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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 30.11.2017

Pronounced on: 12.01.2018

+ LPA 550/2017 & CM Nos.29731-29733/2017 & 38053/2017

DAULAT RAM COLLEGE SOCIETY & ANR Appellants

versus

UNIVERSITY OF DELHI & ANR Respondents

+ LPA 551/2017 & CM Nos.29759-29760/2017 & 38054/2017

THE HINDU EDUCATIONAL TRUST Appellant

versus

UNIVERSITY OF DELHI & ANR Respondents

+ LPA 563/2017 & CM Nos.30408-30411/2017

THE INDRAPRASTHA EDUCATIONAL TRUST
..... Appellant

versus

UNIVERSITY OF DELHI & ANR Respondents

Present: Ms. Diya Kapur with Ms. Akshita Sachdeva &
Ms. Sugandha Batra, Advs. for appellants in LPA
Nos.550/2017 & 551/2017.
Mr. G.K. Mishra & Mr. Raunaq Dutt, Advs. for
appellant in LPA No.563/2017.
Mr. V.P. Singh, Sr. Adv. with Mr. Mohinder J.S.
Rupal, Mr. Prang Newmai & Ms. Slomita Rai, Advs.
for University of Delhi.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE SANJEEV SACHDEVA

S. RAVINDRA BHAT, J.

1. In these three appeals, the correctness of a common judgment of a learned Single Judge, upholding the requirement (contained in a resolution of the Executive Council of the Delhi University [“the University” hereafter] dated 03.11.2012 - hereafter called “the impugned resolution”), stipulating that each affiliated college (such as the petitioner colleges, hereafter “the colleges”) had to send 50% names in excess of the approved strength of their respective governing council/executive council membership (spelt out in the trust deed, or memoranda of association, as the case may be). The impugned resolution embodied a previous resolution of 21.08.1975 (Resolution No. 289). The impugned judgment repelled the challenge to such stipulation, made on the ground that the decision and norm were *ultra vires* the Delhi University Act, (“the Act” hereafter), the University’s statutes and ordinances, and Article 19 (1) (c) and (g) of the Constitution of India.

2. It is unnecessary to elaborately recount all, but the essential facts. The appellants, i.e. the Hindu Educational Trust, the Indraprastha Educational Trust and the Daulat Ram Educational Society set up colleges for imparting education. Each such trust or society had its governing rules and regulation, which stipulated the governing structure, defined its membership, tenure of governing council members, number of members, their qualifications, etc. It is an undisputed fact that in accordance with Statute 30 (1)(C) of the Statutes, framed by the Delhi

University, the colleges' arrangements providing for appointment of members to the Governing Body were approved by the University. It is also not disputed that in accordance with Ordinance XVIII, the University approved the members of the appellants' colleges governing council consistently. The University's Executive Council framed model Rules for composition and mode of appointment of governing bodies of the various colleges through Executive Council Resolution No. 66 dated 27.04.1963; Executive Council resolution of 23.04.1966 and Resolution No. 320 (a) dated 19.11.1966. These model Rules were not given effect to. The constitution, composition, term of office of members and Chairmanship of the Governing Body is to be in accordance with Statute 30 read with Ordinance XVIII of the Delhi University Act.

3. The University, by Executive Council Resolution No. 289 dated 21.08.1975 prescribed guidelines for appointment of members of trusts/societies as nominees on the governing body of the colleges. Under these guidelines, the trusts are to forward a panel of names to the University, consisting of at least 50% more names than the required numbers. The colleges' grievance was that the guidelines for the year 1975 never had any statutory force and were not binding on them. They complained that the said guidelines were contrary to Statute 30 (1)(C), which provides that the Governing Body shall consist of not more than 20 members and that the rules relating to composition of the Governing Body should conform to the Statutes and Ordinance of the University and the conditions of the Government grants to the colleges. The statute nowhere stipulates that the trust/society should forward a panel of names containing 50% more names than the required or stipulated number.

4. The appellants approached the court, stating that the Vice-Chancellor constituted a committee to recommend modalities/guidelines for nomination of members on the Governing councils resulting in the colleges being asked to comply with the guidelines and send 50% names over and above the stipulated governing body/council strength, from which the final names were to be approved by the University. This move, however, was not carried through; the colleges state that the existing practice – prevailing for about 40 years, of sending the required number of names (i.e. for instance, if the governing council's strength in a given case is 10, sending only 10 names, as opposed to 15 names, stipulated by the guidelines) was continued. The petitioner/appellants state that the prevailing situation continued, till 2009 when the University started insisting that the guidelines, stipulated in Resolution 289 dated 21.08.1975, ought to be adhered to. Ultimately, the impugned resolution was made on 02.11.2012, whereby the appellant societies/trusts were required to adhere to the stipulation that the names to be sent for approval, for membership of the respective governing council, ought to be the stipulated number plus 50%, from amongst which, the University would approve the requisite names. The Appellants through Writ Petition No. 54/2012 challenged the said Executive Council Resolutions. During the pendency of the said writ petition, the University passed Executive Resolution dated 03.11.2012 being Resolution No. 51 of 2012 which *inter alia* provided as follows:

(a) *“The trust will forward a panel of names to the University containing not less than 50% more names than the required number, and*

(b) No member shall serve on the Governing Body of a Delhi Government College ordinarily for more than two consecutive terms, and on the Governing Body of a Trust College for more than five terms; However, on the request of the Trust, the Vice Chancellor may extend the term of not more than two members on the Governing Body beyond five years subject to the satisfaction of the Vice Chancellor that such member(s) have made valuable contribution to the Governing Body in their earlier tenures.”

