IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.1262 OF 2018

1. D.Y. Patil College of Engineering
Through its Registrar
Shri.Narendra Suryakant Jain
Having Office At:
Sector No.29, Nigdi-Pradhikaran,
Akurdi, Pune- 411 044

2. D.Y. Patil Pratisthan
Through its Secretary
Having office at :
1216A, Tarabai Park,
Kolhapur, Dist-Kolhapur **...Petitioners**

V/s.

1. All India Council for Technical Education
I G Sports Complex, I. P State,
New Delhi
Through its Member Secretary

2. State of Maharashtra
Through its Secretary
Higher and Technical Education Dept.,
Government of Maharashtra
Mantralaya, Mumbai.

3. The Director of Technical Education
Maharashtra State, Mumbai.

4. Savitribai Phule, Pune University,
Ganeshkhind Raod, Pune. **...Respondents**

Mr.A.V. Anturkar, Senior Counsel a/w Mr.Anijkya Udane h/f Tanaji Mhatugade for the Petitioner.

Mr.Namit V. Loya i/b Mr.Abhijeet A. Joshi for Respondent No.1.

Mr.A.B. Yagyani Government Pleader with Mrs. Sruti D. Vyas 'B' Panel counsel for Respondent Nos.2 and 3.

Mr.Prosper D'Souza i/b Mr.Rajendra Anbhule for Respondent No.4.

CORAM : S.C. DHARMADHIKARI &
SMT.BHARATI H. DANGRE, JJ.

RESERVED ON : 06th JULY 2018

PRONOUNCED ON : 07th SEPTEMBER 2018

JUDGMENT : (Per Smt.Bharati H. Dangre,J)

1. The Writ jurisdiction of this Court is invoked by the petitioner No.1, D.Y. Patil College of Engineering which is run by the petitioner No.2 D.Y. Patil Pratisthan, District-Kolhapur. The present Writ Petition seeks issuance of writ in the nature of mandamus or any other appropriate writ or direction for quashing and setting aside two Government Resolutions issued by the Higher and Technical Education Department, Government of Maharashtra dated 20.10.2000 and 07.10.2009, to the extent that they direct retrospective effect to be given to the pay revisions to the employees of the petitioner No.1. The grievance raised by the present petition is limited to the retrospective implementation of the 5th and 6th pay commission recommendation and the petitioner Nos.1 and 2 have no hesitation in implementing the recommendations of the pay commission itself.

2. The petitioner No.1 who has obtained a necessary permission under the All India Council for Technical Education Act (for short 'AICTE' Act) in the year 1984 and is affiliated to Savitribai Phule, Pune University and is a non-aided private institution imparting education of a professional course. The petitioner submits that the college is not in receipt of any grant from the State Government since it is a non-aided institution and the infrastructural arrangements are catered to from the fees received from the students and the same amount is used for payment of salary of the teaching and non-teaching staff of the petitioner No.1. The petitioners before us has no qualm about implementing the recommendations of the 5th and 6th pay commission to its eligible staff but it is only the retrospective effect of such pay revision which hurts the petitioners. The petitioners submit that the Government of India had taken a decision on 9.10.1998 implementing the revision of pay-scale of teachers in technical institution, following the revision of pay-scale of Central Government Employees on the recommendation of 5th pay, Central Pay Commission. The Government of India had thereafter notified and made its implementation applicable to the AICTE. According to the petitioner the State Government granted its approval for the implementation of the revised pay-scale to the teachers etc., in the

Government and non-Government, Engineering College with effect from 1.1.1996. Similarly, in respect of the recommendations of 6th pay commission, the Government of Maharashtra accepted the same and the decision was taken pursuant to the Pay Revision Committee popularly known as Hakim Committee and the pay revision was directed to be implemented with effect from 1.1.2006. The petitioners do not dispute that they are governed by these rules and regulations formulated by the AICTE, which is a statutory body. The petition contains the categorical statement that the Government Resolution issued by the State Government directed the benefit of the 5th and 6th pay commission to be extended to the teachers as well as to the non-teaching staff of the petitioner institution, there is no opposition to implement the recommendations of 5th pay commission and 6th pay commission as contained in the Government Resolutions but the only objection is to apply the same retrospectively.

3. The learned Senior Counsel Shri.Anturkar appearing for the petitioners would categorically make a submission before us that by no stretch of imagination the petitioners are assailing the applicability of 5th and 6th pay recommendations but the limited challenge is only to its retrospective effect. The learned counsel

