

DSS

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 7151 OF 2016

Oslen A. Dsilva and anr. ... Petitioners
Vs.
State of Maharashtra and ors. ... Respondents

Mr. C.K. Thomas i/b Mr. Manoj Mane for the Petitioners.
Mr.L.M. Acharya, Spl. Counsel a/w. Ms Sushma Bhende, AGP for
the Respondents.

**CORAM : S.C. DHARMADHIKARI &
M. S. SONAK, JJ.**
DATE : 24 JUNE 2016.

JUDGMENT (PER M.S. SONAK,J.)

1] Rule. With the consent of and at the request of learned
counsel for the parties, Rule is made returnable forthwith.

2] The two petitioners in this petition, who claim to be
students belonging to minority community, question the legality and
validity of the requirement specified in clause 18 (18) of the
Information Brochure for admission to Post Graduate Technical
Courses for Academic Year 2016-17 (Brochure). The impugned
clause requires minority candidates seeking admission to Post

Graduate Technical Courses to attach '*Domicile Certificate*' alongwith the application form for Centralised Admission Process (CAP).

3] Mr. C.K. Thomas, learned counsel for the petitioners, has made the following submissions:

(a) The very requirement of “*domicile*” in State of Maharashtra in order to be considered against the minority quota in minority institutions within the State of Maharashtra, is ultra vires the provisions contained in Article 30 of the Constitution of India. Accordingly, clause 18 (18) of the Brochure, which makes it mandatory to attach “*Domicile Certificate*” alongwith application form for CAP is ultra vires and unconstitutional;

(b) The requirement of attaching “*Domicile Certificate*” alongwith application form for CAP has been mandated only in case of “*persons with disability candidates*” and “*minority candidates*” in terms of clauses 18(12) and 18(18) of the Brochure. There is no such mandate, insofar as candidates belonging to the other categories are concerned. This according to Mr. Thomas amounts to practice of hostile discrimination against minority candidates, thereby infringing the equality principle, enshrined in Article 14 of the Constitution;

(c) Finally, Mr. Thomas submitted that the requirement contained in clause 18(18) of the Brochure has been made applicable for the first time from Academic Year 2016-2017. Therefore, production of such Domicile Certificate on or before the cut off date, may not be feasible even to minority candidates, who may otherwise have the necessary domicile in the State of Maharashtra. For these reasons, Mr. Thomas submitted that the State is liable to be directed to grant an exemption in the matter of production and attachment of Domicile Certificate alongwith application form for CAP, at least for the Academic Year 2016-2017. Mr. Thomas submitted that this Court, by interim order dated 16 June 2016 in Writ Petition (L) No. 1603 of 2016, has already directed the grant of such exemption, insofar as admission to under graduate courses are concerned. Mr. Thomas submitted that the same principle should apply to the present case as well.

4] Mr. L.M. Acharya, learned special counsel for the respondents-State, submitted that the requirement of domicile in matters of admissions to the minority quota, has been in existence for past several years and there is no breach of constitutionality involved in the insistence of the same. He submitted that there are several provisions in the Maharashtra Unaided Private Professional

Educational Institution (Regulation or Admissions and Fees) Act, 2015 (said Act) and the Rules made thereunder, which specify that admissions as against the minority quota can be granted only to Maharashtra domicile candidates belonging to a particular linguistic or religious minority community from within the State. This is on the basis that the “*State*” is the basic unit in determining the minority status of a particular institution. Since, the protection is granted only to the minority candidates having domicile in the State of Maharashtra, there is no unconstitutionality involved in clause 18 (18) of the Brochure, which is clearly consistent with said Rules.

5] Mr. Acharya, then submitted that the comparison between candidates with disability or minority candidates on one hand and the rest of the candidates referred to in clause 18 of the Brochure, is quite misplaced and misconceived. Since, in case of candidates with disability or minority candidates, the reservation or protection is available only to Maharashtra domicile candidates, the requirement of production of Domicile Certificate has been specified. In such circumstances, there is no question of violation of Article 14 of the Constitution of India.