5. The three societies/trusts, which are before this court, as appellants, sought relief, contending that the said resolution and the University's insistence that the guidelines should be complied with, is contrary to law. According to them, the guidelines were *ultra vires* the Statute and Ordinances of the University; they could not have been imposed upon them. The colleges also stated that the guidelines were *ultra vires* the Delhi University Act, 1922 (hereafter “the Act”). Furthermore, they stated that the guidelines, especially violated Article 19 (1) (c) and (g) of the Constitution of India. They relied upon *T.M.A. Pai Foundation v State of Karnataka* (2002) 8 SCC 481; *Bramho Samaj Educational Society v State of West Bengal* (2004) 6 SCC 224; *Bijoe Emmanuel v State of Kerala* (1986) 3 SCC 615; *State of Madhya Pradesh v Thakur Bharat Singh* AIR 1967 SC 1170; *Kharak Singh v State of U. P.* (1964) 1 SCR 332. It was also argued that besides, the core right of management through the individuals chosen by the societies was taken away and that the right to carry on the profession of establishing and managing the institutions, under Article 19 (1) (g) was infringed.

6. The University resisted the writ petitions, pointing out that the resolutions merely filled a gap in the existing statutes and ordinances and did not supplant or exceed any statutory condition. The University particularly repelled the argument about *ultra vires*, set up by the colleges, *vis-à-vis* Statute 30 and the provisions of the Act. It was argued that the right to form an association did not assure the right to achieve the objects for which the association is formed. The University also stated that the right to set up an association, meant that once exercised, the membership and the college set up was distinct from the body set up in exercise of the right, i.e. the trust or society. If the society then set up a college, which it desired recognition of, or affiliation to a University, the college had to comply with the conditions prescribed. The right to association, said the University, did not extend to the right to affiliation. Furthermore, the colleges had accepted the major part of the resolution dated 03.11.2012, impugned by them; therefore, they could not complain that their right to association was infringed merely if they were asked to send more names (which *were chosen by them*) for the purpose of the one year term of the college's governing council. The resolutions were made in larger public interest of overall excellence of colleges.

7. The learned Single Judge, by the impugned judgment, held that the right to form an association does not include the right to seek affiliation of the colleges. It was also held, relying on the judgment reported as *All India Bank Association National Industries Tribunal* AIR 1962 SC 17 that the right (to form associations, guaranteed by Art.19 (1) (c)) extends only to establishment or formation of the association, but does not extend or guarantee the achievement of its underlying objects. The Supreme

Court had held that the right only:

“extends to the formation of an association and insofar as the activities of the association are concerned or as regards the steps which the union might take to achieve the purpose of its creation, they are subject to such laws as might be framed and the validity of such laws is to be tested by reference to the criteria to be found in clause (4) of Art.19 of the Constitution”.

8. The learned Single Judge also accepted the University's contentions that the impugned resolutions were conceived in public interest, to achieve excellence in imparting education. They did not, said the judgment, usurp the right to choose the membership of the governing council of every college- they continued to possess the power to choose all the names, including the excess names to be sent for approval. Given that the power to approve included the power not to approve (which is an intrinsic part of Statute 30), the guidelines merely supplemented the existing statutes and ordinances, governing the University. The learned Single Judge accepted a challenge to the impugned resolution, to the extent it restricted the right of society's or trust, to re-nominate members to their governing councils, to only five terms. It was held that this violated Ordinance XVII:

“Ordinance XVIII, inasmuch as, the said Clause, as reproduced above, even though states, that the term shall be for one year, but does not restrict, the renomination of a Member(s) in subsequent years, which suggest, such Member(s) can be renominated for any number of years, without restriction, whereas, the impugned stipulation restricts the period to five years. If that be so, till such time a necessary amendment is effected in the Clause 3(1) of Ordinance XVIII, the stipulation in the impugned

resolution could not have been issued by way of an instruction/guideline through a resolution.”

Contentions of parties

9. The appellants argue that the nature of power in terms of Statute 30, precludes the University from making norms (or resolutions) or amending them so far as the management of colleges is concerned. The University could only approve rules made in pursuance of Statute 30(1)(C) during affiliation of the College with the University, and that the legitimate authority and right to make rules lies with the college itself, which is governed by the rules so made by it. Thus, according to the colleges, the University's involvement was restricted to ensuring that such rules were in conformity with the Statutes, Ordinances and Regulations as well as provisions of the Act, and to approve the said rules at the time of granting affiliation to the College. Since the University approved the rules relating to composition of the Governing Bodies at the stage of affiliation, no further interference could be sought.

10. Ms. Diya Kapoor counsel for the appellant Hindu College trust, argued that the Memoranda of Association of the trusts and societies, which set up colleges, were approved and revalidated. The university could only approve the personnel of the Governing Body so long as they were appointed in compliance with the Ordinances, Statutes, Act and Rules and that power *did not possess the power of selection*. The power of selection sought to be exercised is plainly unsupported by the language of the statute. Thus, the University cannot pick and choose and select names of individuals who are to be part of governing bodies of colleges (which they are seeking to contend is the power to approve/disapprove).

Moreover, the source of this alleged power is plainly untraceable to any of provisions of the Act, Statute or Ordinance and the University has not been able to pin point the source of such power conferred upon itself.

11. Counsel states that Statute 30 provides the Executive Council only the power of "approval" and not the power of "selection" of the personnel of the Governing Body. The University's power is confined to approval only. Yet, by requiring that the list of nominees forwarded contain 50% more names than the required number, the impugned resolution containing the guidelines seek to confer discretion upon the Executive Council in deciding which of the ten nominees to select out of 15 (say, in a given case). The colleges submitted that in conferring such power upon itself, the University acted *ultra vires* the Act. They argued that the courts recognize the distinction between the power of approval and power of appointment and no authority is vested with such power, when expressly power is granted in respect of another aspect. Statute 30(1)(C) according to the college was superseded by the University's guidelines in approving the members of the Governing Body of the colleges. That is the choice of every institution and intrinsic to the right to association, enshrined under Article 19 (1) (c). Ordinance XVIII (3)(1) only stated that "*The members of the Governing Body, other than the Principal, shall hold office for a period of one year and shall be eligible for reappointment or re-election*".

