

IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.729 of 2017
IN
Civil Writ Jurisdiction Case No. 2367 of 2017

- =====
1. Netaji Subhas Institute of Technology through its Member Secretary Madan Mohan Singh, son of Sri T.N. Singh at Netaji Subhas Institute of Technology (NSIT) Campus, Amhara, Bihta, Patna- 801118 (Bihar).
 2. Chandan Kumar Singh, son of Sri Vinay Singh, Resident of Village- Lakhanpur, P.S.- Navinagar, District- Aurangabad.
 3. Vivek Kumar, son of Sri Om Prakash Gupta, Resident of Barhmni Ghat, Uppar Gali, Town, P.S. and District- Gaya.

.... Appellant/s

Versus

1. The State of Bihar through the Principal Secretary, Department of Science and Technology, Govt. of Bihar, Patna.
2. The Principal Secretary, Department of Science and Technology, Govt. of Bihar, Patna.
3. The Admission Supervisory Committee through its Member Secretary cum Principal Secretary of Science and Technology Department, Govt. of Bihar, Patna.
4. The Director, Department of Science and Technology, Govt of Bihar, Patna.
5. Aryabhatta Knowledge University, Patna through its Registrar.
6. The Vice Chancellor, Aryabhatta Knowledge University, Patna.
7. The Registrar, Aryabhatta Knowledge University, Patna.
8. The Examination Controller, Aryabhatta Knowledge University, Patna.

.... Respondent/s

With

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Letters Patent Appeal No. 765 of 2017
IN
Civil Writ Jurisdiction Case No. 2367 of 2017

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1. Khushi Sanskriti, daughter of Sri Baiju Prasad, Resident of Flat No. 102 Shankuntala Apartment, Latma Road, Hatia, Ranchi (Jharkhand).
 2. Kanchan Sinha, daughter of Sri Vidya Nand Sinha, Resident of East Ashok Nagar, Road No. 14 A, House No. 305, Kankarbagh, Patna.
 3. Rangesh Kumar, Son of Sri Pramod Sharma, Resident of Village and P.O.- Dhamni, P.S. Haspura, District- Aurangabad.
 4. Shivam Kumar, Son of Sri Sudhanshu Bhushan Diwedi, Resident of Village- Maner Telpa, P.O. and P.S.- Bikram, District- Patna.

.... Appellant/s

Versus

1. The State of Bihar through the Principal Secretary, Department of Science and Technology, Govt. of Bihar, Patna.
2. The Principal Secretary, Department of Science and Technology, Govt. of Bihar, Patna.
3. The Admission Supervisory Committee through its Member Secretary cum Principal Secretary of Science and Technology Department, Govt. of Bihar, Patna.
4. The Director, Department of Science and Technology, Govt. of Bihar, Patna.



5. Aryabhatta Knowledge University, Patna through its Registrar.
6. The Vice Chancellor, Aryabhatta Knowledge University, Patna.
7. The Registrar, Aryabhatta Knowledge University, Patna.
8. The Examination Controller, Aryabhatta Knowledge University, Patna.
..... Respondent/Respondents
9. Netaji Subhas Institute of Technology through its Member Secretary Madan Mohan Singh, son of Sri T.P. Singh at Netaji Subhas Institute of Technology (NSIT) Campus, Amhara, Bihta, Patna- 801118 (Bihar).
10. Chandan Kumar Singh, Son of Sri Vinay Singh, Resident of Village- Lakhanpur, P.S.- Navinagar, District- Aurangabad.
11. Vivek Kumar, Son of Sri Om Prakash Gupta, Resident of Brahmni Ghat, Uppar Gali, Town, P.S. and District- Gaya.

.... Respondent/s

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Appearance :

(In LPA No.729 of 2017)

For the Appellant/s : Mr. Mohan Lal Verma, Sr. Advocate
Mr. Abhay Shankar Singh, Advocate

For the Respondent/s : Mr. P.N. SHAHI- AAG-6

(In LPA No.765 of 2017)

For the Appellant/s : Mr. Ravindra Srivastava, Sr. Advocate
Mr. Yashraj Bardhan, Advocate

For the Respondent/s : Mr. P. N. SHAHI- AAG-6

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CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY

C.A.V. JUDGMENT

(Per: HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY)

Date: 13-09-2017

Both the Letters Patent Appeal arises out of common judgment and order dated 17.04.2017 whereby the Writ Court on consideration of the pleading and submissions advanced by the parties dismissed the five writ applications, namely, C.W.J.C. No.605 of 2017 filed by Bihar Private Technical and Professional Institutions Association (B.P.T.P.I.A.) and another Vs. The State of Bihar and others. C.W.J.C. No. 2247 of 2017 filed by Kumar Aman and another Vs. The State of Bihar and others. C.W.J.C. No. 3457 of 2017 filed by Netaji Subhas Institute of Polytechnic and others Vs. The State of



Bihar and others. C.W.J.C. No. 2064 of 2017 filed by Dr. Kamlesh Kumar Singh Vs. The State of Bihar and others and C.W.J.C. No. 2367 of 2017 filed by Netaji Subhas Institute of Technology Through Its Member Secretary Madan Mohan Singh and others Vs. The State of Bihar and others.

2. The two appeals under Clause 10 of the Letters Patent of Patna High Court Rule have been filed by Netajee Subhash Institute of Technology through its Member Secretary against the judgment passed in C.W.J.C. No. 2367 of 2017, whereas L.P.A. No. 765 of 2017 has been filed by the students of the Institute in question after seeking leave to file appeal in I.A. No. 3360 of 2017 against the judgment passed in C.W.J.C. No. 2367 of 2017.