6] Finally, Mr. Acharya submitted that it is incorrect on the part of the petitioners to contend that the domicile requirement has been introduced for the first time for admissions to the Academic Year 2016-2017. Such requirement has been in existence in the past as

well and therefore, nothing prevented the petitioners from obtaining the Domicile Certificate before the commencement of admission process. Mr. Acharya, pointed out that the State Government had issued a G.R. dated 1 July 2013, prescribing with clarity the documents and certificates which minority candidates may be required to produce for seeking admission against the minority quota. Such G.R. has been in public domain since the year 2013. Mr. Acharya submitted that the the order dated 16 June 2016 made by this Court in Writ Petition (L) No. 1603 of 2016 is only an interim order and therefore does not constitute a precedent. In any case, Mr. Acharya submitted that the interim order was made in the peculiar facts and circumstances of the said case. The petitioners in the present petition are not in the same position as the petitioners in Writ Petition (L) No. 1603 of 2016. Mr. Acharya submitted that the admission process has, by now, substantially advanced and any interference at this stage will put the entire process out of gear. For all these reasons, Mr. Acharya urged that this petition be dismissed.

7] The rival contentions now fall for determination.

8] At the outset, we must observe that there is no proper foundation laid in petition to sustain constitutional challenge to the requirement of “*domicile*” in matters of admissions against the minority quota in the State of Maharashtra. In exercise of powers conferred by Section 23 of the said Act, the State has enacted and

notified the Maharashtra Unaided Private Professional Educational Institutions (Regulation of Admissions to the Full Time Professional under Graduate Technical Courses) Rules, 2016 (said Rules). The Brochure, basically gives information regarding the eligibility and rules of admission for these courses to first and second year of various technical professional Post graduate courses in the State of Maharashtra. The Brochure, also provides information about invitation of the applications for admission, preparation of merit list, distribution of seats, details of reservation, various rounds and stages of CAP, admissions in Institutional Quota seats and vacant seats after CAP, supernumerary seats, refund of fees etc. The said rules are applicable for admissions in Government and Government Aided professional educational institutions vide G.R. dated 15 March 2016. Suffice to note that there is no formal challenge to any provisions of the said Act or said Rules. The Brochure at best Catalogues the whole process stage and phase wise. That enables the candidates to obtain at a glance all the details about the process. It is not the submission that this Brochure is a substantive instrument by itself far from being termed as a Rule or a piece otherwise of subordinate legislation. However, we proceed on the footing that the Rules or requirements thereof are correctly and prominently reflected in the clauses of this Brochure. Hence, its clauses can be questioned or impugned when such requirement/s are challenged.

9] The challenge, as noted earlier, is only to clause 18(18) of the Brochure, which mandates that Domicile Certificate shall be attached alongwith application form for CAP by minority candidates seeking admissions against the minority quota. It complies the relevant information and projects the set of Rules applicable to the CAP.

10] The said Rules, as transcribed in Brochure, very clearly provide that “*minority quota*” means seats earmarked for the minority community students from within the State, belonging to the minority community to which the institution belongs [clause 2(p)].

11] Clause (5) of the Brochure defines various types of categories. Sub-clause (3) of clause (5) of the Brochure defines the term “*minority candidature*” as the Maharashtra domiciled candidate belonging to a particular linguistic or religious minority community from within the State and as notified by the Government to be eligible under the said category. Clause (7) of the Brochure, which deals with allocation of seats, in sub-clause (3) defines “*minority quota seats*”. This sub-clause again makes reference to clause 5(3) of the Brochure. Clause 7(6) which deals with reservation, again specifies that all reservations shall be applicable to candidates belonging to Maharashtra State only subject to fulfillment of eligibility criteria specified by the various authorities from time to time. In this clause, there is reference to reservation for persons with

disability or candidates belonging to this category. Clause 10(1) of the Brochure, *inter alia*, provides that the minority quota seats shall be allotted to the candidates of the State belonging to the minority community to which the institution belongs by virtue of merit or in open category as per *Inter-se-Merit* if the seats reserved for them are not available at their merit. All these provisions make it quite clear that admissions against the minority quota means admissions earmarked for minority community students from within the State, belonging to the minority community to which the institution belongs. Clause 18(18) of the Brochure, merely prescribes that minority candidates attach alongwith their application form for CAP, the Domicile Certificate of the candidate.