12. Ms. Kapoor and other counsel appearing for the colleges, argued that the right to establish and manage any college or educational institution is an intrinsic part of the right to carry on any vocation, guaranteed under Article 19 (1) (g) of the Constitution of India. They relied on *TMA Pai Foundation* (supra) and submitted that the Supreme

Court had frowned upon regulations or norms which would effectively erode the choice of the institution. By insisting that nominations in excess of the membership of every college's governing council should be made and the University would pick who it deems appropriate, the element of carrying on the management, in accordance with the institution's wishes is compromised. Thus, if a college forwards names, all the excess (five) additional names along with 5 which the college refers (out of 10) may be finally accepted. There are no guidelines for acceptance or rejection of names. The mere circumstance that the University exercises such power is no guarantee that it would do so for relevant considerations.

13. It is argued that the power, under Statute 30, to approve or disapprove a scheme can be exercised once. The question of issuing a resolution embodying norms, despite the approval of the scheme, under Statute, clearly points to exceeding statutory power. Counsel argued that the impugned resolution cannot be imposed without amending the Statute, given the mandate of Section 29 of the Act. Counsel submitted that the impugned judgment, to the extent it holds to the contrary and finds that the resolution amounted to executive instructions, which merely supplemented existing guidelines or rules, is erroneous in law.

14. Learned counsel argued that in the present case, the insistence by the University to approve the names out of a larger pool of names, is nothing but selection and in the process of nominating, the governing council's role is reduced to that of a screening and recommending body. It is submitted that this substantially erodes functional autonomy of the college concerned.

15. The appellants' counsel also urged that the resolutions, to the

extent they violate Article 19 rights are unenforceable, because they are not authorized by law. It is submitted that the condition requiring nomination of 50% more names than required for the governing body is neither contained in any provision of the Act, nor the statutes framed therein. Therefore the law did not authorize it. Counsel, in this context, relied upon the judgments of the Supreme Court in *Kharak Singh* (supra); *Bijoe Emmanuel* (supra) and *Union of India v Naveen Jindal* (2004) 2 SCC 510, for the proposition that without the provision of enacted law, a mere executive measure or instruction cannot restrict the enjoyment of a fundamental right, in this case, the exercise of freedom under Article 19 (1) (g).

16. It was submitted, besides, that the right to carry on academic and management activities through a governing body entirely of its choice, is a core right that cannot be taken away through a mere resolution. In this context, it was submitted that the autonomy to the societies, assured by Section 29 of the Act, could not be taken away; the resolution was consequently *ultra vires* the Act.

17. The University submits and its senior counsel, Mr. V.P. Singh argues that though citizens have a fundamental right to association and to carry on a vocation or occupation, that right does not extend to the attainment of the object for which the society or trust is formed. The right to form and manage the parent society may be the fundamental right of its members. The society has also the right to pursue any activities that it may so desire, including the setting up of an educational institution. Yet, the college or institution so set up by the society has *no right to be affiliated to the University*. To establish a college is distinct from its

affiliation to a University. Mr. V.P. Singh relied on *Ahmedabad St. Xaviers College v. University of Gujarat*, 1975(1) S.C.R. 17 in support of the proposition.

18. Learned counsel argued that the right to carry on a vocation or occupation or to set up an association has to be distinguished also from the right to achieve the objects for which the association or business is set up. The right to form association guaranteed under Article 19 does not extend to the fulfillment of every object of an association. It is also argued that as there is no fundamental right to be granted affiliation to the University, colleges should comply with the norms of the University to be entitled to continued affiliation. Nothing prevents a college from seeking affiliation from any other University, if they are aggrieved by the conditions prescribed by a University.

19. The University argued that Statute 30 (C) reflects overriding power of the Executive Council which provides that "*Colleges and other institutions within the limits of State of Delhi, may be admitted to such privileges of the University as the Executive Council may decide....*". The statute provides that the Governing Body of the college shall be approved by the Executive Council and the rule relating to composition and personnel of the Governing Body and those relating to other matters affecting the management of the College are to be approved by the University's Executive Council. Since no rules were framed in this regard, there was a need for the resolution - approving the guidelines - impugned in this case. The University also argued that the impugned resolution merely supplements the Statutes and the Ordinances. Administrative instructions are valid and can fill gaps and supplement the

statutory rules. The Executive Council acted within its powers in passing the impugned resolution, which contains no infirmity; it is not *ultra vires* Statute 30.

