St. Joseph''s Hospital Trust Vs The Kerala University of Health Sciences and State of Kerala

Court: High Court Of Kerala

Date of Decision: Aug. 7, 2012

Acts Referred: Constitution of India, 1950 â€" Article 14, 15(5), 154, 162, 19
Kerala University Of Health Sciences Act, 2010 â€" Section 10, 10(k), 12(7), 14, 21

Hon'ble Judges: K.M. Joseph, J; K. Harilal, J

Bench: Division Bench

Advocate: Kurian George Kannanthanam, Sri. Tony George Kannanthanam, Sri. Thomas George and Sri. Jiji Thomas, for the Appellant; P. Sreekumar, SC, Kerala Uty. Health, for R1 and R2 and Sri. Roshan D. Alexander, Government Pleader for R3, for the Respondent

Judgement

K.M. Joseph, J.
Both the Writ Petitions being connected, they are disposed of by this common Judgment. Petitioner claims to be an

educational agency of a self financing pharmacy college. Petitioner''s college fell under the purview of the Kerala University. By Ext. P1, on

application, the petitioner was issued with a letter of consent by the Kerala University dated 24.4.2010 for the establishment of a new course M.

Pharm - Pharmacuetical Chemistry. The Governor of Kerala initially promulgated an Ordinance, called the Kerala University of Health & Allied

Sciences, 2009 which came into force in November, 2009. The Ordinance came to be replaced by an Act in the year 2011 (hereinafter referred

to as the University Act). All the colleges coming under the medical and allied fields of education which were affiliated to any of the Universities in

Kerala stood affiliated to the new University, 2010 - 2011. The first respondent vide Ext. P2 order, approved the consent of affiliation in respect

of the course of M. Pharm - Pharmaceutical Chemistry in respect of the petitioner''s college. Petitioner addressed Ext. P3 letter stating that the

Central Regulatory Authority for the M. Pharm Course is the All India Council for Technical Education (AICTE) and it had granted its approval

which was uploaded in the website of AICTE. Affiliation for the M. Pharm Course without any further delay was requested for. By Ext. P4, the

Kerala University notified various colleges which stood affiliated to the said University. By Ext. P5 dated 20.7.2010, the petitioner was requested

to furnish certain details for considering the petitioner''s request for affiliation to the M. Pharm Course. They include the following:

1. Permission from Govt. of Kerala after executing the agreement.

2. Letter of Permission from AICTE.

3. An Undertaking in prescribed proforma (copy enclosed) duly executed in Kerala stamp paper worth Rs. 100/- .

4. Affiliation fee of Rs. 50,000/= (DD in favour of the Registrar, Kerala University of Health and Allied Sciences payable at SBI, Vadakkanchery,

Thrissur).

One of the documents required under Ext. P5 was permission by Government of Kerala after executing an agreement. Ext. P6 letter was sent

wherein it was, inter alia, mentioned that the petitioner is not liable to get consent letter from the Government, nor execute any agreement for the

same. The undertaking mentioned therein was forwarded. Petitioner came to be served with Ext. P7 dated 13.8.2010 from the University which

reads as follows:

With reference to your letter cited, I am to inform you that in accordance with the policy of the Government of Kerala, this University has taken a

decision to grant affiliation to new Colleges and courses only if the College enter into agreement with the Government of Kerala to share 50% of

the seats under Government merit quota. Hence you are requested to furnish the permission of Kerala Government for granting affiliation. In this

connection, you have to also submit the original Letter of Permission issued by the AICTE for granting affiliation.

Thereafter, the petitioner came to be served with Ext. P8 from the AICTE wherein, it is stated that the petitioner''s college was granted approval

for the M. Pharm (Chemistry) for the first shift with an intake of eighteen for the year 2010-2011. Petitioner forwarded the said communication to

the respondent/University. Petitioner moved a Writ Petition seeking a direction to consider the application for affiliation without insisting for any

condition of No Objection Certificate (letter of permission) from the Government of Kerala. Ext. P10 is an interim order directing the University to

pass orders on the application of the petitioner for affiliation for the M. Pharm Course, ignoring the conditions stipulated in Ext. P7. Thereafter, by

Ext. P11, sanction was granted by the Vice Chancellor by exercising his power u/s 12(7) of the Kerala University of Health and Allied Sciences

Ordinance, 2010 for grant of provisional affiliation to M. Pharm in Pharmaceutical Chemistry with an annual intake of 18 students for the academic

year 2010-11, subject to various conditions. We notice that in fact Condition No. 8 is to the following effect:

8. The College should furnish the Letter of Permission from Govt. of Kerala after executing the agreement.

The AICTE granted permission to the petitioner college for two more M. Pharm Courses vide Ext. P12 dated 10.5.2012. Petitioner gave Ext.

P13 representation to the University seeking affiliation. Ext. P14 is a consent of affiliation issued by the Registrar of the Kerala University which

reads as follows:

The Kerala University of Health Sciences hereby gives consent of Affiliation to start M. Pharm Pharmacology and M. Pharm Pharmaceutics

courses with 18 seats each in St. Joseph"s College of Pharmacy, Cherthala during the academic year 2012-13.

The grant of Consent of Affiliation does not entitle the institution to make admission to the new course. Admissions as per the prescribed rules shall

be made only after provisional affiliation is granted by the Kerala University of Health Sciences to the new course.

The Kerala University of Health Sciences will consider the grant of provisional affiliation to the new course subject to the recognition by the

respective Central Council, fulfillment of conditions specified by the State Government and Kerala University of Health Sciences.

The Consent of Affiliation is valid for 2012-13 and 2013-14 academic years.

When enquiries were made, petitioner came to understand that the Government had addressed a Circular to the University on 22.11.2010 that no

affiliation shall be granted to any new college or to any new course, unless the college agrees to surrender fifty per cent of the seats to the

Government and Government issues its letter of permission thereof. Ext. P15 is produced as the Circular. Since Ext. P15 Circular is challenged

and as virtually the whole Writ Petition is based on its invalidity, we will set-forth the same as hereunder:

Government have established a separate University for the promotion of education and research aspects in the field of Health & Allied subjects in

the State, named as Kerala University of Health and Allied Sciences. Before the establishment of this University, all Medical and Allied Institutions

in the State have been affiliated to different Universities by following different guidelines. Since Kerala University of Health and Allied Sciences is a

separate entity, it should have its own guidelines for granting affiliation to Self financing institutions.