12] In our judgment, there is no infringement of Article 30 of the Constitution of India in restricting minority quota to seats earmarked for the minority community students from within the State, belonging to the minority community to which the institution belongs. In fact, prescription of domicile requirement in the State of Maharashtra for admission of minority candidates to the minority quota is quite a relevant and rational consideration consistent with the true scope and import of the protection granted to the minorities under Article 30 of the Constitution of India. The protection granted by Article 30 of the Constitution of India to the minorities is two fold. The first relates to establishment of the institution of the minority's choice. The second, relates to administration of such institution. In

the context of administration, there are several decisions, which have taken the view that “*right to administer*” does not include “*right to mal-administer*” and therefore, it is open to the State Government or other competent authorities to impose reasonable regulatory measures for the benefit of institution and the State and Universities can issue directions from time to time for maintenance of standards and excellence of such institutions, which is necessarily in National interest.

13] The right to establish educational institution is also protected under Article 30 of the Constitution of India. In order to claim minority/linguistic status for an institution in any State, the authorities must be satisfied that the institution has been established by the persons who are minority in such a State; and secondly, right of administration of such minority institution is also vested in such persons, who are genuinely either religious or linguistic minorities in that State. The right conferred by Article 30 of the Constitution cannot be interpreted as if, irrespective of the persons who established the institution in the State for the benefit of persons who are minority in that State, any person, be it a non-minority residing in another State, can administer and run such institution (See para 34 in case of *Dayanand Anglo Vedic (DAV) College Trust and Management Society Vs. State of Maharashtra and anr.*¹).

1 (2013) 4 SCC 14

14] The protection under Article 30 of the Constitution of India does not contemplate that persons, who are religious or linguistic minorities in a particular State, establish an institution of their own choice, but admissions to such institution are left open to persons/students from other States, where, the particular religion or particular linguistic community, may not even constitute the religious or linguistic minority community, in such other States. In fact, such a situation, if permitted, would amount to a fraud upon the provisions contained in Article 30 of the Constitution of India. This position is no longer *res integra*.

15] In *T.M.A. Pai Foundation Vs. State of Karnataka*², one of the question for consideration was whether the “State” or “the country as a whole” ought to be regarded as the unit in order to determine the existence of a religious or linguistic minority in relation to Article 30 of the Constitution of India. The Constitution Bench, in no uncertain terms, has held that with regard to a State law, the unit to determine a religious or linguistic minority can be only the State. The following observations in paragraphs 74 to 81, makes this position quite clear.

“4. In order to determine the existence of a religious or linguistic minority in relation to Article 30, what is to be the unit- the State or the country as a whole?”

74. We now consider the question of the unit for the purpose of determining the definition of “minority” within the meaning of Article 30(1).

2 (2002) 8 SCC 481

75. Article 30(1) deals with religious minorities and linguistic minorities. The opening words of Article 30(1) make it clear that religious and linguistic minorities have been put on a par; insofar as that article is concerned. Therefore, whatever the unit — whether a State or the whole of India — for determining a linguistic minority, it would be the same in relation to a religious minority. India is divided into different linguistic States. The States have been carved out on the basis of the language of the majority of persons of that region. For example, Andhra Pradesh was established on the basis of the language of that region viz. Telugu. “Linguistic minority” can, therefore, logically only be in relation to a particular State. **If the determination of “linguistic minority” for the purpose of Article 30 is to be in relation to the whole of India, then within the State of Andhra Pradesh, Telugu speakers will have to be regarded as a “linguistic minority”. This will clearly be contrary to the concept of linguistic States.**

76. If, therefore, the State has to be regarded as the unit for determining “linguistic minority” vis-à-vis Article 30, then with “religious minority” being on the same footing, it is the State in relation to which the majority or minority status will have to be determined.

