

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 03.10.2019

PRONOUNCED ON : 14.10.2019

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Writ Petition No.25473 of 2019 and
W.M.P.Nos.24994, 24996 and 24998 of 2019

Annai J.K.K Sampoorani Ammal

Charitable Trust,

Represented by its Management Trustee,

Dr.J.K.K Munirajah,

Ethirmedu, Komarapalayam Taluk,

Namakkal District - 638 183.

Established and Administering

J.K.K Munirajahh Institute of Health

Sciences, College of Pharmacy,

Thookanicken Palayam, Erode.

... Petitioner

Vs.

1.The Registrar,

Tamil Nadu Dr. MGR Medical University,

69, Anna Salai, Guindy,

Chennai - 600 032.

2.The Pharmacy Council of India,

Represented by the Secretary cum Registrar,

Combined Council Building

Temple lane, Kotla Road,

Aiwan-E-GHALIE Marg,

Post Box No.7020

New Delhi - 110 002.

... Respondents

Prayer :- This Writ Petition is filed under Article 226 of the Constitution of India for a writ of Certiorarified Mandamus calling for the records relating to the impugned letter issued by the first respondent in Rc.No.Affln.I(5)/08986/2019 dated 05.08.2019 signed on 07.08.2019 quash the same and direct the first respondent to grant consent of affiliation for starting Pharm.D Course for the academic year 2019-2020 without insisting on essentiality certificate (G.O).

For Petitioner :Mr.D.Prabhu Mukunth Arunkumar

For 1st Respondent :Mr.D.Ravinchandar, Standing Counsel

ORDER

This petition is filed by the Managing Trustee of Annai J.K.K.Sampoorani Ammal Charitable Trust, Erode. The petitioner Trust is running a pharmacy college by name 'J.K.K.Munirajahh Institute of Health Sciences College of Pharmacy' since 2015. The Institute is approved by AICTE and affiliated to TamilNadu Dr.MGR Medical University.

2. To the petitioner Institute, the Government of TamilNadu on 23/02/2015, granted permission to start B.Pharm Degree course with intake of 60 seats from the academic year 2015-16. The AICTE and the Pharmacy Council of India granted permission to the petitioner Institute to increase the intake from 60 to 100 seats from the academic year 2018-19. However, the affiliating University which initially granted approval for intake of 100, later withdrew it. Hence, the petitioner Trust filed W.P.27859 of 2018 seeking provisional affiliation with intake of 100 seats. The said writ petition was allowed and the petitioner Institute was granted continuance of provisional affiliation to the petitioner College from the academic year 2018-2019 vide proceedings dated 07/06/2019 with 100 seats intake.

3. In the year 2008 Pharmacy Council of India (PCI) introduced Pharm D (integrated 6 years) course. Existing Pharmacy institutes impart B.Pharm Degree course for more than 4 years were eligible to start Pharm D course which is an integrated 6 years full time course (5 years study and 1 year internship or residency). The petitioner Institute having completed 4 years of imparting B.Pharm degree course is eligible to offer Pharm D course. Hence, the petitioner Institute applied to the University (first respondent) for grant of consent of affiliation to start Pharm D course in its institute. Also applied to the 2nd respondent (PCI) for grant of approval. The 2nd respondent has granted Letter of Approval on 10/06/2019 with a condition to get consent of affiliation from the first respondent.

4. Unlike statutes other courses, the first respondent University, as on date, does not have any statute or ordinance regarding grant of affiliation for Pharm D course, except a stray reference in the university regulation under heading "Pharm D and Pharm D (Post Baccalaureate) course". In the said regulation, it is stated that to start a Pharm D course, prior approval from the Pharmacy Council of India and the University has to be obtained.

5. On receipt of the application from the petitioner seeking permission to start Pharm D course, the first respondent called for certain documents/fees to process. One of the document sought by the University was the essentiality certificate from the Government. The petitioner Institute submitted all other

documents and fees on 27/04/2019, except the essentiality certificate from the State Government. The University vide its communication dated 05/08/2019 insisted the Institute to produce the Government Order for starting Pharm D course.

6.The learned counsel appearing for the petitioner submits that, in the University statutes, ordinance and regulations nowhere prior consent of the State Government is mentioned. Likewise, the Pharmacy Council of India being the regulatory authority does not insist for essentiality certificate from the concern State Government. The University cannot insist upon a certificate which is not contemplated in their statute or in the statute of PCI. The said demand is without any authority.