In the circumstances, Government issue the following guidelines for granting affiliation to Medical, Dental, Nursing, Ayurveda, Homoeo, Unani,

Sidha and all other Para Medical Institutions in the State to Kerala University of Health and Allied Sciences.

No health educational institutions/agency need be given affiliation for starting a new or higher course of study or training (including a Post Graduate

course of study or training) which would enable a student of such course or training to qualify himself/herself for the award of any recognized

Medical/Para medical qualification, or increase admission capacity in any course of study or training (including a post-graduate course of study or

training); except after obtaining No Objection Certificate from the State Government. The State Government shall issue NOC to the education

institution/agency, only if they have agreed to abide the condition specified by Government regarding admission and fee structure and to execute an

agreement in this regard.

(Emphasis supplied)

Petitioner has sought for the following reliefs:

(i) Issue a writ of certiorari or other appropriate order or direction to quash Exts.P7 & P15, in so far as the same insist on the compliance of the

conditions imposed by the Government, as a condition for grant of affiliation.

(ii) Issue a writ of certiorari or other appropriate order or direction to direct the University to grant affiliation to the M. Pham Courses in

petitioner"s College as sanctioned by AICTE in Ext. P12 for the year 2012-13 forthwith.

(iii) Declare that the University cannot decline affiliation once AICTE grants approval for a course or a College.

(iv) Issue a writ of certiorari or other appropriate order or direction to quash Ext. P14, in so far as affiliation is made conditional to what is stated

therein.

(v) Declare that the petitioner is entitled to proceed with admissions for the M. Pharm courses in her college for 2012-13.

2. A Counter Affidavit is filed on behalf of the third respondent (State of Kerala). It is, inter alia, stated as follows:

Petitioner has not approached the Government for issuance of No Objection Certificate. This may be to avoid the conditions that may be

stipulated by the Government. Government issued Circular to ensure quality in education and to give opportunity to students of low income groups

in self-financial institutions, like the petitioner"s institution. To ensure the latter, Government mandates the institutions to enter into an agreement

regarding seat sharing (fifty per cent of the sanctioned seats to Government) and fees structure. It appears that the petitioner institution was not

willing to share fifty per cent of the total seats sanctioned to them by AICTE for admitting students from the merit list prepared by the Government

or such other body entrusted by the Government. The petitioner was also not willing to follow the fee fixed by the Government in those seats set

apart for the Government in those seats set apart for the Government. There is reference to the objects of the University Act. Reference is made to

Sections 6(ix) and 56(1). There are wide and pervasive powers and control with the University and the State Government and to impose

conditions or regulations for the purpose of affiliation of the colleges. After promulgation of the Act, the statutes have been prepared. The Act

never contemplates a vacuum for functioning of the University as well as the affiliated colleges. Since statutes have been prepared, specific

guidelines and formalities in comparison with the procedure of admission to other professional courses are being followed for the issuance of No

Objection Certificate. Approval process of AICTE to start recognized courses states that one copy of the application submitted before the AICTE

is required to be submitted to the State Government or the Union Territory Administration concerned. The views will be forwarded with valid

reasons. Government will arrange inspection by the technical team. After Government gets report, the Government will consider and take decision

in granting NOC for starting the course subject to such conditions. The Act contemplates withdrawal of affiliation if the institution affiliated fails to

comply with the conditions of affiliation or recognition as provided in the Act or Statutes. It is the prerogative of the Government to fix appropriate

conditions. Reference placed on the Judgment of this Court in W.P.(C). No. 24933/11 to hold that the process of granting affiliation is not an

empty formality. Government has ample power to fix any condition for the purpose of No Objection Certificate or letter of permission.

3. A Statement is filed by the first respondent University. It is, inter alia, stated therein that the petitioner did not raise any objection to the condition

imposed in the consent of affiliation based on which the entire process commenced and the statutory council granted permission.

W.P. (C). No. 13371 of 2012 V

4. The case of the petitioner, in brief, is as follows:

Petitioner is an Educational Agency of a Self Financing Pharmacy College by name, Ezhuthachan College of Pharmaceutical Sciences. The college

has been approved by the AICTE and affiliated to the University for the purpose of conducting B. Pharm Courses. Petitioner was trying to get M.

Pharm Courses sanctioned to its college. Approval of the AICTE and the University was required. Petitioner applied to the AICTE for grant of

approval of M. Pharm Course in August, 2009. While the same was pending, petitioner applied to the respondent University for affiliation in

August, 2010 vide Ext. P1. Petitioner was informed by the Officers of the University that it should also obtain NOC from the Government.

Without knowing the legal implications, petitioner had also applied to the Government for NOC as well. The Government initially dilly dallied the

issue, saying that the infrastructural facilities in the college were not sufficient enough. Petitioner had rectified all the defects. The University had

conducted inspection and pointed out some defects in the infrastructure. The same also were rectified. The University was thereafter satisfied.

Thereafter, the University issued Ext. P2 letter directing to remit the amount of fees and also to produce NOC from the Government. Petitioner

forwarded a Demand Draft for Rs. 1,90,000/= as the required fees and also pointed out that the petitioner was awaiting NOC from the

Government vide Ext. P3. At that time, the petitioner could not do anything because the formal orders of approval of the AICTE had not come.