20. Learned counsel for the university also argued that the colleges had complied with major part of the impugned resolution passed by the Executive Council of the respondent University. The petitioner has grievance only with respect to Clause B 2(a) and Clause B 4(e). All other clauses have been duly accepted, except for the above two parts of clause 2 & 4. In one case, the petitioner Society on one hand has averred that earlier two resolutions dated 21.08.1975 (Executive Council resolution No.239) and 11.02.2003 (Executive Council resolution No.138) have been superseded by the resolution passed by the Executive Council on 03.11.2012 (Executive Council Resolution No.51), but at the same time the petitioner society is seeking quashing of only one of earlier resolutions dated 21.08.1975 and the impugned resolution dated 03.11.2012. The said impugned resolution is applicable to 20 colleges affiliated to the University of Delhi and only the Trust/Societies of the three colleges have impugned the said resolutions. In these circumstances, the relief as sought by the petitioners cannot be granted. The petitioners cannot accept a part of the resolution and claim benefits under it and at the same time repudiate the remaining part of the resolution and refuse to comply with the same. Counsel states that the petitioners admit categorically that the university has the power to approve the names of the nominees forwarded by the petitioners for appointment as Members of the Governing Body, total 10 in number. The power to approve includes the power to disapprove any name of the

nominees forwarded by the society/trust. If the society or trust sends only 10 names then it does not leave any scope to approve, choose or select the names by the University. Therefore, the resolution of the Executive Council seeking 50% names in excess of the required number i.e. 15 nominees out of which the University shall select 10 names to be members of the governing body of the college concerned is valid and proper. Furthermore the term of such members of governing bodies is one year w.e.f. their date of appointment. If only 10 names are forwarded of which few are not approved (by the University) the process of sending fresh names would lead to undue delay, detrimental to the affairs of the College and students. The impugned resolution is salutary and wholesome.

Analysis and Conclusions

21. Before undertaking a detailed analysis of the contentions urged, it is essential to extract the relevant provisions. Section 29 of the Delhi University Act, reads as follows:

"29(1) On the commencement of the Delhi University (Amendment) Act, 1943, Statutes of the University shall be those set out in the Schedule. (2) The Executive Council may, from time to time, make new or additional Statutes or may amend or repeal the Statutes:*

Provided that the Executive Council shall not make, amend or repeal any Statute affecting the status, powers or constitution of any authority of the University until such authority has been given an opportunity of expressing an opinion in writing on the proposed changes, and any opinion so expressed shall be considered by the Executive Council.

Provided further that except with the prior concurrence of the Academic Council, the Executive Council shall not make, amend or repeal any Statute affecting all or any of the following matters, namely:

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(vii) the extent of the autonomy which a College may have and the matters in relation to which such autonomy may be exercised."

22. The relevant statutes read as follows:

"6(1) The Executive Council shall, subject to the control of the Court, have the management and administration of the revenue and property of the University and the conduct of all administrative affairs of the University not otherwise provided for.

(2) Subject to the provisions of the Act, the Statutes and the Ordinances, the Executive Council shall in addition to all other powers vested in it, have the following powers, namely:

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(xiii) to exercise such other powers and to perform such other duties as may be conferred or imposed on it by the Act or the Statutes."

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Section 30 reads as follows:

"30. Subject to the provisions of this Act and the Statutes, the Ordinances may provide for all or any of the following matters, namely:

(a) the admission of students to the University and their enrolment as such;

(b) the courses of study to be laid down for all Degrees, Diplomas and Certificates of the University;

(c) the Degrees, Diplomas. Certificates and other Academic distinctions to be awarded by the University, the qualifications for the same, and the means to be taken relating to the granting and obtaining of the same;

(d) the fees to be charged for courses of study in the University and for admission to the Examinations, Degrees and Diplomas of the University;

(g) the maintenance of discipline among the students of the University;

(i) the special arrangements, if any, which may be made for the residence, discipline and teaching of women students, and prescribing for them of special courses of study;

(j) the giving of religious instruction;

(l) the management of Colleges and other Institutions founded or maintained by the University;

(m) the supervision and inspection of Colleges and other Institution admitted to privileges of the University; and

(n) all other matters which by this Act or the Statutes are to be or may be provided for by the Ordinances.”

23. Statute 30 (C) which is relevant for the present purpose, reads as

follows:

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“30.....(C) Colleges and other Institutions within the limits of State of Delhi may be admitted to such privileges of the University as the Executive Council may decide on the following conditions, namely:

(i) Every such college or Institution shall have a regularly constituted Governing Body, consisting of not more than twenty persons approved by the Executive Council and including, among others, at least two representatives of the University and at least three representatives of the teaching staff of whom the Principal of the college or Institution shall be one. The rules relating to the composition and personnel of the Governing Body, and those relating to other matters affecting the management of the college shall conform to the Statutes and the Ordinances of the University and the conditions of the Government Grant to College. Such rule and the personnel will require the approval of the Executive Council.

(ii) XXXXXX XXXXXX XXXXXX”

24. It was contended on behalf of the University that the Appellants being Societies and trusts, were not citizens of India and could not allege infringement of Article 19(1)(g) of the Constitution. The learned Single Judge upheld this argument, reasoning that the right to associate or carry on business, once exercised by forming the association or setting up the commercial activity, cannot be said to be infringed if the regulation concerned (in this case, the resolutions requiring nomination of additional names for approval) were for the larger public good, and good

governance. The learned Single Judge also relied on judgments of the Supreme Court to hold that the right to carry on trade or set up an association did not guarantee the right to achieve the objectives for which the association is set up or the trade carried on. In this regard, *R.C. Cooper v Union of India* AIR 1970 SC 564, held, with respect to maintainability of proceedings complaining of violation of fundamental rights under Article 19 (of corporate entities such as societies/companies) as follows:

“A measure executive or legislative may impair the rights of the company alone, and not of its shareholders; it may impair the rights of the shareholders not of the Company; it may impair the rights of the shareholders as well as of the company. Jurisdiction of the Court to grant relief cannot be denied, when by State action the rights of the individual shareholder are impaired, if that action impairs the rights of the Company as well. The test in determining whether the shareholder's right is impaired is not formal: it is essentially qualitative: if the State action impairs the right of the shareholders as well as to the Company, the Court will not, concentrating merely upon the technical operation of the action, deny itself jurisdiction to grant relief.”