77. In Kerala Education Bill, 1957 case (AIR 1958 SC 956) the question as to whether the minority community was to be determined on the basis of the entire population of India, or on the basis of the population of the State forming a part of the Union was posed at SCR p. 1047. It had been contended by the State of Kerala that for claiming the status of minority, the persons must numerically be a minority in the particular region in which the educational institution was situated, and that the locality or ward or town where the institution was to be situated had to be taken as the unit to determine the minority community. No final opinion on this question was expressed, but it was observed at SCR p. 1050 that as the Kerala Education Bill “extends to the whole of the State of Kerala and consequently the minority must be determined by

reference to the entire population of that State”.

78. In two cases pertaining to D.A.V. College, this Court had to consider whether the Hindus were a religious minority in the State of Punjab. In *D.A.V. College v. State of Punjab* ((1971) 2 SCC 269) the question posed was as to what constituted a religious or linguistic minority, and how it was to be determined. After examining the opinion of this Court in *Kerala Education Bill, 1957* case the Court held that the Arya Samajis, who were Hindus, were a religious minority in the State of Punjab, even though they may not have been so in relation to the entire country. In another case, *D.A.V. College v. State of Punjab* ((1971) 2 SCC 261) the observations in the first *D.A.V. College* case were explained, and at SCR p. 681, it was stated that “what constitutes a linguistic or religious minority must be judged in relation to the State inasmuch as the impugned Act is a State Act and not in relation to the whole of India”. (SCC p. 264, para 5) The Supreme Court rejected the contention that since Hindus were a majority in India, they could not be a religious minority in the State of Punjab, as it took the State as the unit to determine whether the Hindus were a minority community.

79. *There can, therefore, be little doubt that this Court has consistently held that, with regard to a State law, the unit to determine a religious or linguistic minority can only be the State.*

80. The Forty-second Amendment to the Constitution included education in the Concurrent List under Entry 25. Would this in any way change the position with regard to the determination of a “religious” or “linguistic minority” for the purposes of Article 30?

81. As a result of the insertion of Entry 25 into List III, Parliament can now legislate in relation to education, which was only a State subject previously. The jurisdiction of

Parliament is to make laws for the whole or a part of India. It is well recognized that geographical classification is not violative of Article 14. It would, therefore, be possible that, with respect to a particular State or group of States, Parliament may legislate in relation to education. However, Article 30 gives the right to a linguistic or religious minority of a State to establish and administer educational institutions of their choice. The minority for the purpose of Article 30 cannot have different meanings depending upon who is legislating. Language being the basis for the establishment of different States for the purposes of Article 30, a “linguistic minority” will have to be determined in relation to the State in which the educational institution is sought to be established. The position with regard to the religious minority is similar, since both religious and linguistic minorities have been put on a par in Article 30.”

(emphasis supplied)

16] In case of *P.A. Inamdar and ors. Vs. State of Maharashtra and ors.*³, at paragraphs 95,96, 101 and 102, the Hon'ble Supreme Court has observed thus:

“Minority” and “minority educational institutions”

95. The term 'minority' is not defined in the Constitution. Chief Justice Kirpal, speaking for the majority in *Pai Foundation*, took a clue from the provisions of the State Reorganisation Act and held that in view of India having been divided into different linguistic States, carved out on the basis of the language of the majority of persons of that region, it is the State, and not the whole of India, that shall have to be taken as the unit for determining a linguistic minority vis-a-vis Article 30. Inasmuch as Article 30(1) places on par religions and

3 (2005) 6 SCC 537

languages, he held that the minority status, whether by reference to language or by reference to religion, shall have to be determined by treating the State as a unit. The principle would remain the same whether it is a Central legislation or a State legislation dealing with a linguistic or religious minority. Khare, J. (as His Lordship then was), Quadri, J. and Variava & Bhan, JJ. in their separate concurring opinions agreed with Kirpal, CJ. **According to Khare, J., take the population of any State as a unit, find out its demography and calculate if the persons speaking a particular language or following a particular religion are less than 50% of the population, then give them the status of linguistic or religious minority. The population of the entire country is irrelevant for the purpose of determining such status.** Quadri, J. opined that the word 'minority' literally means 'a non-dominant' group. Ruma Pal, J. defined the word 'minority' to mean 'numerically less'. However, she refused to take the State as a unit for the purpose of determining minority status as, in her opinion, the question of minority status must be determined with reference to the country as a whole. She assigned reasons for the purpose. Needless to say, her opinion is a lone voice. **Thus, with the dictum of Pai Foundation, it cannot be doubted that a minority, whether linguistic or religious, is determinable only by reference to the demography of a State and not by taking into consideration the population of the country as a whole.**