7.The learned counsel also submitted that, the first respondent has issued affiliation certificates to few other institutes to start Pharm D course without insisting upon essentiality certificate from the state Government. The petitioner is discriminated in this way. Thereby its right under Article 14 and 19 (1)(g) of the Constitution of India, is violated. Further, the learned counsel for the petitioner relying upon the judgment of the Hon'ble Supreme Court reported in *Jaya Gokul Educational Trust Vs. Commissioner of Secretary to Government* (AIR 2000 (SC) 1614) followed by this Court in *The T.N. Dr.M.G.R., Medical University vs. Arulmighu Kalasalingam College of Pharmacy and others* (AIR 2005 Madras 182), submitted that the letter of the first respondent is contrary to the decisions referred above.

8.Further, it is also contented by the petitioner that, the letter of the Government insisting for essentiality certificate is only in respect of Para Medical Education and Allied Health Science courses. It is not for Pharm D course which is Pre Ph.D Post Graduate Doctoral Programme. Even if it is for all courses, the said letter of the Government will not take the place of the statute or Ordinance or Regulation of the university. Therefore, in the absence of any statutory backing, the demand of the first respondent to get essentiality certificate from the Government and deprive the petitioner from starting Pharm D course in its college based on executive order is unconstitutional.

9.The University has filed counter wherein, it is stated that, the petitioner Institute was asked to get the essentiality certificate from the State Government in view of the letter issued by the Health and Family Welfare Department dated 31/08/2018 wherein, the Government has instructed that permission should be obtained from the Government to start Allied Health Science courses and Paramedical courses, since, all such courses will have employment implications on subsequent dates and it will be unadvisable to start the course without permission of the Government.

10. Though, the University earlier granted affiliations to some of the Institutes for Pharm D course, after receipt of this letter from the Government, the University has not processed any application for Pharm D course without essentiality certificate from the Government. The learned Standing counsel appearing for the first respondent also given the list of Institutes which were asked to produce order from the Government granting essentiality certificate. The first respondent has intimated to the petitioner about the instruction of the Government and the requirement of essentiality certificate. Without challenging the communication of the Government, challenging the consequential letter of the University is not maintainable.

11. According to the first respondent, it refuse to grant affiliation to the petitioner in view of the direction from the Government that the University should not give affiliation without essentiality certificate from Government. Whereas, the petitioner's counsel emphasis that the letter of the Government dated 31/08/2019 cannot override the approval granted by Pharmacy Council of India. The University cannot cite a letter of the Government and deny affiliation. Moreso, when the letter is in respect of para medical courses and allied health science courses only. The petitioner has sought for affiliation to start Pharm D course which is neither para medical nor allied science courses. It is six years integrated course in Pharmacy leading to PhD. Hence, the university should grant affiliation without insisting for essentiality certificate from the Government.

12. In the matter of Higher Education, the power of the State is subject to the powers conferred to the specialised agencies like MCI, AICTE, PCI etc. Though the State Government power is restrictive, it does not mean that it is without any power. The letter of the Government dated 31/08/2018 is the instruction to the University to insist upon essentiality certificate while granting affiliations to allied Health Diploma and Degree courses. The duration of diploma and degree is 2/3 years. Whereas Pharm D course is 6 years course (5 years of theory and one year intern). The intention to insist upon the essentiality certificate is made clear in the letter itself and it is self expalantory. Without any need or essentiality, if the Universities going to permit institutes to start various courses without assessing the employment implications, it may cause social unrest, law and order issue. Therefore, the Government has power to insist on essentiality certificate independent of University statute. The State exercising power derived through Entry 1 of list II in Schedule VII of the Constitution, can insist upon essentiality certificate before affiliation. Such power has to be normally spelt out through executive orders or through legislation. If the statute is silent, through administrative order same may be enforced. There is no

illegality in issuing administrative order insisting essentiality certificate from the Government.