would submit that the issue to be decided is whether a private non-aided institutions like the petitioner should be foisted with an application to pay the employee's retrospectively, the salary made applicable to them in terms of the recommendations of the revised pay commission and whether it can be made imperative in such institutions to discharge heavy burden of arrears. The learned Senior counsel would submit that practically speaking it is not possible for the institution to pass on the burden to the students since for the respective academic years, the fees to be paid by the students have been regulated taking into consideration the expenditure to be borne by the institution and accordingly it has been capped by the Fee Regulatory Authority and since now the students have left the institution on completion of the curriculum, it is difficult for the institution to bear the burden of the arrears. The learned Senior Counsel would also advance submission to the effect that the institution like the petitioner possess a fundamental right, which by this time have even being recognised by the Hon'ble Apex Court to run the institution. He would therefore submit that the doctrine of proportionality require that one has to see degree of the restrictions which are imposed, on the fundamental right and degree of control being really in the nature of restrictions should only be proportionate to the object which is sought to be achieved and should not exceed. He would submit that if the object which is sought to be achieved by directing the teaching and non-teaching staff belonging to the un-aided institution should also get the same benefit which their counterparts in aided institution are entitled to, and obviously the object is that such institutions should not appoint substandard teaching staff/non-teaching staff. The petitioner's institution according to Shri.Anturkar, is ready to bear the burden of the revision of pay-scale and he expresses that there is no iota of doubt in the mind of the petitioner's institution that the AICTE has right to control the technical education, and in exercise of its power it can direct maintenance of minimum standard in those institutions which also extend to the infrastructure which would include the commensurating standards for teaching and non-teaching staff. However, according to him imposing the liability of the arrears, rather than giving a notional effect to them amounts to exceeding the degree of the restriction and violates the doctrine of proportionality.

Another submission which the learned counsel would advance is that if the distinction is to be drawn between an aided and non-aided institution, then obviously the non-aided institution should also get the same benefit, which the aided institutions enjoyed that is which *inter alia* would include 80% of the grant being arranged for, by the Central Government and in that eventuality it would become necessary to declare that the liability of the non-aided institution would be to the extent of 20%. He would thus submit that equality cannot be compartmentalized, it cannot be merely achieved by enforcing the obligation in respect of payment of arrears but according to the learned Senior Counsel it should also then extend to the right of receiving 80% contribution of the revision of pay-scales from the Central Government. Shri.Anturkar, would place heavy reliance on a Division Bench Judgment of this Court in case of ***Sunanda w/o Pandharinath Adhav (Mrs.) & Ors. V/s. State of Maharashtra & Ors.***[1] to support his submission. He would submit that the said judgment of the Division bench of this Court turn places reliance on a judgment of the Hon'ble Apex Court in the case of ***State of Uttar Pradesh V/s. U.P. Polytechnic Diploma Shikshan Sanstha and Another***[2]**.** Wherein the Hon'ble Apex Court had conferred the benefit of the pay revision from the date on which the petition is filed and not with retrospective effect. He would submit that this authoritative pronouncement by the Hon'ble Apex Court has not been taken into consideration in the recent judgment of the Hon'ble Apex Court delivered in case of ***Secretary, Mahatama Gandhi Mission and Another V/s. Bhartiya***

1 2001(1) Bom.C.R. 809
2 2000(10) S.C. 469

Kamgar Sena and Ors.[3] Shri.Anturkar, the learned senior counsel would therefore submit that the petitioners need not be compelled to discharge the burden of the arrears of pay revision, which at this stage is difficult for them to discharge.

4. The Writ Petition impleads the All India Council for Technical Education as respondent No.1. State of Maharashtra through the Secretary Higher and Technical Education as well as the Director of Technical Education have been impleaded as respondent Nos.2 and 3 in the petition. The Savitribai Phule, Pune University to which the petitioner No.1 is affiliated is impleaded as respondent No.4.

5. We have heard the learned Government Pleader Shri.A.B. Vagyani along with Mrs.Sruti D. Vyas 'B' Panel counsel representing the State Authorities and Mr.Namit V. Loya instructed by Abhijeet A. Joshi for the AICTE.

The learned Government Pleader would oppose the petition and would submit that the issue raised in the petition is no more *res-integra* and the judgment delivered by the Aurangabad Bench in case of ***Rangnath s/o Vishnu Raskar and Ors. V/s. The***

3 (2017) 4 SCC 449

State of Maharashtra & Ors.[4] dated 27th January 2015 governs the field. He would submit that on the 5th pay commission being directed to be made applicable with effect from 1.1.1996, the State Government had issued a resolution on 4.10.2000, thereby granting relaxation from implementing the revision of pay-scales to the teachers in the un-aided institutions and instead of 1.1.1996 the scheme of revision of pay-scale was made applicable to the teaching and non-teaching staff of un-aided Engineering Colleges and equivalent institutions with effect from 1.8.2000. Shri.Vagyani would submit that legality of this notification dated 4.10.2000 was the subject matter of the Writ Petition dealt by the Aurangabad Bench and he would submit that the said notification has been held to be *ultra vires* since it was causing interference in the implementation of the All India Council Technical Education Act, which is a Central Enactment. Shri.Vagyani, would also place reliance on the judgment of the Hon'ble Apex Court in case of *Secretary, Mahatama Gandhi Mission and Another V/s. Bhartiya Kamgar Sena and Ors.* (Supra) and he would submit that the excuse of financial liability which the petitioners are trying to invoke, in a somehow similar situation has been not accepted by the Hon'ble Apex Court while implementing the recommendations of the pay

4 Writ Petition No.3528 of 2001 decided on 27/01/2015

commission and the Hon'ble Apex Court according to the learned Government Pleader has categorically laid down a proposition of law that when a statutory obligation is cast, it is for the institution to work out remedies and find out ways and means to meet the financial liability arising out of the obligation to pay the revised pay-scales. In light of the authoritative pronouncement of the Hon'ble Apex Court, the learned Government Pleader would urge that the present Writ Petition deserves a dismissal.