3. In all the writ applications disposed of by common judgment dated 17.04.2017 identical issue was raised and identical prayer was made before the writ Court, however, except the petitioner in C.W.J.C. No. 2367 of 2017, none of the petitioners of writ petitions has preferred any appeal against the common judgment of the learned Single Judge dated 17.04.2017 and the judgment of the learned Single Judge in the absence of challenge has become final qua the writ petitioners of C.W.J.C. No.605 of 2017, C.W.J.C. No. 2064 of 2017, C.W.J.C. No. 2247 of 2017, C.W.J.C. No. 2367 of 2017 and C.W.J.C. No. 3457 of 2017.



4. For ready reference, the prayer made in all the writ applications dismissed by the common judgment is set out below:

C.W.J.C. No. 605 of 2017

(A) For issuance of a writ in the nature of Mandamus directing the respondents to allow all the admitted students of academic session 2016-17 of Diploma Courses of various recognized private Engineering and Polytechnic Colleges associated with the petitioner association, who took admission against sanctioned vacant seats in their respective colleges, to fill up the form and to take their respective semester examinations being conducted by State Board of Technical Education, Bihar or if required may kindly direct the respondents to conduct special semester examination for all of them.

(B) For any other relief/reliefs to which the petitioner association or the students of respective member colleges are found entitled under the facts and circumstances of the present case.”

C.W.J.C. No. 2064 of 2017

This is an application on behalf of the petitioners and students of college for direction to Respondent to hold examination of the Degree Course of 2016-2017 Academic Session and publish result along



with the students of Degree Section of the students of the college who have been registered numbering 73 for which the Examination Controller of Aryabhat Knowledge University has sent information on 27/1/2017 and published result accordingly.

C.W.J.C. No. 2247 of 2017

This is an application on behalf of the petitioner and the students of the college for direction to the Respondents to hold examination of the Diploma Course of 2016-2017 Academic Session and accept registration fee for which the State Board of Technical Education, Bihar is a competent authority and published result, along with the students who have appeared in the examination conducted by Respondent No.4 on 23/1/2017 so that the one year time may be saved.

C.W.J.C. No. 2367 of 2017

“(A) For issuance of an appropriate writ/writs to set aside the impugned part of examination notice dated 8.2.2017 (Annexure-17) issued by respondent Aryabhata Knowledge University, Patna (A.K.U.) by which it has been remarked that the University will conduct examination of only those 2016-17 students whose



admission was taken on the basis of entrance test conducted by B.C.E.C.E./Bihar State Engineering Private Association (i.e. B.P.T.P.I.A.).

(B) For issuance of a consequential writ in the nature of Mandamus directing the respondents to allow all the admitted students of academic session 2016-17 of Engineering Courses of various streams of the petitioner no.1 College,; including the petitioner no.2 and 3; who took admission against sanctioned vacant seats of B-Tech in the petitioner no.-1 college and further to allow them to fill up the form and to take their 1st semester examinations to be conducted by Aryabhatta Knowledge University, Patna with effect from 28.2.2017 or if required may kindly direct the respondents to conduct special semester examination for all such students of petitioner no.1 college.

(C) For any other relief/reliefs to which the petitioners are found entitled under the facts and circumstances of the present case.”

C.W.J.C. No.3457 of 2017

“(A) For issuance of an appropriate writ/writs particularly a writ in the nature of Mandamus directing the respondents to allow all the admitted students of academic



Session 2016-17 of Diploma Courses of various streams of the petitioner no.1 and 2 institutes; including the petitioner no.3 to 6; who took admission against AICTE approved intake (sanctioned vacant seats) of Diploma Level Engineering and Technology Programme (polytechnic course) in the petitioner no.-1 and 2 institutes to pursue and complete their course and further to allow them to fill up the form and to appear in 1st semester/Special examination to be conducted by the State Board of Technical Education, Bihar.

(B) For a consequential writ directing the respondents to conduct special semester examinations for all such students, who have completed their 1st semester course and to now not being allowed to appear in their respective 1st semester examination.

(C) For any other relief/reliefs to which the petitioners are found entitled under the facts and circumstances of the present case.”

5. Although the judgment of the Writ Court has become final so far as the other writ petitioners are concerned and as such it may be a debatable question whether the present appeal is competent or not in view of the non-challenge of the same judgment by other set of writ petitioners in the similar fact, whose writ petition



involved same relief and same facts situation was dismissed and has attained finality in view of the judgment of the **Apex Court in case of Sheodan Singh Vs. Daryao Kunwar, reported in AIR 1966 SC 1332**, however without entering into the issue of legal nicety, I propose to examine the two Letters Patent Appeal, bearing L.P.A. No. 729 of 2017 and L.P.A. No. 765 of 2017 on its own merit.

6. L.P.A. No. 765 of 2017 was filed by the four students after taking leave of the Hon'ble Court claiming therein to be the worst sufferer of the order and judgment of the Writ Court.

7. Mr. Mohan Lal Verma, learned senior counsel appearing on behalf of the appellants in L.P.A. No. 765 of 2017 has in substance submitted that the appellants and other students, who took admission in 2016-17 Sessions in B.Tech course of Netaji Subhas Institute of Technology, Bihta have completed approximately four Semesters and spent their approximately 2 years valuable time of their career are now standing on the cross road as their bright career has eclipsed due to the judgment and order of the Writ Court. He submitted that the students are innocent and bonafide and the Court should exercise clemency jurisdiction to salvage the career of the students, who joined B. Tech Course in the institute in question, which ranked 72 in the country. He submits that most of the students have bright academic career and they joined the course with high



