

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.7072 of 2017

1. 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- 80118 (Bihar),

.... Petitioner/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 Director, Department of Science and Technology, Govt. of Bihar, Patna.
4. The Secretary State Board of Technical Education, Govt. of Bihar, Patna.

.... Respondent/s

Appearance :

For the Petitioner/s : Mr. Nidhesh Gupta, Sr. Advocate
With Mr. Sanjay Singh, Advocate
For the Respondent/s : Mr. KUMAR ALOK- SC7
For the AICTE : Mr. Rajesh Prasad Choudhary, SC-7

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

ORAL JUDGMENT

Date: 08-08-2017

Relying on various decisions of the Supreme Court, right from ***T.M.A. Pai Foundation Vs. State of Karnataka***, reported in ***(2002) 8 SCC 481*** to ***Modern Dental College and Research Centre and others Vs. State of Madhya Pradesh and others***, reported in ***(2016) 7 SCC 353***, this court, in a recent decision in ***Bihar Private Technical and Professional Institutions Association and Ors. Vs. State of Bihar and Others*** reported in ***(2017) 2 PLJR 701***, dealing with the question of admission of students in technical and professional courses in privately managed institutions, has held that there is no scope for adopting any method for admission



to technical and professional courses other than through Combined Entrance Test (CET) to be organized either by the State/University or their agencies or the Association of privately managed institutions imparting same or similar courses. The Court, in the said decision, specifically held in paragraph 41 that there could be no rationale behind holding of more than one CET by the Association for admission to one academic session of a particular technical/professional course. Reiterating this position, the Court held that there should be one entrance test only for one academic session and question of another test for the same course and session might arise only if the test already held suffered from illegality or irregularity, and therefore, not sustainable. The said decision has been rendered on 17.04.2017.

2. It would be evident from the said decision in case of ***Bihar Private Technical and Professional Institutions Association*** (*supra*), that a plea was taken that it was becoming difficult for the private technical and professional institutions in the State of Bihar to sustain because of non-availability of candidates seeking admission to technical courses through CET and, therefore, these institutions being run in the State of Bihar should be allowed to admit students on the basis of marks scored by them in qualifying examination. This aspect has specifically been dealt with in paragraph 44 of the said decision. Paragraph 44 of the said



decision, in my view, is relevant for the present case and, is, accordingly, being reproduced herein below:-

"44. Could it be said that in such circumstance any person who possessed the minimum eligibility criteria should be allowed admission to such technical or profession course on the reasoning that the seats are vacant? The answer, in my opinion, is big NO! The entrance test to professional and technical courses are so organized and structured as to select those who are best suited to take up those courses. The tests are conducted to evaluate their ability to cope with the courses, which may be offered to them on their admission."

3. Dealing with the plea that the Bihar Private and Technical Institutions should be allowed to take admission on the basis of marks obtained by the respective candidates in the qualifying examination, which, according to the petitioners of those cases, would not have breached the criteria of fairness, transparency and non-exploitativeness, the Court held that merit and ability of a candidate to take up a particular professional course in order to maintain desired standard of that profession is equally important, which cannot be ignored. Accordingly, the Court held that it will be against public interest and public policy to allow such candidates, who do not have the aptitude and ability, to study a technical course, admission to such courses.

4. In case of ***Bihar Private Technical and***



Professional Institutions (supra), this Court, while holding admissions taken on the basis of marks secured in the qualifying examination in such course to be illegal, directed the private managements of the respective institutions to refund all the fees and charges (excluding in the Hostel and Mess charges) in their favour, so far received by them from the students, who were illegally admitted on the basis of marks in 10th/12th examination. In addition, the Court directed such Managements to pay a sum of Rs. 50,000/- to all individual students, who were illegally admitted, by way of compensation.

5. The petitioner of this case was one of the petitioners in the batch of writ applications decided by this Court, in case of **Bihar Private Technical and Professional Institutions** (supra), registration number of his case being CWJC No. 3457 of 2017. Against the decision of this Court, Letters Patent Appeals are said to have been filed which, it has been stated at the bar, are pending. One such appeal has been filed giving rise to LPA No. 765 of 2017 (Khushi Sanskriti vs. The State of Bihar) by the students admitted on the basis of marks only. This is to be noted that the decision in case of **Bihar Private Technical and Professional Institutions** (supra) relates to the academic Session 2016-17.