The AICTE issued Ext. P4 dated 1.9.2011 granting formal orders of approval and granted sanction only for one Course, though what was

requested was two. The sanction was for M. Pharm in Pharmaceutical Chemistry. Petitioner forwarded Ext. P4 to the University. The University

again directed to remit `.1,00,000/= as registration fee and inspection fee vide Ext. P5. After inspection, the University requested the petitioner to

rectify the defects vide Ext. P6. Petitioner rectified the defects and submitted a compliance report on 28.1.2012 as per Ext. P7. The University

granted consent of affiliation as per Ext. P8 dated 7.2.2012. It is stated that there is no provision in the University Act for issuance of any consent

of affiliation. Petitioner did not challenge the condition that the petitioner should obtain approval of the AICTE for 2012-13 and NOC which the

petitioner did not have. The AICTE issued Ext. P9 granting approval for 2012-13 on 10.5.2012. Petitioner forwarded the same to the University

for affiliation. The University then issued Ext. P10 stating that the petitioner should produce NOC from the Government and also should pay an

additional amount of Rs. 50,000/= as affiliation fee. Petitioner was agreeable to pay the fees, but was not able to produce the consent. Petitioner

relies on Ext. P10 interim Order passed by this Court in WP(C). No. 2468/2011 by which the University was directed to pass orders on the

petitioner"s application for affiliation ignoring the conditions mentioned in Ext. P7. When enquiries were made, the petitioner came to know that the

Government had issued Ext. P11 Circular to the University on 22.11.2010 directing that no affiliation shall be granted to any new college or to any

new Course in any existing college unless the college agrees to surrender fifty per cent of the seats to the Government and until the Government

issues Letter Of Permission (LOP). In such circumstances, the petitioner seeks the following reliefs:

(i) Issue a writ of certiorari or other appropriate order or direction to quash Ext. P8 in so far as it insists on the NOC of the State Government to

grant affiliation.

(ii) Issue a writ of certiorari or other appropriate order or direction to quash Ext. P11, in so far as the same insist on the compliance of the

conditions imposed by the Government, as a condition for grant of affiliation.

(iii) Issue a writ of mandamus or other appropriate order or direction to direct the University to grant affiliation to the M. Pham Course in

petitioner''s college as sanctioned by AICTE in Ext. P9 for the year 2012-13 forthwith.

(iv) Declare that the University cannot decline affiliation once AICTE grants approval for a course or a college.

(v) Declare that the petitioner is entitled to proceed with admissions of the M. Pharm Courses in its college for 2012-13.

5. We heard Shri Kurian George Kannanthanam, learned senior counsel for the petitioners, Shri P. Sreekumar, learned standing counsel appearing

for the respondent University and also Shri Roshan D. Alexander, the learned Government Pleader.

6. Learned senior counsel for the petitioners would address the following contentions before us:

The State has no authority in law to insist that the petitioners should obtain permission from it. Reliance is placed on the decision of the Apex Court

in Jaya Gokul Education Trust v. Commissioner & Secretary to Government (2000 (2) KLT 267). It is contended that even assuming that the

State has any such power, it cannot further insist that such consent or permission will be given only if the petitioners enter into agreements with the

State, agreeing for seat sharing and regulation of fees. It is next contended that the University is not bound by the Circular. Expatiating, he would

submit that the issue relating to the right of managements be they minority or non-minority, to admit students and to fix fees has engaged the

attention of the highest court. An Eleven Bench in T.M.A. Pai Foundation and Others Vs. State of Karnataka and Others, dwelt at length on this

issue. Still later, a Constitution Bench in Islamic Academy of Education and Another Vs. State of Karnataka and Others, made various

observations. This, in turn, led to the constitution of a Seven Bench in the P.A. Inamdar and Others Vs. State of Maharashtra and Others, , which

has specifically dealt with the issues with which this Court would have to express its views. He invited our attention to paragraphs 124 and 125 of

the decision in Inamdhar''s case (supra) which read as follows:

124. So far as appropriation of quota by the State enforcement of its reservation policy is concerned, we do not see much of a 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 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 the 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 is there 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 amount to nationalisation 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 the 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 candidates.

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.

No doubt, voluntary agreement for seat sharing is not impermissible. The Court held as follows:

128. We make it clear that the observations in Pai Foundation in paragraph 68 and other paragraphs mentioning fixation of percentage of quality

are to be read and understood as possible consensual arrangement which can be reached between unaided private professional institutions and the

State.

He would therefore contend that the condition contemplated in the impugned Circular would occasion violation of Article 19(i)(g) of the

Constitution of India as also Article 30. Learned senior counsel for the petitioners has also a case that the impugned Circular is bad for the reason

that it cannot be treated as issued in accordance with Article 154 of the Constitution. It is pointed out that an Officer has without complying with

the formalities which the Constitution prescribes, issued the impugned Circular. It is not stated to be issued by or on behalf of the Governor. In the

absence of such an incantation that it is made by or under the Order of the Governor, no sanctity can be attached to the same, he contends.

7. Per contra, Shri P. Sreekumar, learned counsel for the University would, no doubt, contend that the University is acting on the basis of the

Circular. He would further submit that there is no fundamental right to affiliation either under Article 19(i)(g) or Article 30 of the Constitution. He

would point out that the principle laid down by the Apex Court in the decision in Jaya Gokul Educational Trust v. Commissioner & Secretary to

Government (2000 (2) KLT 267) may not apply to the facts situation. He would further contend that the decision of the Apex Court in State of

T.N. and Another Vs. Adhiyaman Educational and Research Institute and Others, , which was the basis for Jaya Gokul"s case has been

considerably diluted down by virtue of the subsequent decisions which we will advert to.

8. Learned Government Pleader would also reiterate that there is no fundamental right to affiliation. He would further submit that the Government

has power to issue the impugned Circular u/s 47 of the Kerala Professional Colleges or Institutions (Prohibition of Capitation Fee, Regulation of

Admission, Fixation of Non-Explorative Fee and Other Measures to Ensure Equity and Excellence in Professional Education Act, 2006

(hereinafter referred to as the Kerala Professional Colleges Act). He would also rely on Sections 5, 6, 40, 41 and 47 of the University Act. He

would further contend that the Government is only seeking to implement its policy of equitable distribution of seats. Government is interested in

ensuring the establishing of a fair fee structure. Government has ample power under Article 162, it is submitted.

9. Whether the Government has authority to issue the impugned Circular?

The principal argument of the petitioners is that the impugned Circular cannot stand judicial scrutiny for the reason that the Government has no

authority to insist upon its consent for establishing the college as it has purported to do in the Circular. In the decision in Jaya Gokul Educational

Trust v. Commissioner & Secretary to Government (2000 (2) KLT 267), the Apex Court was actually dealing with a situation where an

application was made for affiliation and the matter was being processed by the University.