6. Certain factual aspects are not in dispute. The petitioner No.1 is a college which has been granted necessary permission under the All India Council for Technical Education Act, 1987. The said college is affiliated to the respondent No.4-University. The AICTE is a body established under the All India Council for Technical Education Act of 1987 which is an enactment to provide for its establishment with a view of proper planning and coordinated development of the technical education system throughout the country and for permission of qualitative improvements of such education to provide for regulation and proper maintenance of norms and standards in the technical education system. The term technical education for the purposes of the enactment envisages programs of education, research and

training in Engineering Technology, Architecture, Town planning, Management, Pharmacy and other such program as the Central Government may in consultation with the council notify. A technical institution has been defined to mean an institution, not being a university which offers courses or program of technical education. In terms of Section 10 of the said enactment the AICTE is duty bound to take all such steps as it thinks fit and necessary for ensuring co-ordinated and integrated development of technical education and maintenance of its standards. The petitioner No.1-institution is granted permission by the AICTE and thus it is under an obligation to conform to all the norms and standards prescribed by the AICTE, be it educational standards or the standards to be maintained by the institution including the necessary infrastructure in form of teaching and non-teaching staff. The respondent No.1 who offers the technical education is thus duty bound to secure an affiliation of the University to run the necessary curriculum and to train the students for the examination to be conducted by the University. The teaching and non-teaching staff which is engaged by the petitioner-institution which assists the institution to impart the necessary education and to cater to the infrastructural need of the said institution is a part and parcel of the said institution. The said staff enjoys a contractual relationship with the petitioner No.2 and it is imperative for the petitioner No.2 to follow the norms prescribed by AICTE in recruiting the said staff with commensurate education qualifications. This staff is prescribed by the Apex body, which is established for co-ordinated development of the technical education system in the country and for maintenance of norms and standards in the said system.

7. The AICTE which is empowered to lay down the norms and standards for the course and curriculum is also empowered to lays down norms for physical and infrastructural facilities, staff pattern, staff qualifications etc. The AICTE has also power to prescribe the pay structure of the teaching staff and of the equivalent cadres in degree and diploma level technical education. The Government of India implemented the revision of pay-scales of teachers in technical education following the revision of pay-scale of Central Government employees on recommendations of the 5th Central Pay Commission. This was done by order dated 9.10.1998 and by the said communication the Government of India advised the AICTE to notifiy the service conditions of the teachers in degree level, technical institution incorporating the pay-scale and other service conditions. Accordingly, the AICTE issued a notification revising the pay-scale and service condition of the teachers in the technical

institution including the degree level private technical institution. A similar notification was issued by AICTE revising the pay-scale of the teachers at the degree level institution which were in receipt of aid from the State Government. The State of Maharashtra on 18.11.1999 issued a resolution granting its approval for the implementation of the revised pay-scale to the teachers in the Government and non-Government Engineering Colleges by issuing Government resolution on 18.12.1999. Similarly, in order to implement the recommendations of the 6th pay commission the AICTE revised the pay structure of teachers and librarians in degree and diploma level technical education by issuing Government Resolution on 5.3.2010. The said scheme announced by the AICTE was extended to the related universities, university department and university affiliated professional degree level and Maharashtra State Board of Technical Education of Diploma Education falling within the preview of State legislature. Provided the State Government accorded its consent to adopt and implement the scheme. The State Government, after considering all the aspects of the scheme announced by the AICTE vide its notification dated 5.3.2010 decided to revise the pay-scales of all the teachers in equivalent cadres working in the Government and non-government institutions with effect from 1.1.2006, by issuing a Government Resolution on

20.08.2010. In addition to the said scheme it also included an additional stipulation of achieving minimum excellence (A) level of average confidential report, very good performance appraisal report through key performance indicator and completion of two AICTE approved refresher program of not less than two weeks duration. The State Government thus issued detailed orders for implementation of the revised scale for teachers and the librarians in degree and diploma level government and non-government aided institutions conducting professional courses. It prescribed the pay structure for different categories in diploma level institution and also prescribed the necessary qualifications to be possessed in order to be eligible for availing the benefits of the pay revision. The State Government therefore, adopted the decision of the AICTE to implement the recommendations of 5th pay commission to the teaching staff in the Government and the non-government Engineering Colleges with effect from 1.1.2006.

