

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

IA Nos. 57 & 59

IN

CIVIL APPEAL NO. 4060 OF 2009

Modern Dental College and Research
Centre and others

.... Applicants

Versus

State of Madhya Pradesh & Ors.
Respondents

....

ORDER

JUDGMENT

K.S. Radhakrishnan, J.

1. We are in these applications called upon to decide the question as to whether the unfilled NRI seats are to be transferred to general pool and be shared equally to be filled up on the basis of the

Common Entrance Test conducted by the State level Committee – Vyavsayik Pariksha Mandal (VYAPAM) or by the Common Entrance Test conducted by the Association of Private Dental and Medical Colleges (APDMC), so far as the private unaided medical/dental colleges in the State of Madhya Pradesh are concerned.

2. Applicants, herein had filed Writ Petition No. 2732 of 2009 before the High Court of Madhya Pradesh (Jabalpur) challenging the constitutional validity of Madhya Pradesh Niji Vyavsayik Shikshan Sanstha (Pravesh Ka Viniyaman Avam Shulk ka Nirdharan) Adhiniyam, 2007 (in short 'the Act') and the Rules framed thereunder. The High Court vide its judgment dated 15.5.2009 repelled the challenge to the Act and the Rules but declared that the provisions of Rule 10(2)(iii) of 2009 as *ultra vires*. The High Court also held that the Judgment would not affect the Common Entrance Test already conducted by VYAPAM

for the year 2009-10. The above-mentioned Writ Petition was disposed of along with other similar matters and a common Judgment was delivered by the High Court.

3. Aggrieved by the judgment in Writ Petition No. 2732 of 2009, Civil Appeal No. 4060 of 2009 was filed by the applicants herein. While admitting the appeal, a Bench of this Court had prima facie found that the provisions of the Act handing over the entire selection process to the State Government or the agencies appointed by the State Government for undergraduate, graduate and postgraduate medical/dental colleges and fee fixation was contrary to and inconsistent with the principles laid down by the eleven-Judges Bench Judgment in ***TMA Pai Foundation and Others v. State of Karnataka and Others*** [(2002) 8 SCC 481] (for short '**Pai Foundation**') and the Judgment in ***P.A. Inamdar and others v. State of Karnataka and others***

[(2005) 6 SCC 537] (in short '**Inamdar**'). The Court also observed that 2007 Act would become unconstitutional, if read literally, but an interim arrangement was made with regard to the admissions in the private unaided medical/dental colleges in the State of Madhya Pradesh for the year 2009-10; the operative portion of that order reads as follows:

"We, therefore, direct that the admissions in the private unaided medical/dental colleges in the State of Madhya Pradesh will be done by first excluding 15% NRI seats (which can be filled up by the private institutions as per para 131 of Inamdar case), and allotting half of the 85% seats for admission to the undergraduate and post graduate courses to be filled in by an open competitive examination by the State Government, and the remaining half by the Association of the Private Medical and Dental Colleges. Both the State Government as well as the Association of Private Medical and Dental Colleges will hold their own separate entrance examination for this purpose. As regards "the NRI seats", they will be filled as provided under the Act and the Rules, in the manner they were done earlier."

4. The Court also observed that the solution arrived at might not be perfect, but it had only tried to find out a best via media for admissions for the academic year 2009-10. However, it was recommended that the same might also be considered for future sessions. The order passed by the Court is reported in ***Modern Dental College and Research Centre and Ors. v. State of Madhya Pradesh and Ors.*** [(2009) 7 SCC 751]. (in short **Modern Dental College**)

5. The above arrangement indicates that 15% of the total sanctioned intake in the unaided Private Medical and Dental Colleges was set apart for giving admission to NRI students and the remaining 85% seats would be filled up equally through the examination conducted by the State and the Common Entrance Test conducted by the Colleges. Controversy now is only with regard to unfilled NRI seats due to lack of sufficient NRI students, and in what manner those seats have to be filled up. State,

has maintained the stand that those unfilled seats would also go to the general pool and be shared by both the State and the Colleges equally. Such a stand was taken by the State on the basis of the interpretation placed by this Court in filling up the unfilled NRI seats in its judgment dated 30.9.2010 in ***R.D. Gardi Medical College and Anr. etc. v. State of M.P. and Ors.*** (2010) 10 SCC 225 (in short **Gardi Medical College**), wherein, while interpreting Rule 8 of the M.P. Admission Rules, 2008 the two-Judges Bench of this Court observed as follows:

"A plain reading of the above leaves no manner of doubt that unfilled NRI seats had to be transferred to the general pool to be filled up on the basis of the merit of the candidates in the State-level common entrance test conducted by the Madhya Pradesh Vyavsayik Pariksha Mandal or by any other agency authorised by the State Government for that purpose. The unfilled seats in the NRI quota were, therefore, to be treated as a part of the general pool and once that was done the share of the college in terms of the order passed by this Court would be 50% out of the said seats. The

High Court has, in that view, rightly held that while the management was justified in filling up 5 unfilled seats in NRI quota, the remaining 5 could not have been filled up otherwise than on the basis of the entrance test referred to in Rule 8."

