



W.P.(MD)No.16339 of 2021

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N.ANAND VENKATESH, J.

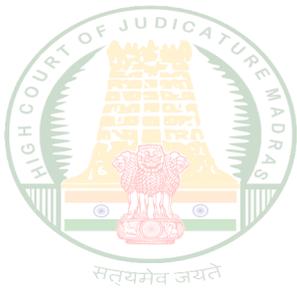
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When the matter came up for hearing on 28.11.2023, this Court passed the following order:

“Heard Mr.M.Ajmal Khan, learned Senior Counsel appearing for the petitioner and Mr.Veerakathiravan, learned Additional Advocate General for the respondents.

2. Going by the nature of the relief that has been sought for in both these writ petitions, it is seen that it confines itself to the admission that was done for the year 2021. Therefore, technically, nothing survives to be decided in these writ petitions at this length of time.

*3. The learned Senior Counsel appearing on behalf of the petitioner has raised a larger issue in these writ petitions by relying upon the judgment in **the Secretary, Mar Chrysostom College of Education vs. State of Tamil Nadu, Department of Higher Education and Others in WP(MD)No.5175 of 2014 dated 08.06.2023**. The learned Single Judge of this Court has gone into the scope and effect of G.O.Ms.No.270, Higher Education (J1) Department dated, 17.06.1998, in the light of the subsequent larger bench Judgment of the Hon'ble Apex Court and has held that the Government Order goes contrary to the judgment*



WEB COPY



W.P.(MD)No.16339 of 2021

of the Hon'ble Apex Court rendered by the larger Bench and that it cannot be enforced as against the minority, unaided professional institutions. The learned Single Judge has gone to the extent of saying that challenge of the said GO will not arise in view of the fact that it is in violation of the judgment of the Hon'ble Apex Court.

4. In the considered view of this Court, the moot question is as to whether this Court has to go into this issue in these writ petitions, since the cause of action and the relief sought for in these writ petitions confines itself to the year 2021. At the best, this Court can leave this question open by giving liberty to the petitioner to raise the issue at the appropriate time.

5. The learned Senior Counsel appearing for the petitioner seeks for sometime to take instructions in this regard.

*6. Post these writ petitions under the caption '**For Orders**' on **06.12.2023**."*

2. When the matter was taken up for hearing today, Mr.Ajmal Khan, learned Senior Counsel appearing on behalf of the petitioner submitted that the issue that has been raised in this Writ Petition is a recurring issue during every academic year when the petitioner is filling up the seats. The learned Senior Counsel, therefore, submitted that the main issue that has been raised in this Writ



W.P.(MD)No.16339 of 2021

Petition has to be considered in order to bring about more clarity for the Minority Institutions to fill up the professional course seats during every academic year.

3. The petitioner has questioned the authority of the State to insist upon filling up 50% of the seats by relying upon G.O.(Ms).No.270, Higher Education (J1) Department, dated 17.06.1998. The learned Senior Counsel submitted that this Government Order completely lost its significance pursuant to the Judgment of the Hon'ble Apex Court in the case of ***P.A.Inamdar and Others Vs. State of Maharashtra and Others*** reported in ***(2005) 6 SCC 537***. The learned Senior Counsel by relying upon this Judgment, submitted that the State cannot fix any quota for seat-sharing between the Management and the State on the basis of local needs of each State in an Un-aided Professional Educational Institution of both minority and non-minority categories. The learned Senior Counsel submitted that the State insisting for filling up a particular percentage of quota will amount to nationalization of seats which was disapproved both in the case of ***T.M.A. Pai Foundation and Others Vs. State of Karnataka and others*** reported in ***(2002) 8 SCC 481*** and in ***P.A.Inamdar case*** referred supra.

4. The learned Additional Advocate General appearing on behalf of the respondents submitted that the Division Bench of this Court in the case of

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W.P.(MD)No.16339 of 2021

Justice Basheer Ahmed Sayeed College for Women (Autonomous), Teynampet,

WEB COPY

Chennai-600 018 Vs. State of Tamil Nadu, represented by its Principal

Secretary to the Government, Department of Higher Educational, Fort

St.George, Chennai-600 009 and Others reported in ***2023 (5) CTC 529*** has

upheld G.O.(Ms).No.270, Higher Education (J1) Department, dated 17.06.1998

and therefore, it is not open for the petitioner to once again rake up this issue.