Under the concerned Statutes, the procedure contemplated included ascertaining the views of the Government. It appears that the college

authorities in the said case applied for the consent of the Government to establish the college. The Government declined to grant consent. It was a

case which was covered by the legislation framed under Entry 66 of List I of the Seventh Schedule to the Constitution of India, namely the AICTE

Act. Entry 66 reads as follows:

66. Co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions.

Entry 25 of List III of Seventh Schedule reads as under:

25. Education, including technical education, medical education and universities, subject to the provisions of entries 63, 64, 65 and 66 of List I;

vocational and technical training of labour.

The Apex Court in the course of its Judgment proceeded to hold as follows:

19. Learned Additional Solicitor General stated before us that there was no statute in the State of Kerala corresponding in the Tamil Nadu Act of

1976 nor any other law which specifically required the ''approval'' of the State Government. It was however contended that the Tamil Nadu case

was concerned only with the standards of education and as to who could fix them. We are not inclined to agree. We have already pointed out

under Point 1 that in the Tamil Nadu case, S.10 (K) of the AICTE Act was referred to and the power of ''approval'' for establishing a technical

institution was considered. In our opinion, even if there was a State law in the State of Kerala which required the approval of the State

Government for establishing technical institutions, such a law would have been repugnant to the AICTE Act and void to that extent, as held in the

Tamil Nadu case.

20. The only provision relied on before us by the State Government which according to its learned senior counsel, amounted to a statutory

requirement of ''approval'' of the State Government, was the one contained in Clause 9 (7) of the Kerala University First Statute. It reads as

follows:

(9) Grant of affiliation:

(1) ...

(3) ...

(7).After considering the report of the Commission and the report of the local inquiry, if any, and after making such further inquiry as it may deem

necessary, the Syndicate shall decide, after ascertaining the view of the Government also, whether the affiliation be granted or refused, either in

whole or part. In case affiliation is granted, the fact shall be reported to the Senate at its next meeting"". It will be noticed that Clause 9 (7) of the

Statute required that before the University took a decision on ""affiliation"", it had to ascertain the ""views"" of the State Government.

21. The reference to the Commission in the above clause 9 (7) is to the Commission of Inspection appointed by the University. Sub-clause (1) of

clause (9) of the statute required ""verification of the facilities that may exist for starting the new colleges/course"". The Commission was to inspect

the site, verify the title deeds as regards the propriety right of the management over the land (and buildings, if any) offered, building accommodation

provided, if any, assets of the management, constitution of the registered body and all other relevant matters. Sub-clause (2) of clause (9) stated

that the affiliation ""shall depend upon the fulfillment by the management of all the conditions for the satisfactory establishment and maintenance of

the proposed institution/courses of studies and on the reports of Inspection by the Commission or Commissions which the University may appoint

for the purpose.

22. As held in the Tamil Nadu case, the Central Act of 1987 and in particular, S.10 (K) occupied the field relating the ''grant of approvals'' for

establishing technical institutions and the provisions of the Central Act alone were to be complied with. So far as the provisions of the Mahatma

Gandhi University Act or its statutes were concerned and in particular statute 9 (7), they merely required the University to obtain the ''views'' of the

State Government. That could not be characterized as requiring the ''approval'' of the State Government. If, indeed, the University statute could be

so interpreted, such a provision requiring approval of the State Government would be repugnant to the provisions of S.10 (K) of the AICTE Act,

1987 and would again be void. As pointed out in the Tamil Nadu case there were enough provisions in the Central Act for consultation by the

council of the AICTE with various agencies, including the State Governments and the Universities concerned. The State Level Committee and the

Central Regional Committee contained various experts and State representatives. In case of difference of opinion as between the various

consultees, the AICTE would have to go by the views of the Central Task Force.

These were sufficient safeguards for ascertaining the views of the State Governments and the Universities. No doubt the question of affiliation was

a different matter and was not covered by the Central Act in the Tamil Nadu case, it was held that the University could not impose any conditions

inconsistent with the AICTE Act or its Regulation or the conditions imposed by the AICTE. Therefore, the procedure for obtaining the affiliation

and any conditions which could be imposed by the University could not be inconsistent with the provisions of the Central Act. The University could

not, therefore, in any event have sought for ''approval'' of the State Government.

Thereafter, in paragraph 23, the Apex Court also held as follows:

23. Thus we hold, in the present case that there was no statutory requirement for obtaining the approval of the State Government and even if there

was one, it would have been repugnant to the AICTE Act. The University statue 9 (7) merely required that the ''views'' of the State Government

be obtained before granting affiliation and this did not amount to obtaining ''approval''. If the University statute required ''approval'', it would have

been repugnant to the AICTE Act. Point 1 is decided accordingly.

In short, when a law is made under Entry 66, then, going by the aforesaid decision, it may not be open to the State to prescribe the obtaining of its

consent for affiliation of the college. It would be a case of legislative incompetence.

10. Learned senior counsel for the petitioners would, in fact, point out that though the word used is ""established"", the facts which are set out in the

Judgment, leave no room for doubt that what was contemplated was the approval of the Government for affiliation. Therefore, it is submitted that

on all fours, the decision clearly concludes the issue which we are called upon to decide.

11. Shri P. Sreekumar, on the other hand, would contend that Entry 66 actually relates to the standards of education and no doubt, in respect of

standards of education, it is a matter which is beyond the powers of the State Legislature or the Government as held by the Apex Court, and that

too, in so far it adversely affects the standards. Government cannot make any inroad into the province reserved by law made by the Parliament

under its authority under Entry 66. But, in this case, he would submit that the Government has issued a general circular wherein it declares that

unless No Objection Certificate is obtained, affiliation need not be granted by the University. The scope of the prohibition and the purport of the

Circular is to achieve social justice and to promote the principle of merit which is why the Government sought to insist on seat sharing and also to

provide for fair fees.

He drew our attention to paragraph 134 of Inamdar''s case which reads as follows:

134. However, different considerations would apply for graduate and postgraduate level of education, as also for technical and professional

educational institutions. Such education cannot be imparted by any institution unless recognised by or affiliated with any competent authority

created by law, such as a university, Board, Central or State Government or the like. Excellence in education and maintenance of high standards at

this level are a must. To fulfil these objectives, the State can and rather must, in national interest, step in. The education, knowledge and learning at

this level possessed by individuals collectively constitutes national wealth.