hopes and expectations that after undergoing proper instruction in the institute of par excellence they will prove assets for the society. Mr. Verma, with reference to Annexure-23 submitted that all the students, who were admitted in the B. Tech course, were eligible in terms of the qualification prescribed by the AICTE. He also submitted that the institute in question is duly recognized by the AICTE and all the students were admitted within the permissible intake of the students. He submitted that all the students have been admitted on the basis of merit list prepared on consideration of marks obtained in 10+2 examination and there is no legal bar in admission in the technical institute on the basis of merit list of marks obtained in 10+2 examination. He has referred to various judgments of the Apex Court to substantiate his argument that the admission in B. Tech course in the institute on the basis of merit list of marks obtained in 10+2 examianation is one of the permissible modes of admission as per the judgment of the Apex Court starting from **T.M.A. Pai Foundation Vs. State of Karnataka**, reported in (2002) 8 SCC 481 to the latest one. Referring the **T.M.A. Pai Foundation (supra)** he submitted that a conjoint reading of para 54, 55, 56, 59 and 68 of **T.M.A. Pai Foundation (supra)** it is evident that admission on the basis of marks obtained at the qualifying school or School Leaving Certificate stage is permissible mode to assess the merit. He submitted with reference



to the judgment of the Apex Court in **Islamic Academy of Education and Another Vs. State of Karnataka and others**, reported in (2003) 6 SCC 697 and referring to the discussions in para 16 onwards he submitted that the students were required to be admitted by following the triple test of merit, transparency and non-exploitativeness and as such their admission cannot be faulted on the ground that they have been admitted on the basis of merit list prepared taking into consideration the marks obtained in 10 + 2 examination. Mr. Verma submitted that in any view of the matter, the students, who were admitted to the course and prosecuted their studies cannot be made to suffer if there is at all any lapse on the part of the institution and indecisiveness of the State Government in the matter of non-holding of second round of combined entrance test, as all the students have in response to advertisement for holding second round of combined entrance test have applied and due to indecisiveness of the State Government, second phase combined entrance test was not held and the students having eligibility for admission in such Technical course have been admitted within the sanctioned strength and they have prosecuted their studies.

8. In the aforesaid factual premise, Mr. Verma submitted that equity of situation demands that the Court should be benevolent and safeguard the interest of the students. He referred to



the order dated 23.09.2005 of the Apex Court passed in I.A. Nos. 90 and 96 of the writ petition (Civil) No. 350 of 1993, where the Apex Court allowed filling of the vacant seat on the basis of merit list on the basis of marks obtained in 10+2 examination conducted by the C.B.S.E. or the other Boards. He referred to the decision in case of **National Board of Examinations Vs. Ami Rajesh Shah**, reported in **(2012) 13 SCC 528** where the Apex Court keeping in view the interest of welfare of the students allowed the admission despite the admission was in breach of the statutory rules framed by the National Board Examinations. The Apex Court in the said judgment clarified that the judgment and order passed by the High Court need not to be treated as precedent in any other case. He referred to the judgment in case of **Manika Ranka and others Vs. Medical Council of India and others**, reported in **(2010) 10 SCC 233**. Para 5 and 6 of the said judgment reads as follows:

“5. In the Regulation published it was stated that the candidates should have secured more than 50% marks in the entrance examination. There is nothing on record to show that these appellants were informed of the marks secured by them in the entrance examination. As these appellants have already completed one year of their course, equities are in favour of the appellants. But however, we maintain



the judgment of the High Court, as regards the principle laid down, but we direct that these appellants may be allowed to continue their M.B.B.S. Course as a special case and their results of the 1st year M.B.B.S. Course may also be declared so that they may continue with their studies.

6. The management of the R.D. Gardi Medical college was not justified in giving admission to these students. Certainly, they must be aware of the fact that the candidates should have secured at least 50% marks in the entrance examination but the learned Senior Counsel appearing for the College says that they were not aware of the marks secured by these candidates as the entrance examination was held by a different Association and the marks were not furnished to them by the Association. However, as the admission is found to be irregular, equal number of students shall be reduced from the management quota for the year 2009-10.”

9. He submitted with reference to the decision of the **Apex Court in Islamic Teachers Training (B. Ed) and others dated 30.01.2017** in which the Apex Court in order to protect the interest of the admission given by virtue of the interim order passed by the High Court directed that the students shall be permitted to



appear in the examination and their results have to be published and on the strength of the aforesaid decision of the Apex Court he submitted that equity of situation warrants interference of this Court to protect the interest of the students even if there is lapse of the institution in the process of taking admission, as the innocent students should not be penalized. He emphatically argued that the learned Single Judge has committed error in holding that admission on the basis of marks in the qualifying examination of 10+2 is not permissible mode of assessment of merit. He drew the attention of the Court towards past practice that in view of the consistent past practice, the petitioners have legitimate expectation and the writ court has committed error in rejecting the contention of the students with regard to their legitimate expectation in the matter of holding of second phase examination and permitting the institute to admit the students on the basis of their marks obtained in the qualifying 10+2 examination. He referred to the judgment of Islamic Education (Supra) and submitted that 15 years back the Apex Court issued direction to the State to frame legislation regulating the admission, but the State of Bihar is reluctant in the matter and due to their default crisis situation has occasioned. He, therefore, submitted that in the absence of statutory rules regulations to regulate the admission process, the institute has admitted the students and as such the



interest of students at this stage needs to be protected.