The learned Additional Advocate General submitted that since the Division

Bench has already upheld the Government Order and the same is binding on the

learned Single Judge of this Court, there is no scope for the learned Single Judge

to disagree with the view taken by the Division Bench.

5. The crux of the issue involved in the present Writ Petition pertains to appropriation of quota by the State in an Un-aided Minority Professional Institution. The question is as to whether the State can insist upon fixing a quota for seat-sharing between the Management and the State.

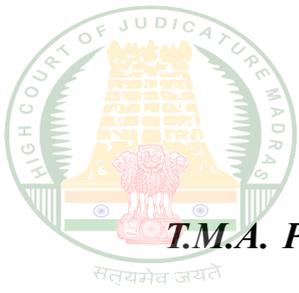
6. The Division Bench in ***Justice Basheer Ahmed Sayeed's case*** referred supra has upheld the Government Order and has held that the State Government can fix a threshold cap for admitting students in a Minority Institution at 50%.



W.P.(MD)No.16339 of 2021

WEB COPY

7. When the above Judgment was rendered by the Division Bench, two other Judgments that were rendered by learned Single Judges of this Court were not brought to the attention of the Division Bench. They are the Judgments in the case of *the Secretary, Mar Chrysostom College of Education, Malankara Avenue, Kirathoor, Kanyakumari District-629 181 Vs. The State of Tamil Nadu, represented by its Secretary, Department of Higher Education, Fort St.George, Chennai-600 009 and two others* in *W.P.(MD).No.5175 of 2014*, dated 08.06.2023. The next Judgment is *W.P.(MD).Nos.1137 and 2050 of 2020*, dated 27.06.2023 in the case of *Joshua Educational and Charitable Trust, Represented by its Chairman, S.A.Joy Raja, residing at Raj Bhavan II, Therekal Puthur, Nagercoil-629 901, Kanyakumari District Vs. The Agricultural Production Commissioner and Secretary to Government, Agricultural Department, Secretariat, St.George Fort, Chennai-9 and others*. In both the Judgments, the learned Single Judges of this Court have taken into consideration the Judgment of the Hon'ble Apex Court in *P.A.Inamdhar's case* and have held that the Government Order in G.O.(Ms).No.270, Higher Education (J1) Department, dated 17.06.1998 cannot be enforced. It was further held that the Government Order itself was a stop-gap arrangement till the Judgment of the Larger Bench of the Hon'ble Apex Court was rendered in *T.M.A. Pai Foundation's case*. In view of the same, after the Judgment was rendered in



W.P.(MD)No.16339 of 2021

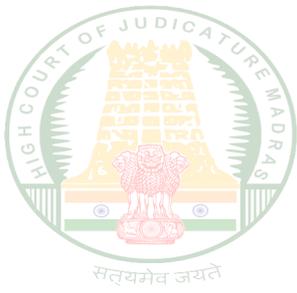
T.M.A. Pai Foundation's case on 31.10.2002, the Government Order ceases to exist.

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8. The learned Additional Advocate General has raised a preliminary issue with regard to the very jurisdiction of the learned Single Judge to refer the matter to a Larger Bench in the light of the Division Bench Judgment of this Court in *Justice Basheer Ahmed Sayeed's case* referred supra, wherein G.O. (Ms).No.270, Higher Education (J1) Department, dated 17.06.1998 was upheld.