He submits that the Government has power under Entry 25 and there is executive power also. He would also no doubt contend that there is

statutory support from Sections 40, 41 and 47 of the University Act.

12. Learned senior counsel for the petitioner would submit that the matter is squarely covered by the decision of the Apex Court and there is

absence of power with the Government. He would also point out that seat sharing has been frowned upon by the Apex Court and that it amounts

to nationalisation of seats. In paragraph 137 of the decision in P.A. Inamdar and Others Vs. State of Maharashtra and Others, the Apex Court has

held as follows:

137. Pai Foundation has held that minority unaided institutions can legitimately claim unfettered fundamental right to choose the students to be

allowed admission and the procedure therefore subject to its being fair, transparent and non-exploitative. The same principle applies to non-

minority unaided institutions. There may be a single institution imparting a particular type of education which is not being imparted by any other

institution and having its own admission procedure fulfilling the test of being fair, transparent and non-exploitative. All institutions imparting same or

similar professional education can join together for holding a common entrance test satisfying the above said triple tests. The State can also provide

a procedure of holding a common entrance test in the interest of securing fair and merit-based admissions and preventing mal-administration. The

admission procedure so adopted by a private institution or group of institutions, if it fails to satisfy all or any of the triple tests, indicated

hereinabove, can be taken over by the State substituting its own procedure. The second question is answered accordingly.

In this connection, we must also bear in mind the arguments of the learned counsel for the respondents that the petitioners in these cases cannot

claim fundamental freedom under Article 19(i)(g). Article 19 provides for fundamental freedoms including the right to carry on an occupation

which, it is well settled, includes the right to run a self-financing educational institution. But, this right is conferred on citizens of India. According to

the respondents, the petitioners cannot be treated as citizens of India. They would, therefore, contend that the Supreme Court has expounded the

principle that Government cannot force an Unaided Institution to share seats with it or prescribe fees, which is the result of the interpretation of

Article 19(i)(g) and Article 30 of the Constitution. Learned senior counsel for the petitioners would point out that in one of the Writ Petitions

(WP(C). No. 12323/12), the petitioner is entitled to invoke the right under Article 30. As far as the judicial veto of interference in fees is

concerned, petitioners contend that it is done by interpreting Article 14, which right is available to noncitizens also. He would further submit that as

far as want of power with the Government to require its consent as contemplated in the impugned Circular is concerned, the matter must be

decided with reference to the law declared in Jaya Gokul Educational Trust v. Commissioner & Secretary to Government (2000 (2) KLT 267).

13. We may first consider the statutory provisions relied on by the respondents. Learned Government Pleader would draw our attention to the

following provisions in the University Act:

Section 5 speaks about the objects of the University. They include, inter alia, (S.5(iii)) to regulate the academic standards of the affiliated colleges

or institutions.

Section 5(xii) to promote equitable distribution of facilities for education in health and allied sciences.

Section 6 speaks of the powers and functions of the University. They, inter alia, include monitoring and evaluating the academic performance of

affiliated colleges and recognised institutions for granting continuation of affiliation and periodical accreditation (S.6(xx)).

There is also power to control and regulate admission of students for various courses of study in University departments, affiliated colleges,

institutions, schools, centres and recognised institutions (S.6(xviii)).

Further reliance is placed on Section 40 of the Act which deals with the power of the Governing Council to make statutes. Section 40 of the Act,

inter alia, provides that the Statutes may provide for, inter alia, conditions and procedure for the affiliation of colleges or for withdrawing the

affiliation of colleges (S.40(2)(xi)). Section 41 provides for the procedure for making Statutes. It, inter alia, provides that Government shall make

the first statute of the University. Thereafter, sub-section (2) provides that the Governing Council may make new or additional Statutes or amend

or repeal the Statutes made by the Government from time to time. Subsection (3) provides for the procedure for amending or repealing of Statutes

by the Governing Council. Section 41(3)(iv) reads as follows:

No Statute providing for the conditions for, or procedure relating to the affiliation of private colleges shall be passed by the Governing Council

without the previous approval of the Government.

Still further, our attention was invited to Section 47 of the Act. It reads as follows:

47. Admission and Examination.-(1) Subject to the rights of the minority educational institutions, admission to all courses in the University

departments and affiliated colleges shall be made in accordance with the reservation policy of Government for the weaker sections of the society

and on the basis of competitive merit in accordance with the rules, if any, made by the Government;

Provided that, where rules have been framed by the Government, in the interest of the students of the entire State, the University shall adopt the

same and such rules shall be published in the Gazette, as the case may be, at least six months before the start of any academic session:

Provided further that having regard to the maintenance of discipline, the authority concerned shall have the power to refuse admission to a student.

(2) At the beginning of each academic year the University shall prepare and publish an academic calendar for all programmes including a Schedule

of Examinations, provided that, no examination or the results of an examination shall be held invalid only for the reason that the University has not

followed the Schedule.

Support is also sought to be drawn from Section 14 of the Professional Colleges Act. Section 14 reads as follows:

14. Power of the Government to issue directions.-(1) The Government may give such directions to any professional college or institution as in its

opinion are necessary or expedient for carrying out the purposes of this Act or give effect to any of the provisions contained therein or in any rules

or orders made thereunder and the management of the college or institution shall comply with every such direction.

(2) The Government may also give such directions to the Officers or authorities under its control which in its opinion are necessary or expedient for

carrying out the purposes of this Act.

It is submitted that the impugned Circular can be supported u/s 14 of the Kerala Professional Colleges Act.

14. Learned senior counsel for the petitioners, on the other hand, would submit that Section 14 of the Kerala Professional Colleges Act cannot be

invoked. Section 14 deals with the power of the Government to give directions to a college or institution, as is considered necessary or expedient

for carrying out the purposes of the Act or to give effect to the provisions contained in any Rules or Orders made thereunder. It is submitted that

the Circular which is challenged, is not a direction issued to the professional colleges or institutions as contemplated. On the other hand, it is

directed against the University and, therefore, it cannot be supported u/s 14 of the Kerala Professional Colleges Act. He would further point out

that Section 5 of the Act speaks about the objects of the University. So also, Section 6 (xx) of the Act speaks about the power of the University to

monitor and evaluate the academic performance of the affiliated colleges. It is also pointed out that Section 40 of the Act deals with the power to

make Statutes in relation to affiliation or withdrawing the same. It is pointed out that no Statutes have been made. As far as Section 41 of the Act is

concerned, it may be true that the Government can make the first Statute. Admittedly, no Statutes have been made. It is also submitted that

Section 41(3)(iv) of the Act is an embargo against passing of any Statute in relation to affiliation without the previous approval of the Government.