10. Mr. Ravindra Shrivastava, learned senior counsel appearing on behalf of the institute in question, who is appellant in L.P.A. No. 729 of 2017 has advanced many folds submissions to find fault in the judgment of the Writ Court. He submitted that conceptually combined competitive examination was introduced as a mechanism to short list the candidates when the candidates were large in number in comparison to the available seats and if the seats are more and candidates are less then only test is eligibility and not any competition examination. He referred to the previous practice of admission and submitted that the institute was allowed to take admission of students only on the basis of marks obtained in 10+2 examination up to 2014 and only thereafter the institute was directed to take admission on the basis of combined entrance test and in the recent past also the consistent practice was to hold second phase competitive combined entrance test, if the seats remained vacant but in the Sessions in question i.e. 2016-17 advertisement was made for holding second phase combined entrance test, but suddenly it was stopped just before the cut off date on 15th August for closing the admission and as such in the crisis situation as an exceptional case the institute took admission. He referred to the various paragraphs of the judgment of **T.M.A. Pai Foundation case** (Supra) and submitted that



the private institutions are catering the need of vast majority population, of course they cannot be allowed to establish and administer educational institution as business venture, but they are allowed to run institution with reasonable surplus with a view to extension and modernization. He submitted that the institute in question is ranked 72 in the whole country and it is an AICTE approved institution and in a given case, if the institute due to reluctance of the State is not allowed to admit the students against the remaining vacant seat of 60% or above, it will lead to closure of institution, as there is no economic viability of running such institution if the 60% or more of the intake seat is allowed to remain vacant, as the institute is to incur recurring and other expenditure for maintenance of it and for meeting the expenditure on the teaching and non-teaching staff and other infrastructure. He submitted that with reference to judgment in **T.M.A. Pai Foundation and Islamic Academy of Education and another case** (Supra) that admission on the basis of 10+2 examination is one of the valid mode of merit test and as such the action of the institution cannot be faulted and in the totality of the facts situation, he submitted that if there is any defect of admission in the institute in the academic session 2016-17 that should be condoned in the larger interest of public, as there is no statutory or otherwise bar in taking admission on the basis of merit list prepared



considering the marks obtained in 10+2 examination. He further submitted that in 9 States admission is permitted on the basis of merit list of marks of 10+2 examination and on numerous occasions the Apex Court has allowed the admission to be taken on the basis of marks of 10+2 examination. He referred to the compelling circumstance, which led to the institute to take admission on the basis of 10+2 examination. He assailed the inaction on the part of the State Government in sitting tight over the matter and did not allow the second phase examination notwithstanding more than 60% of the intake seat was vacant. He submitted that there is no justifiable reason for not allowing the second phase combined competitive examination when in the past as well as even in the present academic session the State Government allowed holding of second phase examination test. Mr. Srivastava thus justified the action of the institute in taking admission, as the same was taken under exception and compelling circumstances when approximately 60% seats remained vacant and despite request second phase entrance examination was declined on 09.08.2016 when 15.08.2016 was the last date for closing admission. He referred to para **59 of the judgment of T.M.A. Pai Foundation case (Supra), para 16 and 17 of Islamic Academy of Education and para 42 of Modern Dental College and Research Centre and others Vs. State of Madhya Pradesh**, reported in **(2016) 7 SCC 353**



and the order passed in Islamic case, which was relied upon by Mr. M. L. Verma appearing on behalf of the students in L.P.A. No. 765 of 2017. He reiterated that there is no case that in the matter of admission, the institute has ignored the candidate with higher merits and admitted the students with lower merits. Referring to the various judgments including the judgment of the Apex Court in case of **State Of Tamil Nadu & Anr. Etc. Etc vs Adhiyaman Educational & Research**, reported in (1995) 4 SCC 104, **T.M.A. Pai (Supra) and Visveswaraiah Technological University v. Krishnendu Halder** reported in (2011) 4 SCC 606, he submitted that entrance test is only relevant, if there are less seat and more candidates and not in a situation where candidates are less and the approved vacant seats are more. He referred to the judgment of the Apex Court **reported in (1971) 1 SCC 607** para 7 and 8 and various other judgments to substantiate that the State Government has totally ignored the principle to be followed in filling up the vacant sanctioned seat.

11. Adverting to the judgment of the Writ Court on the information of brochure of the Institute. Mr. Srivastava submitted that it is true that in the brochure it was published that the admission in course is based on the merit conducted by the Association of Private Institution, but in the crisis situation when the second phase combined entrance test was not held, the institute took admission on



the basis of marks obtained in 10+2, which is otherwise permissible mode of assessing merit on the basis of Apex Court judgment and as such the institute has committed no illegality in admitting the students within the sanctioned strength on the basis of their comparative merit assessed on consideration of marks of 10+2 examination and he emphatically submitted that in none of the case the institute has compromised with the eligibility condition prescribed by the AICTE and so long the institute has followed triple test of merit, transparency and non- exploitativeness in the admission process, one cannot find fault with the admission process followed by the institute. He submitted that the Apex Court judgment as well as proposed Rules framed by AICTE there is provision for multiple entrance tests and the institute has committed no illegality in admitting students on the basis of marks of 10+2 as doctrine of legitimate expectation permit such action. He finally submitted that the learned Single Judge has exceeded his power and jurisdiction in penalizing the institute, as there was no law forbidding the course adopted by the institute in admitting the students.

12. Mr. P. N. Shahi, Additional Advocate General appearing on behalf of the State has referred to paragraph 19 of the judgment of the Writ Court and submitted that the appellants cannot claim equity in view of undertaking recorded by the Writ Court and as



such the appellants cannot be allowed now to take the plea of equity, as they were allowed to take examination on their clear undertaking that will not claim any equity. Para 19 reads as follows:

“19. Mr. M. L. Verma, learned Senior Counsel, appearing on behalf of the petitioners in CWJC No. 2064 of 2017 and Mr. Rajendra Prasad Singh, learned Senior Counsel, appearing on behalf of the petitioners in CWJC No. 2367 of 2017 had submitted on the first day their arguments before me, that till the cases were finally decided, the students might be allowed, by way of interim measure to appear for B. Tech. first Semester examination, commencing from 28.02.2017. Learned Senior Counsel had undertaken that on the basis that the students had been allowed to take the said examination, the petitioners would not raise any claim of equity in their favour.”