25. The Supreme Court therefore held that the fundamental rights of shareholders as citizens are not lost when they associate to form a company/society/ association. The above case has been followed in *Bennett Coleman & Co v. Union of India* 1973 AIR 106, where it was held as follows:

“In the Bank Nationalisation case this Court held the statute to be void for infringing the rights under Articles 19(1)(f) and 19(1)(g) of the Constitution. In the Bank

Nationalisation case, the petitioner was a shareholder and a director of the company which was acquired under the statute. As a result of the Bank Nationalisation case (supra) it follows that the Court finds out whether the legislative measure directly touches the company of which the petitioner is a shareholder. A shareholder is entitled to protection of Article 19. That individual right is not lost by reason of the fact that he is a shareholder of the company. The Bank Nationalisation case has established the view that the fundamental rights of shareholders as citizens are not lost when they associate to from a company. When their fundamental rights as shareholders are impaired by State action their rights as shareholders are protected. The reason is that the shareholders' rights are equally and necessarily affected if the rights of the company are affected. The rights of shareholders with regard to Article 19(1) (a) are projected and manifested by the newspapers owned and controlled by the shareholders through-the medium of the corporation. In the present case, the individual rights of freedom of speech and expression of editors, Directors and shareholders are all exercised through their newspapers through which they speak. The press reaches the public through the Newspapers. The shareholders speak through their editors- The fact that the companies are the petitioners does not prevent this Court from giving relief to the shareholders, editors, printers who have asked for protection of their fundamental rights by reason of the effect of the law and of the action upon their rights. The locus standi of the shareholder petitioners is beyond challenge after the ruling of this Court in the Bank Nationalisation case (supra). The presence of the company is on the same ruling not a bar to the grant of relief.

26. Therefore, *RC Cooper (supra)* has settled, and thereafter the judgment in *Bennett Coleman (supra)* have established that fundamental

rights of the citizens associating to form a company/society/association cannot be undermined only because it is the company/society/association that approaches the court, as long as the individual shareholders or association members also approach it. There is no bar on the jurisdiction of this court to give relief to the citizens who have asked for protection of their fundamental rights by reason of the effect of the action upon their rights. It is also seen that the second appellant in LPA 550/2017 is a citizen of India, claiming a violation of her fundamental rights. The plea of violation of fundamental rights including Article 19(1) (c) and 19 (1) (g), urged by the appellants is, therefore, maintainable.

Plea of ultra vires

27. Section 29 of the Act provides that the Executive Council *shall not make any rules affecting the autonomy of the college and the matters in relation to which such autonomy may be exercised*. In this case, the appellant societies' power to nominate trustees or members to the governing body exists in terms of their respective trust deeds/memoranda of association. It is mainly the governing body that has any control over the administration and management of the college. The appellant societies' scheme (i.e. trust/memoranda/constitution) had been approved the power to nominate 10 members as their representatives as they set up and promoted the colleges. Any encroachment of this power invades the autonomy of the college as the governing body is the root of autonomy in any affairs of the college and matters of its governance. Any restriction on the composition of the governing body would affect the autonomy of the college as the Rules and regulations of the colleges clearly provide for

nomination of 10 members of the governing body by the respective appellant societies/trusts. If any regulation of this power was to be done, the provision of the statute, i.e. Section 29 clearly stated that it was to be done through statutes. For this reason, the impugned resolutions are not in conformity with Section 29 of the Delhi University Act.

28. The University contends that the power of approval provided for in Statute 30(1)(C)(i), includes the power to decline approval. The learned Single Judge held that the power of disapproval being there in Statute 30(1)(C)(i), even before the issuance of the impugned resolution, it must be held that the stipulation that the Society shall forward additional 50% names, is in conformity with Statute 30 (1)(C)(i). The learned Single Judge found merit in the argument that the object behind the decision as stated/canvassed by the University is if only ten names are forwarded by the Society, and out of which few are not approved by the Executive Council, then fresh names shall be required to be submitted by the petitioner leading to undue delay and laches, which shall be detrimental to the College and Students.

29. It is undeniable that the power of approval includes the power to decline approval. However, this cannot translate into a power to pick and choose from a set of options, which would amount to 'selection'. The statute does not empower the University to 'select' the trustees, but only to approve them. Approval is merely for the satisfaction of the University that the nominations and appointment are in compliance with the Act, rules, statute, etc. The approval can be declined by the University only on the basis of non-conformation to the set standards and for no other reason. The Statute does not give any discretion to the University to pick

and choose from a set of options.

30. The resolution prescribing sending 50% additional names would result in giving the choice to the University to ‘choose’ the names of the persons who can be part of the governing body. The argument (of the University) that the additional names shall also be proposed by the Society itself or that it will solve undue delays, is not tenable as the power to choose from a set of names takes away the right of the society or trust, to nominate the ‘most suitable’ persons. Every institution has the right to nominate its “best team”. If there are any issues germane to the suitability of a few (maybe three) of such names, the University may not approve them. In refusing approval too, the University should indicate valid reasons, germane to the issue of governance of the institution. If the institution is compelled to send the requisite number of individuals’ names plus 50% of that limit, its right to have a governing body of its “best team” is diluted, if not completely denuded, because the University can exercise its right to veto five out of the best ten names and choose the balance from the “B team”. This is not conducive to the autonomy guaranteed by Section 29 of the Act. It would not be unreasonable to assume that highly qualified people would not be inclined to offer themselves for nomination when there is a likelihood of rejection, which could be detrimental to the wellbeing of the educational institution.