6. The present writ application under Article 226 of the Constitution of India has been filed on 10.05.2017, i.e. less



than within a month from the date of judgment in case of ***Bihar Private Technical and Professional Institutions*** (supra), came to be delivered by this court, this time seeking a direction to the respondents for issuance of appropriate writ/writs in the nature of mandamus directing the respondents authorities to frame rules/regulations/procedures for admission against the sanctioned vacant seats in respective privately managed technical institutions on the basis of open counselling after preparing a merit list on the basis of the marks obtained in qualifying 12th examination, in terms of the law laid down by the Apex Court in ***T.M. A. Pai Foundation Vs. State of Karnataka*** (supra), and ***Islamic Academy of Education and another Vs. State of Karnataka and others*** reported in **(2003) 6 SCC 697**. There is another plea, which has been taken by the petitioner in the present proceeding to the effect that these private institutions should be allowed to hold successive admission tests for admission to such technical courses, instead of only one for an academic year for a particular technical course, to fill up the sanctioned seats which remain vacant after admissions on the basis of one CET. Apparently, the reliefs, which are being sought in the present proceeding, are directly against the decision rendered by this Court in case of ***Bihar Private Technical and Professional Institutions*** (supra) after taking note of various Supreme Court decisions including



recent one on this point in case of ***Modern Dental College and Research Centre*** (Supra) .

7. Before I proceed to consider the submissions advanced on behalf of the petitioner, I must take note of the fact that a Division Bench of this Court has passed an interim order, dated 04.05.2017, in LPA No. 765 of 2017 to the following effect:-

"As the appellants are students of the Institute in question and as the order passed in the Letters Patent Appeal would have some adverse effect on their right to prosecute the course in question, I.A. No. 3360 of 2017, an application for leave to file this appeal, is allowed.

List on 18th of July, 2017.

In the meanwhile, the appellants herein, who are students, are permitted to prosecute the course in question in the Institute and also to take the examination. However, declaration of the result of the examination shall be subject to the final orders on merits that may be passed by this Court."

8. When this matter was taken up by this Court on 26.07.2017, an order, dated 05.07.2017, passed by a Division Bench of this Court in LPA No. 952 of 2017 was brought to my notice to suggest and create an impression that the judgment of this Court, to the effect that it is impermissible to allow admission to such technical institutions



only on the basis of marks secured by the candidates in qualifying examination delivered in case of the Exalt Educational Trust Vs. State of Bihar and ors (CWJC No. 3060 of 2017), has been stayed. Since interim order was being sought in the present proceeding, the Court has felt the necessity of the case being decided along with the said LPA No. 952 of 2017. A Division Bench of this Court, however, by an order, dated 28.07.2017, has been pleased to return the matter to be decided by the Single Bench in view of the limited scope of interim order passed in case of Exalt Educational Trust (supra). The Division Bench has observed that judgment rendered in case of Exalt Educational Trust (supra) was stayed in LPA No. 952 of 2017, only because of the fact that 300 students were already admitted for the academic Session 2016-17 and the Division Bench granted interim protection by way of staying the judgment only to explore the possibility of considering the question about adverse effect on the education of the 300 students, who are prosecuting studies. Considering that no such issues are involved in the present writ application, the Division Bench has sent back the case to a single Bench for adjudication. On a mention for urgent hearing this matter has been taken up out of turn and is being disposed of by the present judgment and order.

9. At the very outset of the hearing of the present



case, I posed a question to Mr. Nidhesh Gupta, learned Senior Counsel appearing on behalf of the petitioner as to whether there was any difference between the questions already decided in case of ***Bihar Private Technical and Professional Institutions*** (supra) and the questions involved in the present case. Learned Senior Counsel, Mr. Gupta, has submitted that there are distinguishing features, first and foremost being the fact that in case of ***Bihar Private Technical and Professional Institutions*** (supra), the institutions had come to this Court after having already taken admissions to professional/technical courses on the basis of marks obtained by candidates in qualifying examination. He has also submitted that certain developments, which have taken place after the decision in case of Bihar Private Technical and Professional Institutions (supra), was rendered on 17.04.2017, coupled with certain other aspects make the questions involved in the present case distinguishable from those decided in case of ***Bihar Private Technical and Professional Institutions***(supra). Elaborating his submission on this aspect, learned Senior Counsel has submitted that evidently the Science and Technology Department, Government of Bihar has framed draft rules laying down the procedure for admission to technical and professional courses in privately managed institutions in the State of Bihar, which permit admission to



such courses on the basis of marks obtained in qualifying examination. He has also submitted that All India Council of Technical Education (AICTE) has also come out with draft regulations for the said purpose of admission to privately managed technical and professional institutions, which contemplate multiple tests in a year.