But, that is besides the point which is urged before us, he contends.

15. We are of the view that the attempt made by the learned counsel for the University and also the learned Government Pleader to support the

impugned Circular with reference to the statutory provisions which we have adverted to, is without merit. Section 5 of the Act deals with the

objects of the University. No doubt, it has a laudable object to regulate academic standards of affiliated colleges or institutions. But, it is

inconceivable as to how the Government which is a different Body from the University can assume any authority to issue the impugned Circular

seeking support u/s 5(iii) of the Act which relates to regulation of academic standards. Likewise, Section 5 (xii) of the Act, no doubt, also is

intended to declare that one of the objects of the University is to promote equitable distribution of facilities in education, health and allied sciences.

The laudable object which the University is expected to achieve, cannot form the legal basis for the Government of a State to issue the impugned

Circular. Likewise, Section 6 of the Act speaks about powers and functions by the University. No doubt, it includes controlling and regulating

admission of students in affiliated colleges, inter alia, and also monitoring and evaluating the academic performance of affiliated colleges. But here,

we are not called upon to sit in Judgment over the exercise of any power by the University. We are essentially called upon to decide upon the

authority of the Government to dictate to the University that it need not give affiliation, unless and until certain conditions are satisfied, which include

the obtaining of No Objection Certificate from it. We would think that no support can be drawn by the Government with reference to the powers

and functions of the University u/s 6 of the Act.

16. As far as Section 40 of the Act is concerned, it relates to the power to make Statutes. No doubt, Statutes can be made by the Governing

Council in relation to the conditions and procedure for affiliation of colleges of for withdrawing the affiliation of colleges. Undoubtedly, u/s 41, the

first Statute has to be made by the Government. Therefore, the Government has power to make first statute. On a reading of Sections 40 and 41

of the Act together, we can proceed on the basis that Government may make the first statutes providing for conditions and procedure for the

affiliation of colleges or for withdrawing the affiliation of colleges. Admittedly, no such Statutes have been made. We notice that the Act was

published in the Gazette on 24.1.2011 and it is deemed to have come into force on 7.12.2009, even after the passage of more than fifteen months.

Government has not even made the first Statutes. No doubt, learned Government Pleader submits that they are being made. But, that is besides the

point. Without the prior approval of the Government, the Governing Council cannot pass any Statute in relation to affiliation of private colleges.

But, the question which falls for our decision is the authority of the Government to pass such a Circular. We would think that neither Section 40 nor

Section 41 of the Act provides for authority with the Government to issue the Circular in question. The Act specifically clothes the Government

with power to make Statutes which it has desisted from doing, as things stand. There is no power u/s 40 or Section 41 to issue the Circular which

is impugned in these cases.

17. As far as Section 47 of the Act is concerned, no doubt, it declares that admission to all courses in the University departments and affiliated

colleges shall be made in accordance with the reservation policy of the Government and for weaker sections of the society and on the basis of

competitive merit in accordance with the Rules, if any, made by the Government. Section 47 of the Act, in our view, apparently gives effect to the

provisions of Article 15(5) of the Constitution of India. Article 15(5) indeed permits reservation for the scheduled castes and socially and

educationally backward sections and it is not applicable to minority institutions. Section 47 of the Act reflects the intention of the State Legislature

to make available the benefit of the Constitutional amendment by which reservation is permitted under Article 15(5). No doubt, admissions are to

be made on the basis of comparative merit. The words ""comparative merit"" are followed by the words ""in accordance with the Rules"" which in turn

is followed by the words ""if any"" made by the Government. It is an injunction contained in the Statute that admission shall be on the basis of

comparative merit. It may not be appropriate to hold that the principle of comparative merit will not apply unless Rules are made. No doubt, Rules

may be made. Even otherwise, in respect of unaided educational institutions, the principle of merit has been recognized in all the three major

decisions dealing with the issue, namely TMA Pai, Islamic and Inamdar. It may not be out of place to recollect that in all these decisions, the Apex

Court has directed that merit must indeed be the criterion. It has declared the law as to how the criteria of merit is to be arrived at. We see nothing

in Section 47 of the Act to support the Circular issued by the Government. No Rules have been framed by the Government u/s 47 of the Act to

support the Circular issued by the Government. As far as the reservation is concerned, the concept of reservation which, of course, is not

applicable to minority institutions is something which can be insisted upon. No doubt, Article 15(5) speaks about the reservation policy being made

by a law. We are not pronouncing on the reservation policy which is embedded in Section 47 of the Act. Section 47 of the Act is not challenged

before us. Section 47 of the Act will, therefore, apply in its own sphere. Nothing turns in these cases, on the provisions of Section 47 of the Act, in

our view. At any rate, we do not see how the Government can seek support on the basis of the provisions of Section 47 of the Act. Incidentally,

we may observe that in paragraph 4 of the Counter Affidavit filed by the Government in W.P.(C). No. 12323/12, it is, inter alia, stated as follows:

4. At the outset itself it is submitted that, the Writ Petitioner has not approached Government for issuance of no objection Certificate. This may to

be avoid the conditions that may be stipulated by the Government at the time of issuance of NOC regarding sharing of 50% seats and execution of

agreement with the Government. Government issues No Objection Certificate to institutions desirous to start courses brought under the purview of

Kerala University of Health Sciences after conducting inspection to ensure that norms and standards set for the course by State or Central

Councils are strictly adhered to and to ensure quality in education. Government have issued Circular No. 25538/S3/2010/H&FWD dated

22.11.2010 (Ext. P14) considering this and also to give opportunity to students of low income groups in self financing institutions like petitioner

institution. To ensure the latter, Government mandates the institutions to enter into an agreement regarding seat sharing (50% of the sanctioned

number of seats to Government) and fee structure. It appears that the petitioner institution is not willing to share 50% of the total seats sanctioned

to them by the AICTE for admitting students from the merit list prepared by the Government or such other body entrusted by the Government.