31. Therefore, a power to approve or disapprove cannot be interpreted to be a power to choose by the University. The Executive Council could not therefore pass a resolution making it mandatory to send 50% additional names as that would give them the power to choose/appoint, which is not otherwise provided for by Statute 30(1)(C)(i). The

Resolutions are therefore not in conformity with Statute 30(1)(C)(i). This Court is also of the opinion that the *rationale* which persuaded the learned Single Judge to hold that the condition limiting five terms for nominations to governing bodies of colleges were invalid and unenforceable without amendment of statutes, applies equally to the condition requiring nomination of the total number of membership of the governing body, with an additional 50% of such membership for the University's approval.

Is the resolution contrary to the rights of the petitioners under Article 19 of the Constitution of India?

32. The next question is whether the rights of the societies to govern the association in the manner chosen by them (under Article 19 (1) (c)), and the right to carry on an avocation or occupation (Article 19 (1)(g)) infringed in any manner. The learned Single Judge here had rejected the appellant's claim, holding that once a group of individuals forms a society or company, their right to association, or its right to carry on trade (under Article 19 (1)(g)) cannot be said to be infringed, if laws or regulations concerning the activity are made, because the right to association does not carry with it the right to achieving the objective for which the association is set up, in the first place.

33. The judgments in *Kharak Singh* (supra), *Bijoe Emmanuel v. State of Kerala* 1986 (3) SCC 619 and *Union of India v. Navin Jindal* 2004 (2) SCC 510 are authorities for the proposition that any attempt of the state to restrict any fundamental right has to be through authority of law. This means that the restrictive condition is valid, if sanctioned by law.

In *Jindal*, the position was summarized in the following manner:

"13. (3) (a) "Law" includes any Ordinance, order bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law."

A bare perusal of the said provision would clearly go to show that executive instructions would not fall within the aforementioned category. Such executive instructions may have the force of law for some other purposes; as for example those instructions which are issued as a supplement to the legislative power in terms of clause (1) of Article 77 of the Constitution of India. The necessity as regard determination of the said question has arisen as the Parliament has not chosen to enact a statute which would confer at least a statutory right upon a citizen of India to fly a National Flag. An executive instruction issued by the appellant herein can any time be replaced by another set of executive instructions and thus deprive Indian citizens from flying National Flag. Furthermore, such a question will also arise in the event if it be held that right to fly the National Flag is a fundamental or a natural right within the meaning of Article 19 of the Constitution of India; as for the purpose of regulating the exercise of right of freedom guaranteed under Article 19 (1) (a) to (e) and (g) a law must be made.

In Kharak Singh vs. State of U.P. [AIR 1963 SC 1295], this Court held :

"Though learned counsel for the respondent started by attempting such a justification by invoking section 12 of the Indian Police Act he gave this up and conceded that the regulations contained in Chapter XX had no such statutory basis but were merely executive or departmental instructions framed for the guidance of the police officers. They would not therefore be "a Law" which the state is entitled to make under the relevant

clauses (2) to (6) of Article 19 in order to regulate or curtail fundamental rights guaranteed by the several sub-clauses of Article 19 (1), nor would the same be a "a procedure established by law" within Article 21. The position therefore is that if the action of the police which is the arm of the executive of the state is found to infringe any of the freedom guaranteed to the petitioner the petitioner would be entitled to the relief of mandamus which he seeks, to restrain the state from taking action under the regulations."

To the same effect are the decisions of this Court in State of Madhya Pradesh v Thakur Bharat Singh [AIR 1967 SC 1170], Binoe Emmanuel & Ors v State of Kerala & Ors [(1986) 3 SCC 619]."

In the present case, Section 29 and Statute 30(C) do not impose the restriction, which is challenged in these proceedings. Indeed, the latter, i.e Statute 30C clarifies that the total membership of any college's governing council cannot exceed 20 and that of that 5 are to be representative of certain classes, i.e. University nominees, teaching staff and Principal. Therefore, the societies possess the unimpeded right to nominate the rest (of not more than 15), subject to approval by the University. If the latter wished to retain control to choose from amongst a larger group, there should have been a clear justification for such stipulation, with guidelines to regulate the power to choose, in the form of a statutory norm (such as the Statute itself). Therefore, the impugned resolution, not being "law" i.e either enacted by legislature, or tracing its source to it, but a mere *fiat* of the University, cannot override the rights of the appellant societies.

34. Article 19(1)(c) guarantees the freedom of association to all

citizens. However, Article 19(4) provides that the right to form associations or unions can be limited by reasonable restrictions in the form of an existing or new law made *‘in the interests of the sovereignty and integrity of India, or public order or morality...’*.

The Supreme Court discussed the right to freedom of association in relation to composition of membership of an association in the case of *Damyanti Naranga v Union of India* 1971 AIR SC 966. In that case, the Court considered the UP Sahitya Sammelan Act, 1956 which had superimposed a newly created statutory body in the place of the Hindi Sahitya Sammelan - a registered society. Therefore, the Sammelan was now composed of existing members of the erstwhile society, and others who became members without the consent of these original members. It was held that since the original members did not decide the terms of admission of new members, the statute violated the right to form an association under Article 19(1)(c). The Court held:

“The Act does not merely regulate the administration of the affairs of the Society, what it does is to alter the composition of the Society itself as we have indicated above. The result of this change in composition is that the members, who voluntarily formed the Association, are now compelled to act in that Association with other members who have been imposed as members by the Act and in whose admission to membership, they had no say. Such alteration in the composition of the Association itself clearly interferes with the right to continue to function as members of the Association which was voluntarily formed by the original founders. The right to form an association, in our opinion, necessarily, implies that the persons forming the Association have also the right to continue to be associated with only those whom they voluntarily, admit in the Association. Any law, by

which members are introduced in the voluntary Association without any option being given to the members to keep them out, or any law which takes away the membership of those who have voluntarily joined it, will be a law violating the right to form an association. If we were to accept the submission that the right guaranteed by Art. 19 (1) (c) is confined to the initial stage of forming an Association and does not protect the right to continue the Association with the membership, either chosen by the founders or regulated by rules made by the Association itself, the right would be meaningless because, as soon as an Association is formed, a law may be passed interfering with its composition., so that the Association formed may not be able to function at all. The right can be effective only if it is held to include within it the right to continue the Association with its composition as voluntarily agreed upon by the persons forming the Association.”