Court, in the above case, was dealing with the admissions for the academic year 2010-11.

6. The State Government while framing the Madhya Pradesh Private Medical and Dental Under Graduate Course Entrance Examination Rules, 2011 incorporated Rule 5 with regard to unfilled NRI seats with specific reference to the above-mentioned judgment dated 30.9.2010. The Rule reads as follows:

"RESERVATION: Every Institution shall be allowed to fill up to 15% of the sanctioned seats by NRI candidates only, in the manner prescribed by the admission and Fee Regulatory Committee. These NRI seats shall be filled up through a separate counselling. NRI seats remaining vacant shall be merged into the counselling of Non NRI Candidates, as per Hon'ble Supreme Court Order in Civil Appeal No. 8429-8430/2010 dated 30.9.2010."

7. The applicants, noticing that the judgment dated 30.9.2010 in **Gardi Medical College** would seriously affect the rights of unaided educational institutions in the matter of filling up of unfilled NRI seats, filed IA Nos. 51-52 of 2011 in Civil Appeal No. 4060 of 2009 for appropriate modification / clarification of the orders passed by two-Judges Bench in **Modern Dental College** as well as **R.D. Gardi Medical College**. The applications came up for hearing before two-Judges Bench of this Court on 1.8.2011 and this Court passed the following order:

"We are of the opinion that there appears to be some conflict between the observations made in para 28 of the judgment of the two-Judges Bench rendered in the case of **R.D. Gardi Medical College and Another. etc. v. State of M.P. and Ors.** [(2010) 10 SCC 225], quoted below:

28. A plain reading of the above leaves no manner of doubt that unfilled NRI seats had to be transferred to the general pool to be filled up on the basis of the merit of the candidates in the State-level common entrance test

conducted by the Madhya Pradesh Vyavsayik Pariksha Mandal or by any other agency authorised by the State Government for that purpose. The unfilled seats in the NRI quota were, therefore, to be treated as a part of the general pool and once that was done the share of the College in terms of the order passed by this Court would be 50% out of the said seats. The High Court has, in that view, rightly held that while the management was justified in filling up 5 unfilled seats in NRI quota, the remaining 5 could not have been filled up otherwise than on the basis of the entrance test referred to in Rule 8.

and the observations made in para 27(1), quoted below, of ***T.M.A. Pai Foundation and others v. State of Karnataka and others*** [(1995) 5 SCC 220] which is a three Judge Bench decision:

"27(1) So far as NRI quota is concerned, it is fixed at fifteen per cent for the current academic year. It shall be open to the management to admit NRI students and foreign students up to the aforesaid specified percentage, it shall be open to them to admit students on their own, in the order of merit, within the said quota. This direction shall be a general direction and shall operate in the case of all the States where admissions have not been finalized. It is, however, made clear that by virtue of this direction, no student who has already been

admitted shall be disturbed or removed.”

The Court, therefore, referred the matter to a larger Bench. However, by the time year 2011-2012 came to a close hence, the larger Bench could not resolve the apparent conflict and hence, a two Judges Bench of this Court disposed of both IA Nos.51 and 52 vide its order dated 23.9.2011.

8. The same issue, has again been cropped up, now for the academic year 2012-13, hence, it is necessary to clarify the order dated 27.5.2009 in **Modern Dental College** and the judgment of this Court dated 30.9.2010 in **R.D. Gardi Medical College** as to how the unfilled NRI seats be filled up. For the said purpose, the applicants have filed IA Nos.57-59 of 2011, which came up for hearing before two-Judges Bench of this Court on 9.12.2011 and the Court

ordered that the applications be placed before the Constitution Bench.

9. Since main issue referred to Constitution Bench is not likely to come up for hearing shortly and the issue projected in I.As with regard to unfilled seats is of urgent nature, thus, they have been considered by us. Hence, these applications have come up before us for consideration vide order passed by Hon'ble the Chief Justice of India.

10. We have heard learned senior counsel - Shri C.A. Sundaram and Dr. Rajeev Dhawan and learned counsel for the State of Madhya Pradesh - Shri B.S. Banthia. We may at the outset point out that in the instant applications, we are concerned only with the question as to how and in what manner the unfilled NRI seats be filled up for the year 2012-13 till the appeal is finally disposed of, which issue, in our view,

is no more res integra. This Court had earlier in various judgments dealt with the purpose and object of creating NRI quota and the manner in which those quota had to be filled up. A three-Judges Bench of this Court in **TMA Pai Foundation and Others v. State of Karnataka and Others** (1994) 4 SCC 728 had an occasion to consider how, the vacant seats, in the NRI quota be filled up and ordered as follows:

"So far as NRI quota is concerned, we fixed the same as 15% last year. We fixed NRI quota in respect of minorities' institutions as 5%. Although the NRI quota should not, normally, be more than 5% but keeping in view the reduction in the fee structure, we fix the same as 10% (of the total seats) for this year. We further make it clear that in case any in the NRI quota remains unfilled, the same can be filled by the Management at its discretion."