8. On 4th October 2000, the State Government issued a resolution, modifying its earlier resolution dated 18.12.1999 directing revision of pay-scales of teachers of the government, non-government aided and un-aided institutions with effect from 1.1.1996 in the backdrop of the situation brought to the notice of

the State Government by certain institutions which were un-aided and the difficulty expressed by them that they were not in a position to make payment of arrears on account of revisions of the pay-scales to their teachers with effect from 1.1.1996 due to paucity of funds. The State Government therefore resolved that the scheme of revision of pay-scales as declared by the State Government should be made applicable to the teachers, librarians and instructors of the physical eduction in the un-aided Engineering Colleges and other equivalent institution of technical education at its degree or equivalent level in the State with effect from 1.8.2000.

This Government Resolution was subject matter of challenge by group of employees who were aggrieved by same and who had approached the Aurangabad bench with a grievance that they cannot be deprived of the benefits of the revision of pay-scale. The Division Bench of this Court in the case of *Rangnath s/o Vishnu Raskar and Ors. V/s. The State of Maharashtra & Ors (Supra)* in detail referred to the challenge to the impugned notification dated 4.10.2000 which has been assailed as being repugnant to the notification issued by the AICTE. After a detailed reference to the judgment of the Hon'ble Apex Court in case of ***Prashwanath V/s. All India Council for Technical Education and Ors***[5]***,*** *w*here the

5 2013(3) SCC 385

Hon'ble Apex Court had admitted the primacy of the central enactment in the field of technical education and which had subjected the opinion of the State and that of the university to its supremacy, the Division Bench held that once the AICTE had directed that the recommendations of the pay commission should apply to the employees of the Self Financing Institutions with effect from 1.1.1996, the State Government is denuded of its power. The Division Bench in detail dealt with the power of the state legislature and the co-extensive power of the State Government to deal with the subject of "Technical Education" as against the power of the Parliament and that of the Central Government in terms of Entry 66 of List-1 of Scheduled-VII of the Constitution. In this backdrop the Hon'ble Division Bench made the following observations.

> *"19. In this background, we have to examine as to whether the Government Resolution dated 04.10.2000 has encroached upon the powers of AICTE. As said above, the AICTE unequivocally mentioned in their notification that they recommended 01.01.1996 as the date of implementation of the pay-scale for teachers in Private Self-Financing Engineering Colleges. The question is whether the date so mentioned in the notification can be changed unilaterally by the Government of Maharashtra by issuing notification? The answer has to be in negative. While issuing notification, the AICTE did not leave any*

discretion to the State Government in respect of date of implementation of revision in pay-scales for colleges like respondent No. 6. In other notification, such a discretion was left to the State Government mainly because it is the State Government, which was to burden the shoulder.

20. On the other hand, such concession was obviously not required in case of self-financing colleges. Their finances do not depend on the State Government or Central Government. So, their teachers would get revised pay-scale w.e.f. 01.01.1996. In such situation, the financial condition of self-financing institutions had no concern with the State Government at all. The State Government might have received reports about poor financial condition of self-financing institutions like respondent No. 6 then they could have provided financial aid etc. to them without interfering in the decision of AICTE."

9. When we have carefully peruse the resolution passed by the State Government for implementation of the revised pay-scales as per 5th pay commission to the non-teaching post of the non-government aided polytechnic, pharmacy institution, engineering colleges and similar institutions, it is apparently clear that the State Government had issued the said resolution after taking into account the recommendations of the Central Government regarding the 5th pay-scale pursuant to the State Revision of Pay-scale 1997

Committee formed under the Chairmanship of Mr.D.M. Suthankar to recommend the revised pay-scale to the State Government and other employees. The recommendations of the said committee were to revise the pay-scales applicable to the teaching and non-teaching staff of the government polytechnic and in the engineering institutes with effect from 1.1.1996. On due consideration of the recommendations made by the said committee, the State Government took a decision to implement the revised pay-scales to the non-teaching staff of the non-government aided engineering and other institutes. In the said Government Resolution it is made it amply clear that it had decided to implement the revised pay-scale in terms of the enclosures appended to the said circular to the non-teaching staff of the non-government aided, polytechnics, pharmacy institute, engineering colleges and similar institutions in the State of Maharashtra. The revised pay-scales were given effect from 1.1.1996. The said Government Resolution also provided for the manner in which the arrears accruing to an employee would be credited. We have also perused the notification issued by the Higher and Technical Education Department on 7.10.2009 which is placed by the petitioner as annexure “Q” to the petition. The said notification is issued in the backdrop of the provisions of the Maharashtra University Act, 1994 as well as the directions issued by the Hon'ble High Court in various writ Petitions ensuring that the students are imparted quality eduction and the institutions imparting such education are duty bound to provide the necessary infrastructure. The State Government by the said notification framed the Maharashtra Non-agricultural University and affiliated Colleges Code [Revised Pay of Non-teaching Employees (Rules) 2009] the rules came into effect from 1.1.2006 and sub Rule 2 of the Rules of 2009 framed by the State Government on 7.10.2009 made it applicable to the non-teaching staff of 12 non-agricultural universities and to the full time non-teaching staff of the said universities. This includes the Pune university. Perusal of the said rules would also reveal that the State Government was very clear in its terms to grant the benefit of revision of the pay-scale to the non-teaching employees in terms of the recommendations of the 5th pay with effect from 1.1.2006 and no discretion was left to the respective institutions affiliated to the 12 non-agricultural universities to vary date of its implementation.