13. Mr. Shahi further submitted that the institution cannot be allowed to breach the law and the direction of the State and the supervisory committee and claim any protection under the law. He submitted that if institutions are allowed to take admission in breach of the directives of the Supervisory Committee headed by the retired Judge of the High Court appointed in terms of the direction of the Apex Court in **Islamic Academy of Education Case** (Supra) then



granting indulgence and condoning such illegality and direct confrontation would amount to granting premium to illegality.

14. On considering the rival submissions of the parties, this Court is faced with the problem of balancing of competing interest. Rosco Pound said “law is social engineering” the task of constitutional court in the peculiar facts and circumstance is to strike a balance between the interest of the institution, the interest of the students and the State interest in maintaining rule of law.

15. Lord Denning succinctly explained the nicety of rule of law when he said *be you ever so high the law is above you*. In our constitutional system rule of law is the basic feature of the constitution and no one is above the law, the institution cannot be allowed to take decision how to decide the merit and take admission in the institution so long the supervisory committee has issued guideline for admission based on merit list prepared by combined entrance test. No amount of argument can justify the action of the institute in taking admission contrary to the guidelines of the supervisory committee constituted by the State Government in terms of the judgment in **Islamic Academy of Education Case** (Supra). The admission on the basis of marks may be one of the permissible mode, but the point is who will decide and permit the mode of



admission whether institute should admit students on the basis of combined entrance test or marks obtained in 10+2 examination. The State Government may prescribe the mode by framing rules or in absence of framing Rules the Supervisory Committee constituted in terms of the Apex Court in **Islamic Academy of Education Case** (Supra) or the institute has a license to determine the course for admission is the question begging answer in this case. One must keep in mind that in none of the writ petition, the writ petitioners have challenged the guide line for taking admission in terms of combined competitive entrance test. None of the writ petitioners have approached the writ court for a direction to the respondents to conduct either second entrance test or to consider the desirability of permitting admission on the basis of marks obtained in 10+2, which is of course one of the permissible mode but that permissible mode has to be decided only by the State Government by framing rule or in absence thereof by the Supervisory Committee constituted in terms of the Apex Court direction in the case of **Islamic Academy of Education Case** (Supra). Even if there is infirmity in the decision of the Supervisory Committee of the State Government touching the illegality and / or in the realm of void decision, yet the institute was required to challenge such decision and cannot be allowed to adjudge and finalize the admission process according to their own standard. In



this regard, the Apex Court judgment in case of **Sultan Sadik Vs. Sanjay Raj Subba and others**, reported in (2004) 2 SCC 377 is settler where the Apex Court quoted with approval passage of Lord Radcliffe that the order even if not made in good faith is still capable of legal consequence. The relevant part of the Apex Court judgment reads as follows:

Patent and latent invalidity

In a well-known passage Lord Radcliffe said :

An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders.'

This must be equally true even where the 'brand of invalidity' is plainly visible: for there also the order can effectively be resisted in law only by obtaining the decision of the court. The necessity of recourse to the court has been pointed out repeatedly in the House of Lords and Privy Council, without distinction between patent and latent defects. Lord Diplock spoke still more clearly, saying



that:

‘it leads to confusion to use such terms as “voidable” “voidable ab initio”, “void” or “a nullity” as descriptive of the status of subordinate legislation alleged to be ultra vires for patent or for latent defects, before its validity has been pronounced on by a court of competent jurisdiction.”

16. In view of the aforesaid judgment of the Apex Court, I am not inclined to accept the submission of justification of the institute in taking admission. All the submissions of institute in the present appeal is of academic interest, as the submission regarding permissible mode of admission could have been advanced by the institute much before taking admission and by questioning the reluctance on the part of the State in framing rules and regulations regulating admission and even the decision of the supervisory committee in not allowing second phase combined entrance test. Surprisingly enough, even after admission they have not approached this Court for seeking a direction to the respondent authorities to consider their case sympathetically and condone the defects in the admission. In the totality of the facts situation, I am of the considered view that the institute acted as if it is above law and it is competent to decide the manner of preparation of merit list for taking admission as substitute for the supervisory committee constituted by the State of



Bihar in the light of judgment of Apex Court in **Islamic Academy of Education Case** (Supra).

17. The second submission of Mr. Shrivastava, senior advocate appearing on behalf of the institute that they have the legitimate expectation of holding second phase examination does not merit any consideration in view of the fact that the concept of reasonable expectation cannot be stretched to the extent that the institute can adopt a third mode and take admission to fill up the vacant seat. The doctrine of legitimate expectation was coined by Lord Denning in **Schmidt V. Secretary of State for Home Affairs (1969) 2 Ch. 149** the doctrine of legitimate expectation has become established doctrine of fairness in the decision making process. De Smith in celebrate book on judicial review on administration action has discussed the development of the doctrine of legitimate expectation as part of fair procedure. It is regarded as a facet of rule of law with requirements of regularity, predictability and certainty. It is indeed a principle to safeguard the procedure fairness. Adverting to the principle of legitimate expectation and its applicability in the present case, which has to be seen as to what was the promise emanating from the conduct or promise of the State Government, which was breached in the instant case. From their own showing in the past, the State Government and the supervisory committee



permitted second phase combined competitive test so at the best the petitioners could have approached the law court complaining breach of legitimate expectation, if they are aggrieved by non-holding of second phase combined competitive test to fill up the remaining vacant seat, but this principle will not come to their benefit at the stage when they breached the guide line and took admission by adopting the principle of preparing merit list on the basis of marks obtained in 10+2 examination. Adverting to the different orders and the decisions of the Apex Court cited by the senior counsels appearing on behalf of the students as well as the institution whereby in given case and facts situation the Apex Court permitted admission on the basis of merit list prepared on consideration of the marks obtained in 10+2 examined. The orders of the Apex Court in those cases were issued with reference to a particular year and does not laid down the principle to be followed as a precedent. The Apex Court judgment in case of **Ambica Quarry Works v. State of Gujarat and others**, reported in (1987) 1 SCC 213 and various other cases are settled on the point. Recently, the Apex Court in **Roger Shashoua Vs. Mukesh Sharma**, reported in AIR Weekly 2017 page 3166 has discussed the principle of ratio decidendi. Para 51 to 59 is the latest statement of the Apex Court on the doctrine of precedent, which is illuminating in nature and the same is quoted herein below:



51. At this juncture, we think it necessary to dwell upon the issue whether Shashoua principle is the ratio decidendi of BALCO and Enercon (India) Ltd. (supra) and we intend to do so for the sake of completeness. It is well settled in law that the ratio decidendi of each case has to be correctly understood. In *Regional Manager v. Pawan Kumar Dubey*, reported in (1976) 3 SCC 334, a three-Judge Bench ruled:

"7. ... It is the rule deducible from the application of law to the facts and circumstances of a case which constitutes its ratio decidendi and not some conclusion based upon facts which may appear to be similar. One additional or different fact can make a world of difference between conclusions in two cases even when the same principles are applied in each case to similar facts."

52. In *Director of Settlements, A.P. and others v. M.R. Apparao and another*, reported in (2002) 4 SCC 638, another three-Judge Bench, dealing with the concept whether a decision is "declared law", observed:

"7. ... But what is binding is the ratio of the decision and not any finding of facts. It is the principle found out upon a reading of a judgment as a whole, in the light of the questions before the Court that forms the ratio



and not any particular word or sentence. To determine whether a decision has "declared law" it cannot be said to be a law when a point is disposed of on concession and what is binding is the principle underlying a decision. A judgment of the Court has to be read in the context of questions which arose for consideration in the case in which the judgment was delivered....”

53. In this context, a passage from Commissioner of Income Tax v. Sun Engineering Works (P) Ltd. Reported in (1992) 4 SCC 363 would be absolutely apt:

"39. ... It is neither desirable nor permissible to pick out a word or a sentence from the judgment of this Court, divorced from the context of the question under consideration and treat it to be complete 'law' declared by this Court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before this Court. A decision of this Court takes its colour from the questions involved in the case in which it is rendered and while applying the decision to a later case, the courts must carefully try to ascertain the true principle laid down by the decision of this Court and not to pick out words or sentences from the judgment, divorced from the context



of the questions under consideration by this Court, to support their reasonings. ..."

54. In this context, we recapitulate what the Court had said in *Ambica Quarry Works v. State of Gujarat and others*, reported in (1987) 1 SCC 213:

"18. ... The ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it. (See Lord Halsbury in *Quinn v. Leatham*, reported in (1901) AC 495). ..."

55. From the aforesaid authorities, it is quite vivid that a ratio of a judgment has the precedential value and it is obligatory on the part of the Court to cogitate on the judgment regard being had to the facts exposited therein and the context in which the questions had arisen and the law has been declared. It is also necessary to read the judgment in entirety and if any principle has been laid down, it has to be considered keeping in view the questions that arose for consideration in the case. One is not expected to pick up a word or a sentence from a judgment de hors from the context and understand the ratio decidendi which has the precedential value. That apart, the Court before



whom an authority is cited is required to consider what has been decided therein but not what can be deduced by following a syllogistic process.

56. Tested on the aforesaid principle, we find that question that arose in BALCO and the discussion that has been made by the larger Bench relating to Shashoua and C v. D (supra) are squarely in the context of applicability of Part I or Part II of the Act.

It will not be erroneous to say that the Constitution Bench has built the propositional pyramid on the basis or foundation of certain judgments and Shashoua and C v. D (supra) are two of them. It will be inappropriate to say that in Enercon (India) Ltd. (supra) the Court has cryptically observed that observations made in Shashoua have been approvingly quoted by the Court in BALCO in para 110. We are inclined to think, as we are obliged to, that Shashoua principle has been accepted in BALCO as well as Enercon (India) Ltd. (supra) on proper ratiocination and, therefore, the submission advanced on this score by Mr. Chidambaram, learned senior counsel for the respondent, is repelled.

57. It is submitted by the learned senior counsel for the respondent that even if the Shashoua



principle is applicable, it arises from interim orders and Cooke, J. has himself observed that a mini trial would be necessary, therefore, the view expressed in an interim order and reasons assigned therefor are only tentative and cannot be treated as the ratio decidendi. For sustaining the said proposition, inspiration has been drawn from the authority in *State of Assam v. Barak Upatyaka D.U. Karmachari Sanstha*, reported in (2009) 5 SCC 694. According to the learned senior counsel, in such a situation the judgment cannot bind the parties.

58. First we shall deal with principle laid down in the aforesaid authority. In the said case, the Court was dealing with the precedential value of the authorities in *Kapila Hingorani v. State of Bihar*, (2003) 6 SCC 1 and *Kapila Hingorani v. State of Bihar*, (2005) 2 SCC 262. In that context, the Court said that a precedent is a judicial decision containing a principle, which forms an authoritative element termed as ratio decidendi and an interim order which does not finally and conclusively decide an issue cannot be a precedent. It further observed that any reasons assigned in support of such non-final interim order containing prima facie findings, are only tentative and any interim directions issued on the basis of such prima facie findings are temporary arrangements to preserve the



status quo till the matter is finally decided, to ensure that the matter does not become either infructuous or a fait accompli before the final hearing. Dealing with the decisions in *Kapila Hingorani (II)* (supra), the Court opined that the observations and directions in said case were interim in nature based on tentative reasons, restricted to the peculiar facts of that case involving an extraordinary situation of human rights violation resulting in starvation deaths and suicides by reason of non-payment of salaries to the employees of a large number of public sector undertakings for several years, have no value as precedents. The Court further ruled that the interim directions were also clearly in exercise of extraordinary power under Article 142 of the Constitution and, therefore, it was not possible to read such tentative reasons, as final conclusions.