Writ Petitioner is also not willing to follow the fee fixed by the Government in those seat set apart for the Government.

Therefore, it appears to be clear that the purport of the Government by issuing the Circular is to compel the colleges to agree for seat sharing and

fixation of fees for which, support cannot be drawn from Section 47 of the Act.

18. As far as Section 14 of the Professional Colleges Act is concerned, we are of the view that no support can be derived from the said Section.

Section 14 of the Professional Colleges Act, in fact, provides with power to the government to issue direction to the colleges or institutions for the

purpose of carrying out the purpose of the Professional Colleges Act or to give effect to the provisions contained in the Rules. Incidentally, we may

notice that Section 10 of the Professional Colleges Act provided for allotment of seats. It is not in dispute that the said provision came to be

declared as unconstitutional by this Court in Lissy Institution v. State of Kerala (2007 (1) KLT 409). We may notice that we cannot possibly hold

that the Circular is a direction to the colleges for the purpose of carrying out the Act. It is in fact a Circular addressed to the University. We may

further notice that in the absence of Section 10 as things stand, (we are told that an Appeal is pending before the Apex Court from the Judgment in

Lissy Institution''s case), it cannot be said to be issued for enforcing Section 10. No doubt, we may notice the principle which has been enunciated

by the Apex Court in a catena of decisions including Mysore State Road Transport Corporation Vs. Gopinath Gundachar Char, . We would refer

to the Judgment of the Apex Court in V. Balasubramaniam and Others Vs. Tamil Nadu Housing Board and Others, . Therein, the question arose

in the context of the promotion given by a statutory board on the strength of the norms which it had adopted which fell short of the statutory

requirement of publication in the gazette. The Court, inter alia, held as follows:

Even in the case of persons holding the civil posts in the Government this Court has held that notwithstanding the provisions of Art. 309 of the

Constitution, the State Government had the executive power in relation to all matters with respect to which the legislature of the State had power to

make laws and the absence of any such law made under Art. 309 of the Constitution or the rules made under the proviso thereto, the State

Government could make valid appointments in exercise of its executive powers (vide B.N. Nagarajan and Others Vs. State of Mysore and

Others,). The power of the Board under S.16 of the Act is similar to the power exercisable by a State Government under Art. 162 of the

Constitution as regards appointment to State Public Services is concerned and that power could be exercised by the Board in accordance with its

own resolution which in this case had received the approval of the State Government until appropriate regulations were published by it in

accordance with S.161 of the Act.

The Apex Court did not decide the issue as such as to whether the non publication rendered the regulations relating to promotion ineffective. But,

the Court took the view that the Board had the power to make the appointments. The said view has been followed by the Apex Court in The

Meghalaya State Electricity Board and Another Vs. Shri Jagadindra Arjun, . Actually, the principle enunciated by the Apex Court is traceable to

the concept of interpreting the powers of a statutory body with reference to the statute which governs its creation and its powers. When confronted

with this Judgment, the learned senior counsel for the petitioners would submit that in place of the Board or the statutory Corporation which was

considered by the Apex Court, we may substitute the University. The University may have all the powers which are necessary for carrying on its

functions under the Act. But, it will not result in conferment of power with the State which, according to him, is an external body to determine that

NOC must be obtained from it before the University could exercise its powers. We do not think that the respondents can rely on the statutory

provisions.

19. We may now revert back to the principal and the first question which arises is whether we should grant relief to the petitioners on the basis of

the principle enunciated in Jaya Gokul"s case. Undoubtedly, the Courses which are the subject matter of dispute in these cases, are the Courses of

M. Pharm. As far as M. Pharm is concerned, the matter is admittedly governed by the provisions of the AICTE Act. The said Act is a law made

by Parliament which is in the exercise of its law making power under Entry 66 of List 1 of VIIth Schedule. The question which fell for consideration

and which was considered by the Apex Court in Jaya Gokul''s case also related to a Statute made in the exercise of Entry 66. We have already

extracted and referred to the decision of the Apex Court in Jaya Gokul''s case. Therein, the Apex Court has, inter alia, held that even if there was a

State law in the State of Kerala which required the approval of the State Government for establishing an educational institution, such a law would

be repugnant to the AICTE Act and void to that extent. We may further notice that the Court was also dealing with a case where affiliation was

sought. The party had, no doubt, sought permission of the Government which was refused. The affiliation process was going on. It was held that

the concerned Act only contemplated getting the views of the Government. The Court held that this could not be characterised as requiring the

approval of the State Government. More importantly, the Apex Court further held that indeed if the University Statute could be so interpreted,

such a provision requiring approval of the State Government would be repugnant to the provisions of Section 10(k) of the AICTE Act and is void.

Only the views were to be obtained and that if the Act required approval, it would be repugnant to the AICTE Act.

20. What is done under the impugned Circular is to, no doubt, require of the University that it need not give affiliation unless the institutions

obtained the No Objection Certificate from the State Government. This means that even in respect of institutions which are otherwise governed by

a Statute made under Entry 66, affiliation is to be refused unless and until the no objection of the Government is procured. The No Objection

Certificate itself, no doubt, in turn is to be withheld unless the college agrees to abide by the conditions regarding admission and fees structure and

execution of an agreement in this regard. As to what is to be the nature of the condition regarding admission, we would think that the vagueness of

the Circular is supplied by the clarity with which it is adverted to in the Counter Affidavit. That is to say, what is contemplated is that the colleges

must surrender fifty per cent of the seats to the Government or share fifty per cent of the seats.

21. There is a challenge raised by the learned senior counsel for the petitioners regarding the very conditions in the Circular and he contends that

there can be no seat sharing and the Government cannot fix the fees as it has been categorically held to be unconstitutional being a negation of

Article 19(i)(g) and also an infraction of Article 30 of the Constitution. Cross-subsidising is impermissible, he contends.

