHAN, C.J &
A.M. SHAFFIQUE, J.**

W.A. No.796 of 2015

Dated this the 1st day of June 2015

J U D G M E N T

Shaffique, J.

The respondents in W.P.(C) No.24187 of 2009 are the appellants, who challenge the judgment dated 17.7.2014 passed by the learned Single Judge in the said writ petition.

2. The writ petition was filed by the respondent herein, who is hereinafter referred to as the petitioner, seeking for a declaration that the petitioner is entitled to evolve its own fair selection process for selecting the students for admission to Nurse-cum-Pharmacist Course in Homeopathy in its institution and to select the candidates for the said course and to fix reasonable and fair fee structure for the same and further to quash Ext.P16 in so far as it contravenes the right of the petitioner evolve its own fair and transparent selection process to select and admit all the students to its institution and also to fix the fee structure for the Nurse-cum-Pharmacist Course in Homeopathy in its institution. Ext.P16 is a draft agreement

sent by the first appellant to the petitioner. In fact there was an earlier round litigation, which ultimately led to the petitioner being called upon to execute the agreement subject to the result of the writ petition. According to the petitioner, the Government has no right to insist that 50% students to the course is to be filled up under the Government merit quota and the Government has no right to fix the fee structure for such seats. The petitioner has relied upon the judgment of the Supreme Court in **TMA Pai Foundation v. State of Karnataka** [(2002) 8 SCC 481], **Islamic Academy of Education v. State of Karnataka** [(2003) 6 SCC 697] and in **P.A. Inamdar v. State of Maharashtra** [(2005) 6 SCC 537] to contend that the stipulations regarding selection of students and fixation of fee structure by the Government is against law, which cannot be insisted by the Government.

3. In an earlier round litigation, in W.P.(C) No.27538 of 2005, an interim order dated 25.10.2005 was passed by this Court directing the Government to provide the petitioner with the draft agreement and the petitioner was asked to sign the agreement without prejudice to his contentions. In the said

interim order, there was a direction to the Government to invite applications for admission to the seats in two Government Colleges and to the 50% merit seats in the petitioner's college and to fill up the seats accordingly.

4. Ext.P8 is the said interim order in which it was finally stated that the same will be subject to result of the writ petition. The writ petition was finally decided by judgment dated 5.3.2007, in which this Court held as under :-

“Petitioner is a trust running an institute to train students as Nurse-cum-Pharmacists in Homeopathy. Common Examination is conducted by the Government for all the students attending the same course in Government Homeopathy Colleges and in institutes run by petitioner and others. The questions raised pertain to petitioner's right to fix the fees to be collected from the students, the procedure for selection for admission and also the minimum qualification required for admission. The learned counsel for the petitioner pointed out that by virtue of the consistent decisions of the Supreme Court in **TMA Pai Foundation Vs. State of Karnataka** [(2002) 8 SCC 481], **Islamic Academy of Education Vs. State of Karnataka** [(2003) 6 SCC 697] and in **P.A. Inamdar v. State of Maharashtra** [(2005) 6 SCC 537], management's right to fix fees is settled in their favour. The next issue covered by the above decisions is their right to make selection for admission, where the Supreme Court has held that it should be done in a fare and reasonable manner. Following the above judgments, the

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petitioner's entitlement to fix the fees and their right of selection for admission in a reasonable manner are upheld.

2. In so far as, the minimum qualification is required, petitioner has represented to Government to take a realistic approach in the matter because if selection is from students, who secured first class in SSLC, there will be shortage of students for admission to the course. This original petition is accordingly disposed of with a direction to the 1st respondent to decide the question of qualification and dates for commencement of course."

5. Subsequently, another writ petition came to be filed as W.P.(C) No.12556 of 2008 with respect to very same subject matter regarding execution of the agreement, wherein, by a common judgment dated 20.3.2009, the learned Single Judge directed that execution of the agreement cannot be prolonged and it was stated that once the agreement is executed, the Government has to take steps to see that the examination is conducted without any further delay. Subsequently, another draft agreement was sent as Ext.P16, wherein the Government included certain clauses, which had been impugned in the earlier litigation, which was covered by the judgment in W.P.(C) No.27538 of 2005.

6. Before the learned Single Judge it was contended that the Government is not entitled to insist for 50% of the seats in the petitioner's institution or to fix fee structure.

