SUPREME COURT OF INDIA

Messrs Pushpagiri Medical Society

Vs.

State of Kerala

Writ Petition (Civil) No. 347/2004

(A.K.Mathur and Y. K. Sabharwal and D. M. Dharmadhikari JJ.)

29.07.2004

JUDGMENT

1. The petitioner Institution, claiming to be an unaided minority medical college, has filed this petition challenging the constitutional validity of *Kerala Self Financing Professional College (Prohibition of Capitation Fees and Procedure for Admission and Fixation of Fees) Act, 2004*. Section 3 of the Act lays down procedure for admission into self financing professional colleges. Sub-section (2) of Section 3 provides that in every self financing professional college fifty per cent of the total seats in each branch shall be Government quota and the remaining fifty per cent shall be Management quota. Section 4 deals with fee structure. It, inter alia, provides that notwithstanding any thing contained in any law for the time being in force or in any judgment, decree or order of any court or other authority or in any agreement, the fee to be collected from the candidates admitted in the Government quota shall be the same as the fee prevailing for the corresponding course in the State Government colleges. [4(1)(a)]. Section 4(1)(b) stipulates that the fee to be collected from the candidates admitted in the Management quota shall be determined by the Management taking into consideration the inevitable expenses for running the institution. The items that can be taken into consideration while determining the fee under clause (b) aforesaid are laid down in sub-Section (2) of Section 4. According to the petitioner, the Act, in particular the aforesaid provisions providing for quota and fee structure, are violative of various provisions of the Constitution of India, including Articles 14 and 30, and also amounts to usurpation by the legislature of judicial power.

2. In that connection, our attention has been drawn to the judgment dated 20th January, 2003 and the review judgment dated 17th February, 2003 of a Division Bench of the Kerala High Court. By the said judgments, it was held that the reservation of seats of fifty per cent by the Government is not valid reservation should be restricted to 25 per cent seats. The regulations which provided fifty per cent reservation for government seats were quashed. In support of challenge in the writ petition, reliance has also been placed to a Eleven Judge Bench decision in the case of T.M.A. Pai Foundation's case 5) and the Constitution Bench decision in Islamic Academy's case . The question of fixation of quota and fee structure, having regard to the nature of the controversy and interpretation sought to be placed on the aforesaid

decisions, deserves to be referred for decision to a larger Bench for final determination. Our attention has also been drawn to an order dated 15th July, 2004 passed in the case of P.A. Inamdar & Ors. vs. State of Maharashtra & Ors. Whereby some of the similar questions were directed to be referred to a larger Bench.

3. Thus, while issuing rule in the writ petition, we are of the view that the writ petition deserves to be decided expeditiously, preferably well before the commencement of next academic year, by a larger Bench for which purpose papers may be placed before Hon'ble the Chief Justice.

4. At this stage, the question is as to the interim arrangements which may be made pending the decision of the points involved in the writ petition. Mr. Harish Salve, learned counsel for the petitioner, relying upon the aforesaid decisions and, in particular, the judgment of the High Court issuing mandamus, strenuously submits that Government quota cannot be more than 25 per cent. We have also been taken through the order dated 28th February, 2003 passed on S.L.P.(C) Nos.3465-3466/2003. Those petitions have been filed by State of Kerala challenging the judgment of the High Court dated 17th February, 2003. Petitions have also been filed by the State and are pending in this Court challenging the High Court's decision dated 20th January, 2003. The submission of Mr. Salve is that in the S.L.Ps., this Court has not granted stay of the impugned judgment of the High Court and thus the Legislature by enacting the impugned Act has usurped the judicial power and, therefore, having regard to the facts and circumstances of the case, the Management, as an interim measure, may be permitted to fill up the seats to the extent of 75 per cent.

5. Mr. K.K. Venugopal, learned counsel appearing for the respondents, submits that in Islamic Academy's case, a Constitution Bench of this Court, in respect of the admissions in 2003-2004, directed that the seats shall be filled in by the institutions and the State Governments in the ratio of 50:50. The Bench further directed that if by any interim order, this Court had permitted any institution to fill up a higher percentage of seats and the seats had been filled up accordingly, the same should not be disturbed. It was pointed out that the S.L.Ps. against the decision of the Kerala High Court above referred were also before the Constitution Bench. Reference has also been made to the Inamdar's case where, as an interim measure, for the academic year 2004-2005, the management quota of admission to the professional institutions was restricted to 50:50, though in that case the counsel representing the institutions conceded that for the time being and strictly without prejudice, they were willing to abide by the quota fixed by the State Government, i.e. 50:50.

6. While it is correct that 50 per cent government quota was quashed by a Division Bench of Kerala High Court and the S.L.Ps. are pending in this Court and no stay has been granted, but, at the same time, it is also to be borne in mind that the S.L.Ps. were before the Constitution Bench when directions for adhering to 50:50 ratio was made in respect of Academic Year 2003-2004. In addition for the present academic year, we have the aforesaid enactment, though validity whereof is under challenge. The effect of the directions in Islamic Academy's Case and the validity of section 3 of the Act are still to be examined.

7. Having regard to the totality of the circumstances, we do not think that it would be expedient to stay the operation of Section3 of the Act and to direct that the Government quota should be 25 per cent.

8. The other question is regarding the fee structure. In terms of the decision in Islamic Academy's case, the Government of Kerala appointed a Committee headed by Justice K.T. Thomas, a former Judge of this Court. The said Committee has fixed the fee at Rs. 1.13 lakh as the maximum annual fee to be collected from each student of the private self financing medical colleges. The Committee in its order dated 28th May, 2004 has observed that the cross-subsidy has been disfavoured by this Court in T.M.A. Pai Foundation's case.

9. Mr. Venugopal took us through some of the portions of the said decision, including the judgment of Hon'ble Variava, J., to contend that cross-subsidy has not been held to be illegal in the said decision. On this aspect, prima facie, the opinion of Variava, J. does not represent majority opinion. Section 4 of the Act, prima facie, brings in cross-subsidy which, prima facie, is not permissible as per the decision in T.M.A. Pai Foundation's case. The question as to whether the students can afford or not the fee fixed by Justice Thomas Committee is not very relevant for the present purposes. No one stops the State Government to subsidize such students as it may deem just, fit and proper.

10. For the present purposes, as interim measure, we are of the view that the students should provisionally pay the fee as fixed by Justice Thomas in the order dated 28th May, 2004, which means that the students should neither pay the fee as claimed by the petitioner Institution nor one postulated by Section 4 of the Act. This direction would be applicable for the present Academic Year 2004-2005. The provisional payment at the aforesaid rate would be subject to further orders as may be passed by this Court.