10. In the backdrop of the entire scheme formulated by the State Government in terms of the Government Resolution dated 20.8.2010 making the revision of pay-scales of the teachers and equivalent cadre in the degree/diploma level technical education in

terms of the AICTE Scheme (6th pay commission) and the Maharashtra Non-agricultural University and Affiliated Colleges Code [Revised Pay of Non-teaching Employees (Rules) 2009] applicable to the non-teaching staff of the non-agricultural university, it is not open for the petitioner to canvass the submission that the liability of the recommendations of the pay commission be not imposed on them with a retrospective effect. The non-teaching employees of the petitioner No.1-institution had approached the Grievance Committee seeking arrears accruing to them on account of the recommendations of the 6th pay commission which were made applicable by the State Government from 1.1.2006 and being aggrieved by the inaction on the part of the petitioner No.1 to pay them the arrears. On such a grievance being raised the management council of the Pune University passed resolution accepting the orders passed by the Grievance Committee and directed payment of the arrears of the 5th pay revision and also the 6th pay revision. Being aggrieved, the petitioners have approached this Court by filing Writ Petition No.3065 of 2016 assailing the resolution of the Management Council of the university dated 4.8.2015 and the recommendations made by the Grievance Committee dated 11.6.2015. The Division Bench of this Court on 13.11.2017 was pleased to admit the Writ Petition but in light of the judgment delivered by the Aurangabad Bench in Writ Petition No.3528 of 2001 dated 27.1.2015 *Rangnath s/o Vishnu Raskar and Ors. V/s. The State of Maharashtra & Ors (Supra)* was pleased to reject the prayer of any interim protection. The petitioners have therefore, prayed before us that even this petition should be admitted. We however, do not find any justification for doing so since we are of the clear opinion that the petitioner Nos.1 and 2 which are controlled by the AICTE, a statutory body and when this body has taken a decision to implement the revision of pay-scales as per recommendations of 5th and 6th pay commission and the State Government having accepted the recommendations have directed implementation of the pay revision from 1.1.1996, it is not open for the petitioner to canvass before us that they were gracious enough to implement the recommendations of the pay revision but are unable to give it a retrospective effect. The petitioners who are bound by the norms and regulations framed by the AICTE to ensure the proper norms and standards to be maintained in the technical institution are bound by the mandate issued by the State Government directing even the non-aided institutions to make the revision of pay-scale applicable from retrospective date. The petitioner cannot run away from the said responsibility only on the count of a financial crunch being posed as an excuse and this is the only a defence which Shri.Anturkar seeks to invoke in order to discharge the petitioners of their burden to pay the arrears according on accept of pay Revision. We do not find that financial crunch can be used as a shield to refrain the petitioners from discharging its obligation in terms of the Government Resolution and the Rules of 2009.

10. The Reliance place by the learned Government Pleader on the judgment of *Secretary, Mahatama Gandhi Mission and Another V/s. Bhartiya Kamgar Sena and Ors.(Supra)* deals with a somehow similar contingency in the backdrop of the Rules of 2009 framed by the State Government to which he had made a reference in the above paragraph namely the Maharashtra Non-agricultural Universities and Affiliated Colleges Standard Code (Non-teaching Employees Revised Pay Rules of 2009) formulated on 7.10.2009.

The appellant a Charitable Trust registered under the Bombay Public Trust Act which was administering two un-aided, university affiliated Engineering Colleges at Nanded and Aurangabad approached the Hon'ble Apex Court assailing the judgment delivered at Aurngabad Bench in Writ Petition No.11091 of 2010 where the Hon'ble High Court had allowed the Writ Petition filed by the non-teaching staff in the employment of the appellant and the revised pay-scale as recommended by the 6th pay commission was extended to the non-teaching staff. The Hon'ble Apex Court took note of the fact that an administration of an Educational Institution involves two facts namely :-

(i) Imparting of knowledge.

(ii) Maintaining the necessary infrastructure for providing the venue and other facilities for imparting the knowledge and for performing twin functions, man power is required which is in the form of teaching/non-teaching staff.