7. Having relied upon the judgments as aforesaid, especially in paragraphs 124 and 125 in **P.A. Inamdar's case (supra)**, the learned Single Judge found that the draft agreement to the extent it proposes to fill up 50% seats by the Government or such authorities as determined by the Government is totally illegal and without jurisdiction as it interferes with the right of the petitioner and its members to carry on the occupation guaranteed under Article 19(1)(g) of the Constitution of India. Similarly it was found that the Government has no right to fix fee structure of an unaided institution, which is already covered in various judgments as aforesaid. In the light of the said findings, the learned Single Judge held in the judgment as under :-

“On a consideration of the entire materials now placed on record, this Court is of the definite view that the petitioner is entitled to get the relief as prayed for. Therefore, this writ petition is allowed.

It is hereby declared that the petitioner is entitled to evolve its own fair selection process for selecting the

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students for admission to Nurse-cum-Pharmacist course in Homeopathy in its institution and to select the candidates for the said course and to fix reasonable and fair fee structure for the same.

Ext.P16 is quashed to the extent it contravenes the right of the petitioner to evolve its own fair selection process to select and admit all the students to the institution and also to fix the fee structure for the next coming Pharmacist course in the Homeopathy institution.

The respondents are directed to delete the clauses, especially, the last sentence of clause-2, clause 4, clause-5 and clause-6 to the extent it provides for the Government to make selection to 50% seats, prescribes the mode and method by the Government in the matter of selection of students and imposes the requirement of approval of the prospectus and the fees by the Government.

The respondents are directed to modify the agreement accordingly and execute the same without any further delay.”

8. Smt.Girija Gopal, the learned Special Government Pleader appearing for the appellants inter alia contended that in terms of the sanction order, Ext.P7 and the subsequent factual situation involved in the matter, the petitioner is under obligation to permit the Government to have 50% of the seats reserved under the Government Merit Quota. According to her, the previous judgment between the same parties cannot have any application as the petitioner has agreed to provide 50%

seats in the petitioner's college as Government merit quota and therefore, the petitioner could not go back from the terms of the said agreement.

9. In fact, though, it was strenuously argued that the earlier judgment did not cover the issue, even after going by the judgment in W.P.(C) No.27538 of 2005, it is clear that the issues had already been settled. That apart, a reference to **P.A. Inamdar's case (supra)**, especially in paragraphs 124 and 125, which are extracted hereunder clearly covers the issue, which reads as under :-

"124. So far as appropriation of quota by the State and enforcement of its reservation policy is concerned, we do not see much of a difference between non-minority and minority unaided educational institutions. We find great force in the submissions made on behalf of the petitioners that the States have no power to insist on seat-sharing in unaided private professional educational institutions by fixing a quota of seats between the management and the State. The State cannot insist on private educational institutions which receive no aid from the State to implement the State's policy on reservation for granting admission on lesser percentage of marks, i.e. on any criterion except merit.

125. As per our understanding, neither in the judgment of Pai Foundation nor in the Constitution Bench decision in Kerala Education Bill which was approved by Pai

Foundation is there anything which would allow the State to regulate or control admissions in the unaided professional educational institutions so as to compel them to give up a share of the available seats to the candidates chosen by the State, as if it was filling the seats available to be filled up at its discretion in such private institutions. This would amount to nationalisation of seats which has been specifically disapproved in *Pai Foundation*. Such imposition of quota of State seats or enforcing reservation policy of the State on available seats in unaided professional institutions are acts constituting serious encroachment on the right and autonomy of private professional educational institutions. Such appropriation of seats can also not be held to be a regulatory measure in the interest of the minority within the meaning of Article 30(1) or a reasonable restriction within the meaning of Article 19(6) of the Constitution. Merely because the resources of the State in providing professional education are limited, private educational institutions, which intend to provide better professional education, cannot be forced by the State to make admissions available on the basis of reservation policy to less meritorious candidates. Unaided institutions, as they are not deriving any aid from State funds, can have their own admissions if fair, transparent, non-exploitative and based on merit.”

10. In the light of the aforesaid statement of law by the Supreme Court if the Government insists that 50% merit quota is to be allocated to the Government in terms of the agreement, the same would definitely be against the law laid down by the Supreme Court in the aforesaid Constitution Bench judgment.

11. As far as the fixation of fee structure also is concerned, the same issue has also been dealt with in the Constitution Bench judgments aforesaid. Under such circumstances, we do not think that the learned Single Judge has committed any error in deciding the writ petition. We find no ground to interfere with the judgment of the learned Single Judge.

Accordingly, the writ appeal is dismissed.

Sd/-
ASHOK BHUSHAN
CHIEF JUSTICE

Sd/-
A.M. SHAFFIQUE
JUDGE

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P.A. TO JUDGE