96. Such definition of minority resolves one issue but gives rise to many a questions when it comes to defining 'minority educational institution'. **Whether a minority educational institution, though established by a minority, can cater to the needs of that minority only? Can there be an enquiry to identify the person or persons who have really established the institution?**

Can a minority institution provide cross-border or inter-State educational facilities and yet retain the character of minority educational institution?

...

...

101. In this background arises the complex question of transborder operation of Article 30(1). *Pai Foundation* has clearly ruled in favour of the State (or a province) being the unit for the purpose of deciding minority. By this declaration of law, certain consequences follow. First, every community in India becomes a minority because in one or the other State of the country it will be in minority - linguistic or religious. ***What would happen if a minority belonging to a particular State establishes an educational institution in that State and administers it but for the benefit of members belonging to that minority domiciled in the neighbouring State where that community is in majority? Would it not be a fraud on the Constitution?*** In *St. Stephen's*, their Lordships had ruled that Article 30(1) is a protective measure only for the benefit of religious and linguistic minorities and "no ill-fit or camouflaged institution should get away with the constitutional protection". ***The question need not detain us for long as it stands answered in no uncertain terms in Pai Foundation. Emphasising the need for preserving its minority character so as to enjoy the privilege of protection under Article 30(1), it is necessary that the objective of establishing the institution was not defeated.***

"If so, such an institution is under an obligation to admit the bulk of the students fitting into the description of the minority community. Therefore, the students of that group residing in the State in which the institution is located have to be necessarily admitted in a large measure because they constitute the linguistic minority group as far as that State is concerned. In other words, the predominance of

linguistic students hailing from the State in which the minority educational institution is established should be present. The management bodies of such institutions

cannot resort to the device of admitting the linguistic students of the adjoining State in which they are in a majority, under the facade of the protection given under Article 30(1)."

The same principle applies to religious minority. If any other view was to be taken, the very objective of conferring the preferential right of admission by harmoniously constructing Articles 30(1) and 29(2), may be distorted.

102. It necessarily follows from the law laid down in Pai Foundation that to establish a minority institution the institution must primarily cater to the requirements of that minority of that State else its character of minority institution is lost. However, to borrow the words of Chief Justice S.R. Das (in Kerala Education Bill) a 'sprinkling' of that minority from the other State on the same footing as a sprinkling of non-minority students, would be permissible and would not deprive the institution of its essential character of being a minority institution determined by reference to that State as a unit."

(emphasis supplied)

17] If therefore, with regard to a State law, the unit to determine a religious or the linguistic minority, can only be the State and further, the minority institution so established in a State must primarily cater to the requirement of that minority of that State, else, its character as a minority institution may be lost, we see no infirmity whatsoever in prescribing the requirement of domicile, in order that the minority candidates are considered for admission against the

minority quota in minority institutions within the State of Maharashtra. Such a provision, is in fact, quite consistent with the very objective of Article 30 of the Constitution of India. Clause 18 (18) of the Brochure, merely requires the minority candidates to attach Domicile Certificate alongwith application form for CAP. There is accordingly, nothing ultra vires or unconstitutional with regard to such requirement. Rather the requirement in the Brochure is a safeguard against misuse of the constitutional protection. Else, the mischief noted above cannot be curbed.