10. He has submitted that since rules framed by the State Government have so far not been notified and the proposed rules framed by the AICTE are yet to take shape of delegated legislation under sub-section (1) of Section 2 read with Section 10 (o) & (r) of All India Council for Technical Education Act, 1987, the said draft rules can be given effect to till the rules do not come in force. To buttress his contention, he has placed reliance on Supreme Court's decision in case of ***Chandigarh Administration through the Director Public Instructions vs. Usha Kheterpal Waie and others***, reported in (2011) 9 SCC 645 and in case of ***High Court of Gujarat an another vs. Gujarat Kishan Mazdoor Panchayat and ors***, reported in (2003) 4 SCC 712.

11. In support of his contention that admissions can be allowed to such courses in privately managed institutions on the basis of marks, he has relied on 11 Judge Bench decision of the Supreme Court in case of ***T.M.A. Pai Foundation and others*** (supra), with special reference to



paragraph 59 of the said decision. He has also submitted that at least 9 states in the country by framing rules and regulations have permitted privately managed technical and profession institutions to take admission on the basis of marks secured by the respective candidates in the qualifying examination, the same standard can be adopted and applied for the State of Bihar also. According to him, the Science and Technology Department, Government of Bihar, too has framed rules permitting admission of students on the basis of marks obtained in qualifying examination, the privately managed technical institutions of this State should not be deprived of the opportunity to take admission on the said basis to fill up vacant seats. He has next submitted, referring to Entry 25, List III of Schedule VII of the Constitution of India, that it is within the competence of the State executive to frame rules and regulations relating to education including Technical Education, Medical Education and University, though subject to the provisions of Entries 63,64, 65 and 66 of List-I of the said Schedule. He has, accordingly, submitted that based on the decision of the Science and Technology Department, Government of Bihar incorporating provisions for admission on the basis of marks obtained in qualifying examination, in the draft rules, these institutions should be allowed to take admission on the said basis. He has referred to communication, dated 11.07.2017, made by



the Director, Science and Technology Department, Government of Bihar, addressed to the Member Secretary, AICTE making a request to accord consent/no objection to the draft rules, so that the rules might be notified after getting approval of the State Government. He has also drawn my attention to the reply of AICTE, dated 24.07.2017, wherein AICTE is said to have made it clear that AICTE did not have any direct role in admission of the students in State Level Technical Institutions except prescribing the entry level qualifications for admission to these courses at various levels. It has further been mentioned in the said communication dated 24.07.2017 that the admissions should be made on merit and in transparent manner.

12. Learned Senior counsel appearing on behalf of the petitioner has further submitted that it can be easily inferred from the said communication, dated 24.07.2017 that the AICTE is not opposed to the idea of taking admission in privately managed institutions on the basis of marks obtained in qualifying examination.

13. Learned counsel appearing on behalf of the AICTE has submitted that apart from what has been communicated in the letter, dated 24.07.2017, nothing is required to be added on its behalf. He has also submitted that till the State authorities or educational institutions do not breach the requirement of minimum standard prescribed



by the AICTE in the matter of admission to the technical courses, AICTE cannot have any objection to admissions being allowed in technical institutions. He has submitted that AICTE has merely expressed its expectation in the said communication that the admissions should be on the basis of merit and method of admission should be transparent.

14. Learned counsel appearing on behalf of the State of Bihar has submitted that the rules framed by the Science and Technology Department, Government of Bihar, cannot be given effect to for the purpose of permitting the private educational institutions to take admission on the basis of marks obtained in qualifying examination for two reasons. He has firstly submitted that in the light of law laid down by a Division Bench of this Court in case of **Mirza Ghalib T. T. College Vs. State of Bihar**, reported in **(2017) 1 PLJR 256** and subsequent decision in case of **Bihar Private Technical and Professional Institutions** (supra), the General Administration Department, Government of Bihar has objected to the proposed provision in the rules prepared by the Science and Technology Department of allowing admission on the basis of marks in qualifying examination. He has next submitted that the General Administration Department has returned the rules framed by the Science and Technology Department, Government of Bihar raising certain objections and, therefore, the said draft rules cannot be the



basis for permitting these institutions on the basis of marks obtained in qualifying examination.