13. The above proposition of law has been settled by this court long ago in W.P 18157/2012 judgement dated 11/10/2012 (Shree Balaji Medical College and Hospital -vs- MCI), when the issue whether state can insists on revalidation of essentiality certificate after expiry of 3 years, in the absence of any rule or regulations framed by MCI came up for consideration. This court after extensive reference to the case laws, held that there is no illegality in insisting essentiality certificate through administrative order. The relevant portion of the well researched judgment of the Hon'ble Mr. Justice N. Paul Vasanthakumar (as he then was) is extracted below for reiterating the legal proposition:-

"16., after 2007 several new medical colleges are established in the State and in number of colleges student strength was increased. The requirement of getting essentiality certificate from the State Government for establishment of a new medical college and for increasing the student strength, is well settled. The Hon'ble Supreme Court in the decision reported (2002) 1 SCC 589 (State of Maharashtra v. Indian Medical Association) and the Division Bench of this Court in the decision reported in (2003) 2 MLJ 568 (H.E.T.C. Educational Society v. State of Tamil Nadu) held that Essentiality Certificate is bound to be obtained. In this case, petitioner is not disputing the said proposition.

17. It is also relevant to note that neither in Section 10A of the Indian Medical Council Act, 1956, nor in the Regulations framed, the validity period of the essentiality certificate issued is stated, which means, the Act and Regulations are silent about the validity period of the essentiality certificate once issued. The Board of Governors, which is now functioning as MCI as per Section 3A from 15.5.2010, is therefore entitled to fix the validity period. The only prohibition is, if there is a specific provision, no decision contrary to the same can be taken, except with the approval of the Central Government. It is well settled principle of law that if the Act/Regulations are silent about any issue,

administrative instructions can be issued to fill up the gap, provided the same is not in contravention of the statutory provision. Following judgments can be usefully cited for the above said proposition.

(a) In the Constitution Bench decision reported in AIR 1967 SC 1910 : (1968) 2 LLJ 830 : (1968) 1 SCR 111 (Sant Ram Sharma v. State of Rajasthan) in paragraph 7 it is held thus, "7. We proceed to consider the next contention of Mr N.C. Chatterjee that in the absence of any statutory rules governing promotions to selection grade posts the Government cannot issue administrative instructions and such administrative instructions cannot impose any restrictions not found in the Rules already framed. We are unable to accept this argument as correct. It is true that there is no specific provision in the Rules laying down the principle of promotion of junior or senior grade officers to selection grade posts. But that does not mean that till statutory rules are framed in this behalf the Government cannot issue administrative instructions regarding the principle to be followed in promotions of the officers concerned to selection grade posts. It is true that Government cannot amend or supersede statutory rules by administrative instructions, but if the rules are silent on any particular point Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed." (Emphasis Supplied)

(b) In AIR 1991 SC 2288 : (1992) 1 SCC 20 (Comptroller & Auditor General of India v. Mohan Lal Mehrotra) in paragraph 12 it is held thus, "12. The High Court is not right in stating that there cannot be an administrative order directing reservation for Scheduled Castes and Scheduled Tribes as it would alter the statutory rules in force. The rules do not provide for any reservation. In fact, it is silent on the subject of reservation. The government could direct the reservation by executive orders. The administrative orders cannot be issued in contravention of the statutory rules but

it could be issued to supplement the statutory rules. (See: the observations in Sant Ram Sharma v. State of Rajasthan (AIR 1967 SC 1910). In fact similar circulars were issued by the Railway Board introducing reservations for Scheduled Castes and Scheduled Tribes in the Railway services both for selection and non-selection categories of posts. They were issued to implement the policy of the Central Government and they have been upheld by this Court in Akhil Bharatiya Soshit Karamchhari Sangh (Railway) v. Union of India ((1981) 1 SCC 246 : AIR 1981 SC 298)."

(c) In the Constitution Bench judgment reported in AIR 1996 SC 352 : (1995) 6 SCC 1 (Krishna Chandra Sahu v. State of Orissa) in paragraph 31 (in SCC) it is held thus, "31. Now, power to make rules regulating the conditions of service of persons appointed on Government posts is available to the Governor of the State under the proviso to Article 309 and it was in exercise of this power that the present rules were made. If the statutory rules, in a given case, have not been made, either by Parliament or the State Legislature, or, for that matter, by the Governor of the State, it would be open to the appropriate Government (the Central Government under Article 73 and the State Government under Article 162) to issue executive instructions. However, if the rules have been made but they are silent on any subject or point in issue, the omission can be supplied and the rules can be supplemented by executive instructions (See: Sant Ram Sharma v. State of Rajasthan (AIR 1967 SC 1910.))" (Emphasis Supplied)