18] We see no merit in the second contention of Mr. Thomas premised upon discrimination and consequential breach of Article 14 of the Constitution of India. In order to make out a case of discrimination, the petitioners were required to both plead as well as establish that the “*minority candidates*” referred to in clause 18(18) of the Brochure, are on the same footing as the candidates referred to in the remaining sub-clauses of clause 18 of the Brochure. There are no pleadings to this effect. In fact, there could be no pleadings to this effect. Even a bare perusal of the various candidatures referred to in clause 18 of the Brochure would establish that there is no significant commonality between the minority candidates and the candidates belonging to other categories. It is settled position in law that equality is amongst equals. In the present case, there can be no comparison between the different types of candidates referred to in the various sub-clauses of clause 18 of the Brochure. Depending upon

the category, the clause 18 prescribes the documents to be attached alongwith the application form for CAP. For example, there is no point in prescribing a Domicile Certificate for Jammu and Kashmir migrant candidates or foreign nationals/foreign students. The Domicile Certificate requirement has been prescribed for persons with disability candidates, because, some seats are reserved only to such category students domiciled in the State of Maharashtra and not beyond. The same is the position with admissions against the minority quota. As noted earlier, minority quota means seats earmarked for the community students from within the State belonging to the minority community to which the institution belongs. Obviously, therefore, students seeking admission against such quota are required to be domiciled in the State of Maharashtra. The requirement with regard to production of Domicile Certificate is, therefore, legal and valid and not unconstitutional or ultra vires, as urged by the petitioners. The production of Domicile Certificate is quite a legitimate mode for ascertaining the domicile status of the candidates who seek admission against the minority quota. Accordingly, we see no merit in the challenge based upon discrimination or violation of Article 14 of the Constitution of India.

19] The last contention of Mr. Thomas, is possibly based upon the hardships faced by the petitioners in obtaining the Domicile Certificate from the prescribed authorities within the time limit prescribed. In the first place, Mr. Thomas is not accurate in his

submission that the requirement of domicile has been introduced for the first time for admissions to the academic year 2016-2017. The record indicates that such requirement was always there. At the highest, some concessions may have been granted in the previous academic years, in the matter of actual production of Domicile Certificate alongwith the application seeking admission. In ground 'c' to the petition, the petitioners have themselves pleaded that till academic year 2015-2016, a candidate could apply for consideration against the minority quota by producing the following documents:

“(i) declaration/leaving certificate containing information of religion/language; and

(ii) Domicile Certificate or

(iii) proof of having applied to the Competent Authority for issuing Domicile Certificate; with an undertaking that the Domicile Certificate would be furnished well before the due date of verification of admission by Pravesh Niyantran Samitti.”

20] From the aforesaid, it is quite clear that not only 'domicile' was one of the prescribed requirement for admission against minority quota, but further, there was also requirement for production of Domicile Certificate. No doubt, such Domicile Certificate, upto academic year 2015-2016, could have been produced before due date of verification of admission by Pravesh Niyantran Samitti. This was, at the highest, a concession granted to the candidates. Obviously, the petitioners cannot claim any vested rights in such concession or for

that matter the continuance of such concession. Besides, from the pleadings in the petition, it is quite clear that the petitioners were aware, not only of the requirement of Domicile Certificate, but further were also aware of the necessity to produce Domicile Certificate or at least proof of having applied to the competent authority for issuance of Domicile Certificate. Since, the petitioners were quite clear that they were to apply for admissions against the minority quota, nothing prevented them from applying for Domicile Certificate well in advance. In the present case, there is not even any averment that the petitioners have applied to the competent authority for issuance of Domicile Certificate well in time and that issuance of same has been delayed by the competent authorities.

21] The interim order dated 16 June 2016, in the Writ Petition (L) No. 1603 of 2016, is obviously made in peculiar facts and circumstances of the said case. There is no question of extension of such benefit to the petitioners in the present petition. There is, as noted earlier, not even any averment in the petition that the petitioners have applied to the competent authority for issuance of Domicile Certificate well in time. That apart, the admission process, by now, has advanced substantially and there is merit in the contention of Mr. Acharya that the entire admission process might be put out of gear, in case, any concessions are extended to the petitioners, at this stage.

22] For all the aforesaid reasons, we see no merit in this petition. Rule is discharged. In the facts and circumstances of the present case, there shall be no order as to costs.

[M. S. SONAK, J.]

[S.C. DHARMADHIKARI, J.]