9. It is true that judicial discipline requires a learned Single Judge to follow the Judgment of a Bench of a larger strength. However even the Single Judge can invite the attention of the Hon'ble Chief Justice to refer a matter to a Larger Bench, where the Judge doubts the correctness of the view taken by the Bench of a larger strength when it is not in line with the Judgment of the Hon'ble Apex Court. That apart, even a learned Single Judge who doubts a decision of a Larger Bench can seek for a reference in line with the powers vested with the Hon'ble Chief Justice under Order 1 Rule 6 of the High Court Madras Appellate Side Rules, 1965. Useful reference can also be made to the Judgment of the Hon'ble Apex Court in the case of **Central Board of Dawoodi Bohra Community and another Vs. State of Maharashtra and Another** reported in **(2005) 2 SCC 673** and the relevant portion is extracted hereunder:

<https://www.mhc.tn.gov.in/judis>



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W.P.(MD)No.16339 of 2021

“Having carefully considered the submissions made by the learned senior counsel for the parties and having examined the law laid down by the Constitution Benches in the abovesaid decisions, we would like to sum up the legal position in the following terms :-

(1) The law laid down by this Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or co-equal strength.

(2) A Bench of lesser quorum cannot doubt the correctness of the view of the law taken by a Bench of larger quorum. In case of doubt all that the Bench of lesser quorum can do is to invite the attention of the Chief Justice and request for the matter being placed for hearing before a Bench of larger quorum than the Bench whose decision has come up for consideration. It will be open only for a Bench of co- equal strength to express an opinion doubting the correctness of the view taken by the earlier Bench of co- equal strength, whereupon the matter may be placed for hearing before a Bench consisting of a quorum larger than the one which pronounced the decision laying down the law the correctness of which is doubted.

(3) The above rules are subject to two exceptions : (i) The abovesaid rules do not bind the discretion of the Chief Justice in whom vests



WEB COPY



W.P.(MD)No.16339 of 2021

*the power of framing the roster and who can direct any particular matter to be placed for hearing before any particular Bench of any strength; and (ii) In spite of the rules laid down hereinabove, if the matter has already come up for hearing before a Bench of larger quorum and that Bench itself feels that the view of the law taken by a Bench of lesser quorum, which view is in doubt, needs correction or reconsideration then by way of exception (and not as a rule) and for reasons it may proceed to hear the case and examine the correctness of the previous decision in question dispensing with the need of a specific reference or the order of Chief Justice constituting the Bench and such listing. Such was the situation in *Raghubir Singh & Ors. and Hansoli Devi & Ors. (supra)*.*

10. Useful reference can also be made to the Judgment of the Full Bench in the case of ***K.Rajalingam and Others Vs. R.Suganthalakshmi and Others*** in ***Criminal Appeal Nos.89 and 90 of 2020 etc.***, dated 28.05.2020 and the relevant portion is extracted hereunder:

“2. The Honourable Chief Justice, after going through the issues framed and the reasons assigned by the learned single Judge and after taking note of the law laid down qua the framing of the issues in exercise of the powers vested under Order I Rule 6 read with Rule 7 of the High Court



WEB COPY



W.P.(MD)No.16339 of 2021

of Madras, Appellate Side, 1965, referred the matter by constituting a Full Bench consisting of three of us to answer the questions raised. The Honourable Chief Justice accordingly opined that it is legally permissible for a single Judge, who doubts a decision of the Larger Bench to seek for a Reference. This Reference has been made consciously after taking note of the subsequent decisions of the Apex Court governing the field wherein one of the judgments which took into consideration the earlier judgment of the Apex Court, which weighed heavily in the minds of the Full Bench.”

11. In the instant case, the Judgment that has been rendered by the Division Bench in ***Justice Basheer Ahmed Sayeed’s case*** referred supra is not in line with the Judgment in ***P.A.Inamdhar’s case***. For proper appreciation, the relevant portions in the said Judgment are extracted hereunder.

*“123. Conditions which can normally be permitted to be imposed on the educational institutions receiving the grant must be related to the proper utilization of the grant and fulfillment of the objectives of the grant without diluting the minority status of the educational institution, as held in *Pai Foundation* (See para 143 thereof). As aided institutions are not before us and we are not called upon to deal with their cases, we leave the discussion at that only.*



WEB COPY



W.P.(MD)No.16339 of 2021

124. So far as appropriation of quota by the State and enforcement of its reservation policy is concerned, we do not see much of difference between non-minority and minority unaided educational institutions. We find great force in the submission made on behalf of the petitioners that the States have no power to insist on seat sharing in the unaided private professional educational institutions by fixing a quota of seats between the management and the State. The State cannot insist on private educational institutions which receive no aid from the State to implement State's policy on reservation for granting admission on lesser percentage of marks, i.e. on any criterion except merit.