35. The learned Single Judge relied on *All India Bank Employees' Association v. National Industrial Tribunal*, (1962) 3 SCR 269 which held that the right to form an association does not entitle the citizen or individual or group forming the association a concomitant right to claim that the objects for which the association is formed too is part of the larger fundamental right to form association. The learned Single Judge went on to hold that “*the said stipulations do not relate to/have a bearing/effect the petitioners' existence as Societies or their right to carry any profession or carry on any occupation, trade or business, rather they relate to the procedure for nomination to the Governing Body and the tenure of the Membership of the Governing Body of the Institutions run by the petitioners.*”

36. In view of the above reasoning, the learned Single Judge refused to engage with the impact of actions on the exercise of rights. In *Damyanti Naranga (supra)* the Court considered the direct and indirect ways in which freedoms could be impacted. The unwillingness of the Court to assess the constitutionality of actions by considering whether the act in question indirectly impacts the exercise of the freedom diminishes the conception and utility of the right.¹ In this case, the right to nominate members as representatives of the Trust on to the governing body is part of the fundamental right to form association of all the citizens forming the society, as the very object of each of the societies' existence is to manage the respective colleges which is done through the governing body.

37. This court is of opinion that the single judge overlooked the fact that none of the colleges or societies claimed that their right to set up associations or set up the college, in exercise of Article 19 (1) (c) or Article 19 (1) (g) was *per se* impaired. The Supreme Court's decision in the *Bank Employees' Association (supra)* merely held that the right to set up a society does not automatically result in the assurance that the object (of its formation) can be achieved; similarly the right to carry on a business or vocation does not mean that there is a right to continue it, or that its objective of profit is assured. In the context of the present case, these rights mean that the society, which sets up the college, can administer it, in accordance with its choice, provided it complies with laws, that regulate the activity. Any restriction on 19(1)(c) should be under Article 19(4) '*in the interests of the sovereignty and integrity of India or public order or morality*'. In this case, there is no reasonable

¹ The Oxford Handbook of the Indian Constitution, page 870.

nexus between the restriction (to send 50% more names than the required number, giving greater role to the state in deciding who forms the governing body) and public order or morality. Regardless of whether the restriction is “law” or not, there is no *rationale* for the University to impose such a restriction which has an impact on the exercise of fundamental rights of the Appellant-societies/trusts, and none such reason or justification has been advanced by the University. There is no reason or justification for a change given by the University. Therefore, such condition is an unreasonable restriction on the rights of appellants, which is not in the interests of the general public. Hence the said restrictions cannot be imposed in accordance with Article 19(4) of the Constitution.

38. The right to govern is not a “concomitant” right, as the learned Single Judge erroneously held. It is a part of the core right to set up the college, and manage it. If the reasoning that persuaded the learned Single Judge were to be upheld, it would be open to the executive to take over, or take effective control, at least, of all private colleges, by resolving that the right to nominate members to colleges’ governing bodies is a mere concomitant right and not a part of the right to association or right to carry on a profession or vocation and that such resolutions are necessary in the public interest.

39. As far as Article 19 (1) (g) is concerned, the following passage from the judgment in *T.M.A. Pai (supra)* are decisive:

“50. The right to establish and administer broadly comprises of the following rights:-

(a) to admit students:

(b) to set up a reasonable fee structure:

(c) to constitute a governing body;

(d) to appoint staff (teaching and non-teaching); and

(e) to take action if there is dereliction of duty on the part of any employees.

.....

In any event, a private institution will have the right to constitute its own governing body, for which qualifications may be prescribed by the state or the concerned university. It will, however, be objectionable if the state retains the power to nominate specific individuals on governing bodies. Nomination by the state, which could be on a political basis, will be an inhibiting factor for private enterprise to embark upon the occupation of establishing and administering educational institutions. For the same reasons, nomination of teachers either directly by the department or through a service commission will be an unreasonable inroad and an unreasonable restrictions on the attorney of the private unaided educational institution.

The expression "education" in the Articles of the Constitution means and includes education at all levels from the primary school level upto the post-graduate level. It includes professional education. The expression "educational institutions" means institutions that impart education, where "education" is as understood hereinabove.

The right to establish and administer educational institutions is guaranteed under the Constitution to all

citizens under Articles 19(1)(g) and 26, to minorities specifically under Article 30.

*72. Once aid is granted to a private professional educational institution, the government or the state agency, as a condition of the grant of aid, can put fetters on the freedom in the matter of administration and management of the institution. The state, which gives aid to an educational institution, can impose such conditions as are necessary for the proper maintenance of the high standards of education as the financial burden is shared by the state. The state would also be under an obligation to protect the interest of the teaching and non-teaching staff. In many states, there are various statutory provisions to regulate the functioning of such educational institutions where the States give, as a grant or aid, a substantial proportion of the revenue expenditure including salary, pay and allowances of teaching and non-teaching staff. It would be its responsibility to ensure that the teachers working in those institutions are governed by proper service conditions. The state, in the case of such aided institutions, has ample power to regulate the method of selection and appointment of teachers after prescribing requisite qualifications for the same. Ever since *In Re The Kerala Education Bill, 1957* [(1959) SCR 995], this Court has upheld, in the case of aided institutions, those regulations that served the interests of students and teachers. Checks on the administration may be necessary in order to ensure that the administration is efficient and sound and will serve the academic needs of the institutions. In other words, rules and regulations that promote good administration and prevent mal-administration can be formulated so as to promote the efficiency of teachers, discipline and fairness in administration and to preserve harmony among affiliated institutions.*

Other Aided Institutions

73. There are a large number of educational institutions, like schools and non-professional colleges, which cannot operate without the support of aid from the state. Although these institutions may have been established by philanthropists or other public-spirited persons, it becomes necessary, in order to provide inexpensive education to the students, to seek aid from the state. In such cases, as those of the professional aided institutions referred to hereinabove, the Government would be entitled to make regulations relating to the terms and conditions of employment of the teaching and non-teaching staff whenever the aid for the posts is given by the State as well as admission procedures. Such rules and regulations can also provide for the reasons and the manner in which a teacher or any other member of the staff can be removed.