Later another three-Judges Bench of this Court in **TMA Pai Foundation and Others v. State of Karnataka and Others** (1995) 5 SCC 220 had also endorsed the same view holding that it would be open

to the Management to admit NRI students and foreign students within that quota and in case they were not able to get the NRI or foreign students upto the aforesaid specified percentage, it would be open to them to admit students on their own, in the order of merit, within the said quota. The operative portion of the order with regard to NRI quota for the year 1995-96 was as follows:

(1) So far as NRI quota is concerned, it is fixed at fifteen per cent for the current academic year. It shall be open to the management to admit NRI students and foreign students within this quota and in case they are not able to get the NRI or foreign students upto the aforesaid specified percentage, it shall be open to them to admit students on their own, in the order of merit, within the said quota. This direction shall be a general direction and shall operate in the case of all the States where admissions have not been finalized. It is, however, made clear that by virtue of this direction, no student who has already been admitted shall be disturbed or removed."

Similar order was also passed by this Court in **AP (P) Engg. College Management Assn. v. Govt. of A.P.** (2000) 10 SCC 565. The operative portion of the order of the two-Judges Bench reads as follows:

"4. After hearing learned counsel for the parties, we direct that the State of Andhra Pradesh shall allow the 5% NRI quota in the private engineering colleges in the State of Andhra Pradesh to be filled up in the manner earlier directed by this Court and to permit the management of the private engineering colleges to fill up the unfilled NRI quota, at its own discretion, subject, however, to the criteria of merit, qualification and fee structure – as prescribed by the Government not only for the current academic year but also for successive academic years, till the main matter is decided by this Court in the pending cases."

11. We may also in this connection refer to the judgment of the seven-Judges Bench in **P.A. Inamdar v. State of Maharashtra** [(2005) 6 SCC 537], wherein this Court had dealt with the rights of unaided minority and non-minority educational institutions and held that the State cannot regulate or

control admissions, so as to compel them to give up a share of the available seats to the candidates chosen by the State, as if it was filling up, the seats available, to be filled up at its discretion in such private institutions. Court held that would amount to nationalization of seats, such imposition of quota of State seats or enforcing reservation policy of the State on available seats in unaided professional institutions are acts constituting serious encroachment on the right and autonomy of private professional educational institutions. It was also ordered that such appropriation of seats can also not be held to be a regulatory measure in the interest of the minority within the meaning of Article 30(1) or a reasonable restriction within the meaning of Article 19(6) of the Constitution.

Inamdar having said so dealt with NRI seats as well. In Para 131 of judgment, the Court had only dealt with the question as to how NRI seats had to be

filled up: First, it was ordered that the seats should be utilized bona fide by NRIs only and for their children or wards. Further, it was ordered that within quota, merit should not be given a complete go-bye. Further, it was also ordered that the amount of money, in whatever form collected from such NRIs, should be utilized for benefiting students such as from economically weaker sections of the society, whom, on well defined criteria, the educational institution might admit on subsidized payment of their fee.

Further, In para 132 of the **Inamdar**, it had also been clearly held that the policy of reservation should not be enforced by the State nor any quota or percentage of admissions could be carved out to be appropriated by the State in a minority or non-minority unaided educational institution.

12. We are of the considered view that the above principles laid down by a larger Benches of this Court, in the matter of filling up of NRI seats were not correctly understood or applied by this Court in **R.D. Gardi Medical College** while interpreting Rule 8 of the M.P. Admission Rules, 2008. The finding recorded in **R.D. Gardi Medical College** that the unfilled seats in NRI quota in unaided professional colleges should be treated as a part of the general pool and be shared equally by the State and the unaided professional colleges goes contrary to the principles laid down by the eleven-Judges Bench in **Pai Foundation, Inamdar** as well as the Judgments rendered by the three Judges Bench in **Pai Foundation** referred to earlier. The wrong interpretation given by in **R.D. Gardi Medical College** is seen incorporated in Rule 5 of the Madhya Pradesh Private Medical and Dental Under Graduate Course Entrance Examination Rules 2011 as well, which in our view cannot be legally sustained.

13. We are, therefore, inclined to allow both the applications and over rule the direction given by the two learned Judges of this Court in **R.D. Gardi Medical College** and hold that it is open to the unaided professional educational institutions to fill up unfilled NRI seats for the year 2012-13 and for the succeeding years through the entrance test conducted by them till the disposal of the appeal subject to the conditions laid down in **Inamdar** strictly on the basis of merits.

14. IA Nos. 57 and 59 of 2011 in Civil Appeal No. 4060 of 2009 are allowed to the extent mentioned above and disposed of on the basis of the above modifications and clarifications.

.....J
(Deepak Verma)

.....J.
(B.S. Chauhan)

.....J.
(K.S. Radhakrishnan)

New Delhi,
April 3, 2012



JUDGMENT