Their lordships after making reference to the respective entries pertaining to "Technical Education" finding place in List-1 and List-3 of Scheduled-VII noted that Section 8(3) of the Maharashtra University Act, 1994 authorized the state to make rules providing for various aspects of employment of officers, teachers and their employees of the universities, affiliated colleges and recognised institutions and that such rules would prevail over any other subordinate legislation made by the statutory authority formulated under the Act. The Hon'ble Apex Court observed thus:-

"76. The very fact that the Government of India thought it fit to revise the pay scales of its employees and also thought it fit to accept the suggestions of the UGC to

revise the pay scales of various Universities and other bodies whose maintenance expenditure is met by the UGC (in other words virtually by the Union of India), shows that the Government of India is completely convinced that there is a definite need to revise the pay scales of not only its employees, but also the employees of its instrumentalities. The fact that the Government of India made an offer to the States that the Government of India is willing to shoulder a substantial portion of the financial burden arising out of the adoption of revised pay scales in the event of the States choosing to adopt the revised pay scales, also indicates that the Government is fully convinced that having regard to various factors operating in the economy of the country there is a need to revise the pay scales of the personnel employed even by various States and their instrumentalities. Such a conclusion of the Union of India is endorsed by the State of Maharashtra. The decision of the State in issuing the two GRs revising the pay scales of the teaching staff of all the educational institutions and non-teaching staff of the aided educational institution is proof of such endorsement."

11. However, while dealing with the aspect as to whether the State Government was justified in drawing an artificial distinction between aided and un-aided institutions, the following observation finds place in the judgment of the Hon'ble Apex Court :

> *"Therefore, we see no justification in excluding the non-teaching employees of the unaided educational institutions while extending the benefit of the revised pay scales to the non-teaching employees of the aided educational institutions. Such a classification, in our opinion, is clearly violative of Article 14 of the Constitution of India."*

12. The following observations of the Hon'ble Apex Court would be relevant to the issue involved in the present case and needs a reproduction.

> *"92. In view of our conclusion that the State of Maharashtra has taken a decision in exercise of the power allowable to it under Section 8(3) of the Maharashtra Universities Act, the question whether AICTE is the competent body to regulate the service conditions of the employees of engineering colleges in our opinion is wholly irrelevant to the issue and academic. Even if the appellant's submissions in this regard were to be accepted, it only leads to the inevitable conclusion that the Maharashtra State legislature is the competent body to deal with the subject. It did deal with the subject under Section 8(3) of the Maharashtra Universities Act. Section 8(3) clearly authorises the State Government to frame rules dealing with the service conditions of the employees (both teaching and non-teaching) of various educational institutions. The power is duly exercised.*

While exercising such power is that State of Maharashtra drew an artificial distinction between aided and unaided educational institutions.

93. Another submission of the appellants that is required to be dealt with is that since the appellant does not receive any financial aid from the State, calling upon the appellants to pay its employees in terms of the revised pay scales would be compelling them to perform an impossible task. The appellants submitted that their only source of revenue is the fee collected from the students. Their right to collect fee is regulated pursuant to judgments of this Court in incoherence T.M.A. Pai Foundation & Others v. State of Karnataka & Others, (2002) 8 SCC 481[38] and Islamic Academy of Education & Another v. State of Karnataka & Others, (2003) 6 SCC 697[39]. Therefore, if they are compelled to pay their staff higher salaries they would be without any financial resources as they do not receive any aid from the State.

94. On the other hand it is argued by the respondent that the determination of the fee structure and the amount of the fee that could be collected by the appellants from the students is made by the Fee Regulatory Committee and such a body is bound under law and does in fact take into account the various relevant factors in determining the fee structure. It is, therefore, submitted that it is always open to the managements to make an appropriate application before *the Fee Regulatory Committee bringing all the relevant factors to the notice of the body competent to determine the fee structure and raise appropriate revenue.*

95. At the outset, we make it clear that at least insofar as non-teaching staff are concerned, the appellants have no excuse for making such a submission because in the earlier round of litigation the respondents - non- teaching employees of the appellants, though succeeded both before the High Court and this Court in obtaining appropriate directions to the appellant and other authorities to revise the pay scales of the employees in tune with the Fifth Pay commission, entered into a settlement dated 30th January, 2006, the terms of which have already been taken note in this judgment at para 4.

96. Under the said agreement, the management agreed to revise the pay scales from time to time in tune with the revision of the pay scales of the employees of the State. Therefore, the submission of the management in this regard is liable to be rejected on that ground alone.

97. Even otherwise, if the appellants are obliged under law, as we have already come to the conclusion that they are in fact obliged, it is for the appellants to work out the remedies and find out the ways and means to meet the financial liability arising out of the obligation to pay the revised pay scales."

13. The reliance place by Shri.Anturkar on the judgment of the *Sunanda w/o Pandharinath Adhav (Mrs.) & Ors.V/s.State of Maharashtra & Ors.(Supra)* is not of succour to the case of the petitioner. In that case the petitioner working as teachers in the respondent No.6, unaided school, staked their claim for payment of salary as per 5th pay commission with effect from 01.01.1996. The respondents denied the same on the ground that the school was being run on no grant basis and it was residential school governed by MEPS Act,1977 and MEPS Rules 1981. The said school happened to be run with the assistance of Rahuri Sahakari Sakhar Karkhana Limited and it made categorical statement that it was not able to continue the financial assistance any more. In the backdrop of this fact this fact the Hon'ble Division Bench considered the demand of the petitioner and observed that from the sugar season of 1997-98 the Rahuri Sahakari Sakhar Karkhana have stopped deductions from the payment of cane price towards the financial assistance to the trust and when the Division Bench observed as follows :-

> *"Though the petitioners have disputed the financial crisis that is being faced by the trust as well as the Rahuri Sahakari Sakhar Karkhana Limited, it cannot be denied that the trust has to generate income to run the concerned school on its own and, by legitimate means like revision of fees, donations from members/well wishers*

etc. Under these circumstances, the plea of the management, not to make the Fifth Pay Commission Recommendations effective from 1st January, 1996 deserves to be considered favourably and the judgment of the Gujarat High Court in the case of Swaminarayan Education Trust (supra) and the judgment of the Supreme Court in the case of State of U.P. and another a. U.P. Polytechnic (supra) certainly uphold the plea of the respondent management".