All citizens have a right to establish and administer educational institutions under Articles 19(1)(g) and 26, but this right is subject to the provisions of Articles 19(6) and 26(a). However, minority institutions will have a right to admit students belonging to the minority group, in the manner as discussed in this judgment.”

40. This court is of the opinion that members of the societies in these cases will be left with no rights if the right to nominate trustees is undermined or taken away from them. It practically impacts the exercise of the right to freedom of association and the right to carry on the profession or vocation, of administering an educational institution, if those forming the society are imposed with an obligation to send 50% additional names, even if the names are to be given by the appellants. The mere circumstance that the additional names are to be given by the Appellants does not mean their freedom of association or freedom to

carry on a profession, through the governing body of their choice is respected. These freedoms can be exercised meaningfully only when citizens form and continue an association voluntarily with members they choose to associate with and whom they want to involve in the governance structure of the profession or vocation. The obligation to send additional names implies that the University retains discretion to take away the nomination of those who may have voluntarily joined the association to be representatives of the Trust on the Governing Body. It takes away the rights of the members of the Societies to choose the ‘most suitable’ members they would want to associate with as the 10 members chosen by the University amongst the 15 names may not be the ‘most suitable’ as perceived by the Appellants. They would be 10 members ‘most suitable’ according to the choice of the University. The essence of the right to form association is taken away when the composition of such association is not entirely in the hands of the citizens so forming it.

41. In *T.M.A. Pai* (supra) the Supreme Court had observed that the right to nominate, reserved through government policies and legislation, in private institutions, violates the right of the society or trust and those who set it up to govern it:

“It will, however, be objectionable if the state retains the power to nominate specific individuals on governing bodies. Nomination by the state, which could be on a political basis, will be an inhibiting factor for private enterprise to embark upon the occupation of establishing and administering educational institutions...”

42. The University had sought to urge that the colleges are recipients of aid by the University Grants Commission and cannot thus, object to an

innocuous provision that requires nomination of 50% more names than the requisite membership of the governing council, for approval. This court is of opinion that the grant of aid, by a third party (and not the University) *ipso facto* does not result in denuding the basic right of the society to govern its institution in accordance with its choice. *T.M.A Pai (supra)* too dealt with the extent of regulation of aided institutions, by the state or public authorities and held that:

“Once aid is granted to a private professional educational institution, the government or the state agency, as a condition of the grant of aid, can put fetters on the freedom in the matter of administration and management of the institution. The state, which gives aid to an educational institution, can impose such conditions as are necessary for the proper maintenance of the high standards of education as the financial burden is shared by the state. The state would also be under an obligation to protect the interest of the teaching and non-teaching staff. In many states, there are various statutory provisions to regulate the functioning of such educational institutions where the States give, as a grant or aid, a substantial proportion of the revenue expenditure including salary, pay and allowances of teaching and non-teaching staff. It would be its responsibility to ensure that the teachers working in those institutions are governed by proper service conditions. The state, in the case of such aided institutions, has ample power to regulate the method of selection and appointment of teachers after prescribing requisite qualifications for the same.”

43. The content of the regulation and its reach can therefore, only be with respect to aspects of management such as selection of teachers, standards of education, conditions of service of teaching and non teaching

staff, etc. Necessarily, this regulatory inroad cannot extend to choosing which individuals are to govern the college or educational institution. Here, statute 30C in fact regulates the extent of membership of the governing council of college, when it provides that such governing councils would be “*consisting of not more than twenty persons approved by the Executive Council and including, among others, at least two representatives of the University and at least three representatives of the teaching staff of whom the Principal of the college or Institution shall be one.*” Therefore, the balance (after providing for two representatives of the University and three of the teaching staff) i.e a maximum of 15 (which in most of the cases, is not more than 10- to be nominated by the society in its discretion) are to be entirely nominated by the concerned society. The insistence that instead of 10 names, 15 names are to be provided, would considerably, if not entirely erode the right of the society to be governed by a body comprising individuals selected by it. It is therefore, held that the impugned resolution infringes the right of the appellant societies under Article 19 (1) (g) of the Constitution of India.

Conclusions

44. For the foregoing reasons, it is held that the impugned resolution- and the resolutions it seeks to enforce (i.e. requiring colleges to send 50% more names for approval, over and above the maximum number stipulated in their constitution/trust deed/memoranda of association) to the University, is *ultra vires* Section 29 of the Act, Statute 30 of the Statutes and violates Article 19 (1) (c) and (g) of the Constitution of India. As such, the impugned resolution and other such resolutions are not binding and enforceable upon the appellant societies and other

similarly situated societies. The impugned judgment is accordingly set aside; the writ petitions filed by the appellants are consequently allowed in terms of the above directions but without any order on costs.

**S. RAVINDRA BHAT
(JUDGE)**

**SANJEEV SACHDEVA
(JUDGE)**

JANUARY 12, 2018