59. Thus, the analysis made in the said case, the two-Judge Bench has opined that a precedent is a judicial decision containing a principle which forms an authoritative element termed as ratio decidendi and any reasons assigned in support of such interim order containing prima facie findings are only tentative. There cannot be any quarrel over the aforesaid proposition of law. However, the controversy involved in this case has its distinctive characteristics. The



Commercial Court in London, interpreting the same agreement adverted to earlier judgments (may be in anti-suit injunction) and held that in such a situation the Courts in London will have jurisdiction. The analysis made therein, as has been stated earlier, has been appreciated in BALCO and Enercon (India) Ltd. (supra) and this Court has approved the principle set forth in the said case. Once this Court has accepted the principle, the principle governs as it holds the field and it becomes a binding precedent. To explicate, what has been stated in Shashoua as regards the determination of seat/place on one hand and venue on the other having been accepted by this Court, the conclusion in Shashoua cannot be avoided by the parties. It will be an anathema to law to conceive a situation where this Court is obligated to accept that the decisions in BALCO and Enercon (India) Ltd. (supra) which approve Shashoua principle are binding precedents, yet with some innate sense of creativity will dwell upon and pronounce, as canvassed by the learned senior counsel for the respondent, that inter-party dispute arose in the context of an anti-suit injunction and, therefore, the same having not attained finality, would not bind the parties. This will give rise to a total incompatible situation and certainly lead to violation of



judicial discipline. We cannot conceive it to be permissible. Therefore, without any hesitation, we reject the said submission.

18. Thus in view of the Apex Court judgment with due respect, the decision of the Apex Court on which heavy reliance has been placed to justify the admission on the basis of merit list prepared considering the marks of 10+2 examination cannot be taken as a precedent, as those decisions were rendered by the Apex Court in order to do justice to the parties before the Apex Court, presumably under Article 142 of the Constitution of India which is further evident from the decision cited and relied upon by the appellants reported in (2004) 13 SCC 704, which reads as follows:

“1. It appears that in the engineering colleges in the State of Tamil Nadu and Andhra Pradesh, a number of seats of government quota and also of management quota are unfilled even after admitting those who were in the list prepared after qualifying the entrance examination conducted by the State as also by the consortium. If the permission as sought in these applications is not granted, these seats would go waste.

2. Having heard learned counsel for the parties and without the order being treated as a precedent, we permit the engineering colleges



in these two States to fill the unfilled seats, whether of management quota or of government quota, within a period of one week subject to the condition that only those who are otherwise eligible and qualified would be granted admissions, though they may not have taken either of the aforesaid entrance examination. Any higher standards fixed by the State Governments would be required to be completed while granting admission.”

19. Now adverting to the judgment of the learned Single Judge in the conspectus of the pleading of the parties, I find that the writ petitions were filed only when Aryabhatta Knowledge University declined to register the students, who were not admitted on the basis of combined competitive test. Before the Writ Court there was no challenge as to communication of decision on the part of the State in not holding second phase combined competitive test. There was no prayer to condone the admission of the students taken on the basis of merit list on consideration of marks obtained in 10+2 examination and the entire submission in the absence of pleading to that effect was only haywire. Within the parameters of the pleadings of the parties one cannot find fault with the decision of the Writ Court dismissing the writ application, though I am not in agreement with the Writ Court certain observation, but in the totality of the facts of this



case, I am in agreement with the conclusion and decision of the Writ Court. Admission on the basis of marks of 10+2 examination may be permissible mode for assessment of merit, but it is not the issue in the instant case in view of the fact that neither the State Government nor the supervisory committee decided this mode of assessment of merit list to be adopted. The entire submission in the absence of challenging the decision of the supervisory committee or the State Government is only academic. Even assuming that there was compelling exceptional circumstance in view of the dead line of 15th August for closing the admission, the proper course would have been that the institution or the students could have approached the State Government for condoning the defects in the admission and regularize the admission but they have not done. They have even not approached the Court for a direction to the respondent authorities to regularize their admission and condone the defects in the admission to the contrary by challenging the action of the Aryabhat Knowledge University in not permitting registration of the students and allowing them to appear at the examination they cannot be allowed to justify their admission. One cannot find fault with the decision of the University in the attending facts and circumstances of this case. The Aryabhata Knowledge University only allowed registration of the students, who have come through combined entrance test and not through back door



as any other mode of entrance other than combined entrance test is only a back door and as such the action of the Aryabhata Knowledge University cannot be faulted.