Shri.Anturkar would submit that the judgment of Hon'ble Apex Court in the case of *State of Uttar Pradesh V/s. U.P. Polytechnic Diploma Shikshan Sanstha and Another (Supra)* revolved around a similar situation and the Hon'ble Apex Court modified the order passed by the High Court with a direction that the scales and selection grade would be granted to the Writ Petitioner's not from the date as directed by the High Court but from the date of which the petition was filed by the Writ Petitioner. His claim is that the revision of the salary was accepted but not retrospectively and it was directed to be implemented from the date of filing of the Petitioner in the High Court.

Perusal of the facts of the said case would reveal that the Hon'ble Apex Court was approached by an association of assistance teachers in various government aided Polytechnics demanding some pay-scale as assistance lecturers of government Polytechnic and Selection grade. The prayer of the petitioners came to be granted with effect from when date of Assistant Lecturers in Government Polytechnics were granted pay-scale and selection grade. When State of UP approached the Hon'ble Apex Court, and the matter was argued on the point of the period from which the above scales and selection grade have to be given, their lordships modified the order of the High Court and directed that the scales and selection grade will be granted to the petitioners not from the date as directed by the High Court but on the date of which the petitions were filed before the High Court. We do not see as to how the said judgment applies to the case of a petitioner as in the present case the petitioners are disputing the liability in respect of revision of pay-scales to be paid with a retrospective date. The Hon'ble Apex Court was dealing with a case of parity in pay-scale of the assistant lecturers of Government aided Polytechnics as against the U.P. Polytechnic Diploma teachers. We are of the opinion that the said judgment in no way assists the petitioner.

14. We have considered the submissions of the learned counsel Shri.Anturkar that the management like the petitioner could

not be foisted with an obligation to pay the revised pay-scales with retrospective date and discharge the liability by disbursing arrears in favour of its employees since it is the specific submission of Shri.Anturkar that the petitioner being an private Educational Institution has a fundamental right to run such an institution and any interference in the exercise of this fundamental right by imposing fetters in any manner would infringe the fundamental right of the petitioner. In our view this argument is not open to the petitioner as the Hon'ble Apex Court in the case of ***T.M.A. Pai Foundation V/s. State of Karnataka***[6] case had categorically held that education is treated as noble “occupation” on “no profit no loss” basis and those who establish and manage the educational institutions are not expected to indulge in profiteering or commercializing this noble activity. Keeping this object in mind the Court did not give complete freedom to the Educational Institutions in respect of right to admit the students and also with regard fixation of fees. Thus the right which Shri.Anturkar claims is not a right to carry on business but at the most it is recognised as an occupation “giving the status of a fundamental right. The Hon'ble Apex Court has delineated four specific rights which encompass the right to occupation of educational institutions namely:-

6 ***2002-8-SCC-481***

(i) Right to admit students;

(ii) Right to set up reasonable fee structure;

(iii) Right to appoint staff (teaching and non-teaching);

(iv) Right to dereliction of the duties on the part of the any of the employee.

The Hon'ble Apex Court in case of T.M.A. Pai expounded on the nature and extent of the control of the state on the basis of level of education. When a right to run an educational institution is recognised as occupation and when Article 19(1)(g) is being sought to be invoked and being equated as a fundamental right guaranteed under Article 19(1)(g) of the Constitution, it cannot be taken as an absolute right and the state is empowered to impose reasonable restrictions and control the availment of such a right. The right under Article 19(1)(g) which is not absolute in terms but can be subjected to reasonable restrictions under clause (6) and such restriction should be in the interest of general public. Moreover, under Article 19(1)(g) the state is empowered to make any law relating to professional and technical qualification necessary for practicing any profession or carrying any occupation or trade or any business. Thus, while examining as to whether the restrictions that have been imposed are reasonable or not and whether they are in the interest of general public, a balance has to be struck between the right sought to be exercised on the one hand and the restriction imposed on the other. The Hon'ble Apex Court in case of ***Modern Dental College and Reasearch Centre V/s. State of Madhya Pradesh***[7] has examined the right of private aided and private un-aided educational institutions and also examined the sweep of the restrictions to which it can be subjected. The Hon'ble Apex Court recognised the need to strike a balance between the two and observed thus :-

> *"33. The history of the dispute regarding Government control over the functioning of private medical colleges is quite old now but the tug of war continues. There seems to be some conflict of interest between the State Government and the bodies that establish institutions and impart professional medical education to the youth of this country. While on the one hand the State Governments want to control the institutions for socio- political considerations and on the other the people who invest, set up and establish the institutions have a genuine desire to run and exercise functional control over the institution in the best interests of the students, it cannot be disputed that the State does not enjoy monopoly in the field of imparting medical education and the private medical colleges play a very significant role in this regard. The State lacks funds that is imperative to provide best infrastructure and latest facilities to the students so that*

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they emerge as the best in their respective fields.