125. As per our understanding, neither in the judgment of Pai Foundation nor in the Constitution Bench decision in Kerala Education Bill, which was approved by Pai Foundation, there is anything which would allow the State to regulate or control admissions in the unaided professional educational institutions 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 the seats available to be filled up at its discretion in such private institutions. This would



WEB COPY



W.P.(MD)No.16339 of 2021

amount to nationalization of seats which has been specifically disapproved in Pai Foundation. 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. Such appropriation of seats can also not be held to be a regulatory measure in the interest of minority within the meaning of Article 30(1) or a reasonable restriction within the meaning of Article 19(6) of the Constitution. Merely because the resources of the State in providing professional education are limited, private educational institutions, which intend to provide better professional education, cannot be forced by the State to make admissions available on the basis of reservation policy to less meritorious candidate. Unaided institutions, as they are not deriving any aid from State funds, can have their own admissions if fair, transparent, non-exploitative and based on merit.

126. The observations in paragraph 68 of the majority opinion in Pai Foundation, on which the learned counsel for the parties have been much at variance in their submissions, according to us, are not to be read disjointly from other parts of the main judgment. A few



WEB COPY



W.P.(MD)No.16339 of 2021

observations contained in certain paragraphs of the judgment in Pai Foundation, if read in isolation, appear conflicting or inconsistent with each other. But if the observations made and the conclusions derived are read as a whole, the judgment nowhere lays down that unaided private educational institutions of minorities and non-minorities can be forced to submit to seat sharing and reservation policy of the State. Reading relevant parts of the judgment on which learned counsel have made comments and counter comments and reading the whole judgment (in the light of previous judgments of this Court, which have been approved in Pai Foundation) in our considered opinion, observations in paragraph 68 merely permit unaided private institutions to maintain merit as the criterion of admission by voluntarily agreeing for seat sharing with the State or adopting selection based on common entrance test of the State. There are also observations saying that they may frame their own policy to give free-ships and scholarships to the needy and poor students or adopt a policy in line with the reservation policy of the state to cater to the educational needs of weaker and poorer sections of the society.

127. Nowhere in Pai Foundation, either in the majority or in the minority opinion, have we



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W.P.(MD)No.16339 of 2021

found any justification for imposing seat sharing quota by the State on unaided private professional educational institutions and reservation policy of the State or State quota seats or management seats.

128. We make it clear that the observations in Pai Foundation in paragraph 68 and other paragraphs mentioning fixation of percentage of quota are to be read and understood as possible consensual arrangements which can be reached between unaided private professional institutions and the State.

129. In Pai Foundation, it has been very clearly held at several places that unaided professional institutions should be given greater autonomy in determination of admission procedure and fee structure. State regulation should be minimal and only with a view to maintain fairness and transparency in admission procedure and to check exploitation of the students by charging exorbitant money or capitation fees.

130. For the aforesaid reasons, we cannot approve of the scheme evolved in Islamic Academy to the extent it allows States to fix quota for seat sharing between management and the States on the basis of local needs of each State, in the unaided private educational institutions of both minority and non-minority categories. That



WEB COPY



W.P.(MD)No.16339 of 2021

part of the judgment in Islamic Academy, in our considered opinion, does not lay down the correct law and runs counter to Pai Foundation.”