20. Although I find that the action of the institute in taking admission in breach of the guideline is impermissible and I also notice the undertaking of the senior advocate Mr. M. L. Verma appearing in C.W.J.C. No. 2064 of 2017 and Mr. Rajendra Prasad Singh appearing in C.W.J.C. No. 2367 of 2017 that they will not claim any equity, if the students are allowed to appear as interim measure in B. Tech 1st Semester examination, but the fact remains that the State of Bihar has also contributed to a great extent in creating the present crisis. The matter would have been different, if the State and its instrumentality have taken action of cancelling admission immediately after the students were admitted, but they adopted indifferent attitude and remain passive spectator in this process and allowed the institute to take admission, the innocent students, who took admission, prosecuted their studies and they have spent their valuable time in prosecuting their studies in B.Tech course cannot be left in lurch. At this juncture, I find that as the High Court being the Constitutional Court is required to adopt the process of dispensing justice in a pragmatic manner. In our justice oriented jurisprudence in order to strike a balance between the competing interest, although I



find negligence and lapse of the students, institution as well as the State, but considering the future prospect of the students, who have been admitted in the course with high hopes and expectations and have prosecuted their approximately three semesters, their admission if cancelled due to the lapse of the institution and the State can they be compensated in terms of money as assessed by the Writ Court is a million dollar question, the Writ Court assessing the loss of the individual students directed the management to pay Rs.50,000/- and to refund the fee, cannot be an appropriate compensation for their almost three semesters study, their high hopes expectation and the future prospect considering the fact that they have all the eligibility as prescribed by AICTE for admission and in fact they have been admitted within the permissible seat intake and also considering the fact that the institute which has admitted the student is rank 72 in the country and claims to have all the necessary infrastructure for imparting proper instruction in the technical education, I think it would be not only a loss of the individual student, but also a loss of the national interest and considering the totality of the facts situation, I am constrained to consider the interest of the students as paramount in the process of balancing the competing interest. I am thus of the considered view that the students admitted in the institute deserve protection



21. Adverting to the interest of the State and the competing interest of the institute, I have no hesitation in holding that the institute interest vis-à-vis competing interest of the State, the State interest in maintaining rule of law is on higher pedestal and as such the institute cannot go escort free in taking admission in teeth of the guide line of the supervisory committee constituted by the State Government in terms of direction of the Apex Court.

22. Accordingly, I direct that the Principal Secretary, Department of Science and Technology, Government of Bihar to consider the case of regularizing / condoning the defect in the admission of the students in B. Tech course in the institute in question as one time measure sympathetically as remedial measure, however, liberty shall be available to the Principal Secretary, Department of Science and Technology, Government of Bihar to take appropriate action against the institute for taking admission in frontal disregard to the guideline of the supervisory committee in accordance with law.

23. I am constrained to exercise this power in view of the Clause 14 of the Letters Patent Rule, which ordain the Appellate Court to comply the rule of law, equity and rule of good conscience and in view of the Apex Court judgment that the Court can mould relief and grant proper relief even if not specifically prayed for as held



out in AIR 1951 SC 41 and various other judgments of the Apex Court including the judgment reported in (1975) 1 SCC 770, which is quoted for ready reference:

4. We feel the submissions devoid of substance. First about the jurisdiction and propriety vis a vis circumstances which come into being Subsequent to the commencement of the proceedings. It is basic to our processual jurisprudence that the right to relief must be judged to exist as on the date a suitor institutes the legal proceeding. Equally clear is the principle that procedure is the handmaid and not the mistress of the judicial process. If a fact, arising after the lis has come to court and has a fundamental impact on the right to relief for the manner of moulding it, is brought diligently to the notice of the tribunal, it cannot blink at it or be blind to events which stultify or render inept the decretal remedy. Equity justifies bending the rules of procedure, where no specific provision or fairplay is violated, with a view to promote substantial justice--subject, of course, to the absence of other disentitling (actors or just circumstances. Nor can we contemplate any limitation on this power to take note of updated facts to confine it to the trial Court. If the litigation pends, the power exists, absent other special circumstances repelling resort to



that course in law or justice. Rulings on this point are legion, even as situations for applications of this equitable rule are myriad. We affirm the proposition that for making the right or remedy claimed by the party just and meaningful as also legally and factually in accord with the current realities, the court can, and in many cases must, take cautious cognisance of events and developments subsequent to the institution of the proceeding provided the rules of fairness to both sides are scrupulously obeyed. On both occasions the High Court, in revision, correctly took this view. The later recovery of another accommodation by the landlord, during the pendency of the case, has as the High Court twice pointed out, a material bearing on the right to evict in view of the inhibition written into s. 10(3) (iii) itself. We are not disposed to disturb this approach in law or finding of fact.

5. The law we have set out is of ancient vintage. We will merely refer to *Lachmeshwar Prasad Shukul v. Keshwar Lal Chaudhuri* reported in 1940 FCR 84 which is a leading case on the point. Gwyer C.J., in the above case, referred to the rule adopted by the Supreme Court of the United States in *Patterson v. State of Alabama*, reported in 294 US 600, 607 :

We have frequently held that in the exercise of our



appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered."

and said that that view of the Court's powers was reaffirmed once again in the then recent case of *Minnesota v. National Tea Co.* reported in 309 US 551, 555. Sulaiman J., in the same case(1) relied on English cases and took the view that an appeal is by way of a re-hearing and the Court may make such order as the Judge of the first instance could have made if the case had been heard by him *at the date on which the appeal was heard* (emphasis, ours). Varadachariar J. dealt with the same point a little more comprehensively. We may content ourselves with excerpting one passage which brings out the point luminously (at p. 103) :

"It is also on the theory of an appeal being in the nature of a re-hearing that the courts in this country have in numerous cases recognized that in moulding the relief to be granted in a case on appeal, the court of appeal is entitled to take into account even facts and events which have come into existence after the decree appealed against."

24. The decision of the Writ Court is modified to the extent that the respondent Secretary will consider sympathetically the



case of students and regularize their admission as one time measure and the decision to that effect may be taken within a period of three weeks from the date of production of this order and the respondent Aryabhata University will also take steps for declaration of the result after order are passed by the State Government. Accordingly both the L.P.A. are disposed of with modification and direction indicated above.

(Anil Kumar Upadhyay, J)

Rajendra Menon, CJ: I agree

(Rajendra Menon, CJ)

Uday/-

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