34. In the modern age, therefore, particularly after the policy of liberalization adopted by the State, educational institutions by private bodies are allowed to be established. There is a paradigm shift over from the era of complete Government control over education (like other economic and commercial activities) to a situation where private players are allowed to mushroom. But at the same time, regulatory mechanism is provided thereby ensuring that such private institutions work within such regulatory regime. When it comes to education, it is expected that unaided private institutions provide quality education and at the same time they are given 'freedom in joints' with minimal Government interference, except what comes under regulatory regime. Though education is now treated as an 'occupation' and, thus, has become a fundamental right guaranteed under Article 19(1)(g) of the Constitution, at the same time shackles are put insofar as this particular occupation is concerned which is termed as 'noble'. Therefore, profiteering and commercialisation are not permitted and no capitation fee can be charged. The admission of students has to be on merit and not at the whims and fancies of the educational institutions. Merit can be tested by adopting some methodology and few such methods are suggested in T.M.A. Pai Foundation, which includes holding of CET. It is to be ensured that this admission process meets the triple test of transparency, fairness and non-

exploitativeness.

15. The right to run educational institution which the petitioner claims to be flowing from Article 19(1)(g) bring with its purview, as has been mentioned above, the four specified rights and this includes a right to appoint staff (teaching and non-teaching). The private institutions which aim at achieving high standards and excellence which would achieve the same by ensuring and providing for necessary infrastructure which would be conducive to the growth of the institution and it can thus attain excellence. Available infrastructure would bring within its sweep the teaching and non-teaching staff and the equipment, expenditure on administration and maintenance as well as the reasonable surplus required for growth and development of professional institutions. Excellence can be achieved only if the infrastructure is well arranged for. The infrastructure would be said to be well arranged if it involves qualified teaching and non-teaching staff. The AICTE which is apex body, established for the purpose of proper planning and co-ordinated development of the technical education system has prescribed the qualification to be possessed by the teaching as well as non-teaching staff so as to bring uniformity in the quality of infrastructure made available in such technical institutions. It is

empowered to regulate the maintenance of academic standard including the atmosphere and the infrastructure. When the Apex body like the AICTE is empowered to prescribed the qualifications which would ensure the welfare of the student community to promote merit, achieve excellence and curb malpractice and exploitation and when it decides to reward the qualification so acquired and possessed by prescribing a pay-scale, we do not think it is open for the petitioners to defeat the said object sought to be achieved by the AICTE in ensuring the minimum standards to be possessed by the teaching and non-teaching staff of the educational institutions imparting technical education. The right to establish and manage professional educational institutions cannot be claimed to be in absolute terms but it is subject to reasonable restrictions under clause (6) of Article 19. In fixing the fee structure of an institution, the Hon'ble Apex Court in ***Modern School V/s. Union of India***[8] has held that the following considerations are material namely :-

(a) Infrastructure and facilities available;

(b) Investments made, salaries paid to the teachers and staff;

(c) Future planning for expansion and/or betterment of institutions subject to two restrictions namely non profiteering and non-charging of capital fees.

8 (2004-5-SSC-583)

A private institution like the petitioner is entitled to have its fee structure determined by taking into consideration the aforesaid variants and then the fees payable by the students would cater to the salaries to be paid to the teachers and the other staff. Thus it is not as if the institution like the petitioners will be out of pocket if it disburses their arrears in order to effectively implement the recommendations of the pay revision, which is essentially necessary for the purpose of maintaining the academic standard and the minimum infrastructure of the educational institutions.

In light of the aforesaid observation we are of the opinion that the petitioners cannot claim relief as sought in the petition in light of the aforesaid observation made by the Hon'ble Apex Court. It is not open to the petitioners to canvass a specious argument that the petitioners are ready to implement the recommendations of the pay commission but it would be restricted only to its current application and that the petitioners should not be directed to bear the burden of the arrears. In the result, we do not find any merit or substance in the petition and the same deserves to be dismissed. However, we deem it appropriate in the interest of justice to grant period of six months to the petitioner Nos.1 and 2 to make the payment of arrears to its teaching and non-teaching staff in terms of the Government Resolution dated 20.10.2000 and

7.10.2009. The arrears accruing to the staff of the petitioner No.1-college is directed to be disbursed to the respective employees within a period of six months. The Writ Petition is dismissed.

(SMT.BHARATI H. DANGRE, J.) **(S.C. DHARMADHIKARI,J.)**