12. It is clear from the above Judgment that the State does not have any power to insist for seat-sharing in Un-aided Professional Educational Institutions by fixing a quota of seats between the Management and the State. The Apex Court in P.A.Inamdhar's case took into consideration the Judgment in T.M.A. Pai Foundation's case and held that the same will amount to nationalization of seats. It was further held that insofar as un-aided Institutions are concerned, the admissions must be fair, transparent, non-exploitative and based on merits. If this criteria is adhered, there is no question of the State insisting for a fixed quota for seat-sharing. It was further held that an Un-aided Private Institution can voluntarily agree for seat-sharing with the State or adopt selection based on any entrance test conducted by the State. However, it does not mean that a seat-sharing quota can be insisted by the State on Un-aided Private Professional Educational Institutions. It was further clarified that such appropriation of seats cannot be held to be a regulatory measure in the interest of the Minority Institution within the meaning of Article 30(1) or a reasonable restriction within the meaning of Article 19(6) of the Constitution of India. Thus, the earlier Judgment in the case of Islamic Academy of Education and another Vs. State of Karnataka and others reported in (2003) 6 SCC 697 which approved of the State to fix quota for seat-sharing in Un-aided Private Educational Institutions, was held bad and running contrary to T.M.A. Pai Foundation's case.

13. The Division Bench in *Justice Basheer Ahmed Sayeed's case* referred supra has not taken into consideration the effect of Paragraph Nos.123 to



W.P.(MD)No.16339 of 2021

130, which virtually takes away the power of the State to fix quota for seat-sharing and thereby, G.O.(Ms).No.270, Higher Education (J1) Department, dated 17.06.1998, can never be enforced as against the Minority and Un-Aided Professional Institutions.

14. It must also be borne in mind that G.O.(Ms).No.270, Higher Education (J1) Department, dated 17.06.1998 was more in the nature of an interim arrangement till the Judgment of the Larger Bench was rendered by the Hon'ble Apex Court in *T.M.A. Pai Foundation's case*. The same is clear from Paragraph No.6 of the concerned Government Order. The learned Single Judge in W.P.(MD).Nos.1137 and 2050 of 2020 has taken a view that from the date of the Judgment in *T.M.A. Pai Foundation's case*, the enforcement of the Government Order itself stood withdrawn. Clause 8 (v) of the Government Order virtually runs contrary to the Judgment of the Hon'ble Apex Court in both *T.M.A. Pai Foundation's case* and *P.A.Inamdhar's case*

15. In view of the above, I am inclined to invite the attention of the Hon'ble Chief Justice to refer the matter to the Full Bench in order to answer the following questions:

“(a). Whether G.O.(Ms).No.270, Higher

Education (J1) Department, dated 17.06.1998, was in the



WEB COPY



W.P.(MD)No.16339 of 2021

nature of a stop-gap arrangement till the Judgment of the Larger Bench was pronounced by the Hon'ble Apex Court in ***T.M.A. Pai Foundation and Others Vs. State of Karnataka and others*** reported in ***(2002) 8 SCC 481?***

(b). Whether the Government Order in G.O. (Ms).No.270, Higher Education (J1) Department, dated 17.06.1998 insisting the Self Financing Educational Institutions imparting professional course of education established and administered by any Minority to fill up 50% quota, on the basis of any merit list prepared by the competent authority, can be enforced in the light of the Judgment of the Hon'ble Apex Court in ***T.M.A. Pai Foundation's case and P.A.Inamdhar's case?*** and

(c). Whether the Judgment of the Hon'ble Division Bench in ***Justice Basheer Ahmed Sayeed College for Women (Autonomous), Teynampet, Chennai-600 018 Vs. State of Tamil Nadu. Represented by its Principal Secretary to the Government, Department of Higher Educational, Fort St.George, Chennai-600 009 and Others*** reported in ***2023 (5) CTC***



WEB COPY



W.P.(MD)No.16339 of 2021

529, upholding the power of the State for seat-sharing to an extent of 50% through the merit list prepared by the competent authority, is not in line with the Judgment of the Hon'ble Apex Court in *T.M.A. Pai Foundation's case and P.A.Inamdhar's case* and hence requires re-consideration?"

16. The Registry is directed to place this order before the Hon'ble Chief Justice in order to constitute a Full Bench to answer the questions that have been referred to in this order.

06.12.2023

NCC:yes/no

Index:yes/no

Internet:yes/no

Speaking Order / Non Speaking Order

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W.P.(MD)No.16339 of 2021

N. ANAND VENKATESH,J.

TSG

W.P.(MD)Nos.16339 of 2021

06.12.2023