15. I will first deal with the submissions made by the learned Senior counsel appearing on behalf of the petitioner on the question as to whether based on the rules prepared by the Science and Technology Department, Government of Bihar, this Court, in the light of Supreme Court's decisions in case of ***Chandigarh Administration through the Director Public Instructions vs. Usha Kheterpal Waie and others***(supra), and in case of ***High Court of Gujarat an another vs. Gujarat Kishan Mazdoor Panchayat and ors*** (supra), should permit the privately managed technical institutions to take admission on the basis of the said so-called draft rules. In case of ***Chandigarh Administration through the Director Public Instructions vs. Usha Kheterpal Waie and others***(supra), the Supreme Court referred to its previous decision in case of ***Vimal Kumari Vs. State of Haryana and others*** reported in ***(1998) 4 SCC 114*** and in case of ***Abraham Jacob and others Vs. Union of India***, reported in ***(1998) 4 SCC 65***, where the Court had found the intention of the government to be clear to enforce those rules in the "near future". In the present case, the draft rules prepared by the Science and Technology Department, Government of Bihar has been objected to by the General Administration



Department, Government of Bihar on the ground that the rules are not in accord with the decisions of this Court and the Supreme Court. There is thus no decision of the State Government nor any apparent intention State Government to enforce these proposed draft rules. In that view of the matter, the rules framed by the Science and Technology Department, Government of Bihar cannot be made the basis for issuing any direction as sought in the present proceeding. Similarly in case of ***High Court of Gujarat an another vs. Gujarat Kishan Mazdoor Panchayat and ors*** (supra), the Supreme Court reiterated the earlier view in case of ***Vimal Kumari (supra)*** to hold that rules even at the draft stage can be the basis for decision provided there is clear intention on the part of the Government to enforce those Rules in the "near future". There is no material on record to suggest that the State has/had any intention to enforce the rules prepared by the Science and Technology Department, Government of Bihar.

16. I may now come to paragraph 59 of the Supreme Court's decision in case of T.M. A. Pai Foundation (supra), much emphasis has been given on which by learned Senior Counsel representing the petitioner. Paragraph 59 of the Supreme Court's decision in case of ***T.M.A.Pai Foundation*** (supra), reads thus:-

"59. Merit is usually determined, for admission to professional and higher education



Colleges, be either the marks that the student obtains at the qualifying examination or school-leaving certificate stage followed by the interview, or by a common entrance test conducted by the institution, or in the case of professional colleges, by government agencies.”

17. I reiterate here that decision rendered by the Supreme Court in case of ***T.M.A. Pai Foundation*** (supra) has been elaborately dealt with by Division Bench of this Court in case of ***Mirza Ghalib T. T. College*** (supra) and subsequent decision in case of ***Bihar Private Technical and Profession Institutions Association*** (supra).

18. Considering the said Supreme Court’s decisions, this Court in most unambiguous terms has held that CET can be the sole basis for admission to Professional-Technical courses in privately managed institutions. The Combined Entrance Test may be held either by the State/its agency or the association of the privately managed institutions imparting same/similar courses. The Court specifically held that it would be in the public interest that only such persons take up professional courses, who do not have only basic qualification, but also have the merit, ability and aptitude to take up courses designed for a particular purpose. This can be done only through appropriately designed screening test, this court has propounded. Paragraph 48 of this Court’s decision in Case of ***Bihar Private Technical Provisional***



Institutions (supra), is relevant and, is , accordingly, quoted hereinbelow:-

"48. It is in the public interest that only such persons take up technical and professional courses, who do not have only basic qualification, but also have the merit, ability and aptitude to take up courses designed for a particular purpose. This can be done only through appropriately designed screening test. It will not be in the public interest to promote mediocrity by allowing admission of such persons who could have otherwise well in the different walks of life, but could not be said to be fit to take up B. Tech. or similar technical courses. It is not known how these admissions were taken, based on marks obtained in 10+2/10th examination. Whether it was confined to those who had applied pursuant to notice issued by the Association for Combined entrance Test and had shown willingness to take up the technical courses or they subsequently approached the institutions for their admission, after admission on the basis of entrance tests were over. The manner in which the institutions have taken admission based on 10+2 marks/result cannot have approval of this Court."

19. Learned Senior Counsel has also referred to an interim order passed by the Supreme Court, dated 23.09.2005 in Islamic Academy of Education and others Vs. State of Karnataka and ors, on I.A. Nos. 90 and 96 in Writ Petition(Civil) No. 350 of 1993 to submit that by the said order the Supreme Court had allowed the institutions to fill up



remaining vacant seats on the basis of merit marks obtained in 10+2 examination conducted by the Central Board of Secondary Education and other Boards. The said order of the Supreme Court has been taken note of by this Court in case of **Bihar Private Technical and Professional Institutions** (supra), before laying down that admission to such courses can be made only to Competitive Combined Entrance Test and by no other means. There being clear decision in case of **Bihar Private Technical and Professional Institutions** (supra), that it is impermissible to admit students on the basis of marks secured by them in their qualifying examination, I do not find any reason to have a different view in the present case.

20. I do not find any merit in this application. This application is accordingly dismissed.

21. There shall, however, be no order as to costs.
(Chakradhari Sharan Singh, J)

ArunKumar/-

AFR/NAFR	AFR
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