(d) In (1998) 8 SCC 753 (State of Orissa v. Mamtarani Sahoo) in para 11 the Supreme Court held thus, "11. It is true that the Government cannot amend or supersede statutory rules by administrative instructions, but if the rules are silent on any particular point, the Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed. In the present case, the Rules provide, inter alia, for

constitution of a State Selection Board. They are silent on the question of appointment of District Selection Boards and the procedure for inviting applications and selecting candidates by the District Selection Boards. Since the Rules are silent in this regard, administrative instructions have been issued confined to these aspects on which the Rules are silent. Undoubtedly, it would have been far better, had the Government amended the existing Rules to provide for these matters; but that is no ground for preventing District Selection Boards from functioning when there are administrative instructions which supplement these Rules. It has been strenuously urged before us that unless statutory rules are framed in respect of District Selection Boards, no regular appointments can be made by the District Selection Boards. We do not find any merit in this contention looking to the fact that there are administrative instructions which supplement the existing Rules."

(e) In (2008) 4 SCC 171 (Dhananjay Malik and Others v. State of Uttaranchal and Others), in paragraph 15 it is held thus, "15. The aforesaid ruling has been reiterated in para 9 of the judgment by a three-Judge Bench of this Court in Union of India v. K.P. Joseph⁷ as under: (SCC p. 196) 9. Generally speaking, an administrative order confers no justiciable right, but this rule, like all other general rules, is subject to exceptions. This Court has held in Sant Ram Sharma v. State of Rajasthan³ that although Government cannot supersede statutory rules by administrative instructions, yet, if the rules framed under Article 309 of the Constitution are silent on any particular point, the Government can fill up gaps and supplement the rules and issue instructions not inconsistent with the rules already framed and these instructions will govern the conditions of service.

(f) A Division Bench of this Court in the order dated 25.4.2002 made in W.P.Nos.1256 and 5657 of 1999 considered the issue as to whether administrative instructions can be

issued in the absence of any statute or rule prevailing, and upheld the direction issued by the Government through Government Order debarring the candidates, who obtained PG degrees through open universities, as not eligible for promotion as Headmasters. The contention that in the absence of any statutory bar or amending the rule, no Government Order could be issued to defeat the right of persons seeking promotion, was not accepted by the Division Bench and upheld the Government order."

18. In this case, the impugned decision of the Board of Governors of the respondent requesting the institution/management to produce fresh essentiality certificate or get the essentiality certificate re-validated after expiry of three years, is having a nexus to the object sought to be achieved viz., whether the increase of intake is necessary at this point of time, whether the institution is having infrastructural and instructional facilities as required as per the present norms, etc., The said decision is not in any manner running contra to the provisions of the Indian Medical Council Act, 1956 and Regulations."

14. In this case, the Principal Secretary to the Government in Health and Family welfare Department has communicated to the University that the institutes which intend to start any Diploma or Degree courses in Allied Health courses should get essentiality certificate from the Government. Pharm D course is a Degree course with 6 years duration. The argument that the instruction of the Government applies only to Diploma in Pharm course and Bachalors in Pharm course is not correct. Degree course means and include 6 years Pharm D also.

15. In the counter, the respondents have pointed that the writ petition without challenging the administrative order of the Government dated 31/08/2018, the consequential letter of the University dated 05/08/2019 is not maintainable. This court holds that, though the consequential letter of the university 05/08/2019 alone is challenged by the petitioner and not the administrative order of the Government dated 31/08/2018, even if the administrative order is subjected to challenge, the challenge could not sustain in view of the above finding.

16. Therefore, insisting on essentiality certificate issued by the Government is legally sustainable. The letter of the

University directing the institute to get essentiality certificate from the Government cannot be faulted. Hence, writ petition prayer to direct the University to grant affiliation without essentiality certificate from the Government is not sustainable.

17.In the light of the above findings, which is arrived based on the decisions cited, I hold that, there is no illegality in the communication of University based on the administrative order of the Health and Family Welfare Department. Thus, the issue raised in this writ petition is answered against the petitioner.

18.In the result, the writ petition is dismissed. No costs. Consequently, connected miscellaneous petitions are also dismissed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1.The Registrar,
Tamil Nadu Dr. MGR Medical University,
69, Anna Salai, Guindy,
Chennai - 600 032.

2.The Secretary cum Registrar,
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+1 cc to M/s.D.Prabhu Mukunth Arunkumar, Advocate Sr.No. 85786

AKM/15.10.19/10P- 4C /

Order made in
W.P.No.25473 of 2019