22. We have already adverted to paragraphs 124 and 145 of Inamdhar"s case. Learned counsel for the respondents on the other hand would

point out that the petitioners cannot claim the benefit of Article 19(i)(g). This is for the reason that Article 19(i) (g) speaks about fundamental

freedom which is available only to a citizen. Accordingly, the petitioners cannot claim as citizens. They would also draw our attention to the fact

that by a catena of decisions of the Apex Court, it is now well settled that even a minority institution under Article 30 cannot claim any fundamental

right to affiliation as distinguished from the establishment.

23. Learned senior counsel for the petitioners would submit that W.P.(C). No. 12323/12 is certainly entitled to the benefit under Article 30 and in

paragraph 125 of Inamdhar"s case (supra), the Apex Court has held that any direction for seat sharing would amount to nationalisation of seats

and it will amount to violation of Article 30 as it cannot be treated as a reasonable regulation. He would further submit that while it is true that the

Apex Court has held that there is no fundamental right to affiliation, he would submit that the Apex Court has also dwelt on the conditions which

may be imposed for the grant of affiliation which are in conformity with Article 30 and conditions which would occasion violation of Article 30. In

this regard, he would draw our attention to paragraph 121 of the Inamdar"s case, which reads as follows:

121. Affiliation or recognition by the State or the Board or the university competent to do so, cannot be denied solely on the ground that the

institution is a minority educational institution. However, the urge or need for affiliation or recognition brings in the concept of regulation by way of

laying down conditions consistent with the requirement of ensuring merit, excellence of education and preventing maladministration. For example,

provisions can be made indicating the quality of the teachers by prescribing the minimum qualifications that they must possess and the courses of

studies and curricula. The existence of infrastructure sufficient for its growth can be stipulated as a prerequisite to the grant of recognition of

affiliation. However, there cannot be interference in the day-to-day administration. The essential ingredients of the management, including admission

of students, recruiting of staff and the quantum of fee to be charged, cannot be regulated.

The said paragraph, no doubt, deals with the affiliation of minority institutions. It gives the impression that minority institutions can seek freedom

from regulation in the matter of admission of students and the fees to be charged. But, then, learned counsel for the University as also the learned

Government Pleader would point out that in other paragraphs of the Judgment, there are observations which would show that the observations

made in paragraph 121 should not be read in isolation. They would point out that they are all following the direction in the Islamic''s case and

Committees have been set up both in regard to the supervision of admission and also for regulation of fees (to prevent profiteering and also

charging of capitation fees). Therefore, both admission and collection of fees can be the subject matter of regulation, even in respect of minority

institutions, runs the argument of the learned counsel for the respondents.

24. There is also a case for the learned senior counsel for the petitioners that the State cannot exercise executive powers if a right under Article 19

is involved, as executive powers are anathema in an area where the right is under Article 19 (See the decision in the National Anthem''s case (

Bijoe Emmanuel and Others Vs. State of Kerala and Others, . In fact, learned counsel for the University fairly brings to our notice the decision of

the Apex Court taking similar view in State of Bihar and Others Vs. Project Uchcha Vidya, Sikshak Sangh and Others, . It is beyond the scope of

any doubt that if the right under Article 19 is to be encroached upon by way of reasonable restriction on the fundamental right, it can be achieved

only by a law and the word ""law"" as it stands interpreted, will not embrace within its scope an executive instruction, be it one made under Article

162 of the Constitution.

25. Here, we may also notice the Judgment of the Apex Court which is brought to our notice by Dharam Dutt and Others Vs. Union of India

(UOI) and Others, . Therein, the Apex Court held that Article 19 can be invoked only by citizens of India. That apart, the court also elucidated the

various aspects of Article 19.

36. Article 19 confers fundamental rights on citizens. The rights conferred by Article 19(1) are not available to and cannot be claimed by any

person who is not and cannot be a citizen of India. A statutory right - as distinguished from a fundamental right - conferred on persons or citizens is

capable of being deprived of or taken away by legislation. The fundamental rights cannot be taken away by any legislation: a legislation can only

impose reasonable restrictions on the exercise of the right. Out of the several rights enumerated in clause (1) of Article 19, the right at sub-clause

(a) is not merely a right of speech and expression but a right to freedom of speech and expression. The enumeration of other rights is not by

reference to freedom. In the words of the then Chief Justice Patanjali Sastri in State of W.B. v. Subodh Gopal Bose these rights are great and

basic rights which are recognized and guaranteed as the natural rights, inherent in the status of a citizen of a free country. Yet, there cannot be any

liberty absolute in nature and uncontrolled in operation so as to confer a right wholly free from restraint. Had there been no restraints, the rights and

freedoms may tend to become the synonyms of anarchy and disorder. The founding fathers of the Constitution, therefore, conditioned the

enumerated rights and freedoms reasonably and such reasonable restrictions are found to be enumerated in clause (2) to (6) of Article 19

excepting for sub-clauses (i) and (ii) of clause (6), the laws falling within which descriptions are immune from attack on the exercise of legislative

power within their ambit.

37. The Court, confronted with a challenge to the constitutional validity of any legislative enactment by reference to Article 19 of the Constitution,

shall first ask what is the sweep of the fundamental right guaranteed by the relevant sub-clause out of sub clauses (a) to (g) of clause (1). If the right

canvassed falls within the sweep and expanse of any of the sub-clauses of clause (1), then the next question to be asked would be, whether the

impugned law imposes a reasonable restriction falling within the scope of clauses (2) to (6) respectively. However, if the right sought to be

canvassed does not fall within the sweep of the fundamental rights but is a mere concomitant or adjunct or expansion or incidence of that right, then

the validity thereof is not to be tested by reference to clauses (2) to (6). The test which it would be required to satisfy for its constitutional validity is

one of reasonableness, as propounded in the case of V.G Row, or if it comes into conflict with any other provision of the Constitution.

(Emphasis supplied)

26. Apparently, the attempt of the learned counsel for the University and the Government would be to establish that while there might be a

fundamental right to carry on a profession or an occupation, the fundamental right would not take within its scope the right to get affiliation and the

subject matter of the Circular is affiliation.

27. We have noticed that the Apex Court in Jaya Gokul''s case, relied on the decision in State of T.N. and Another Vs. Adhiyaman Educational

and Research Institute and Others, . We may indicate as to how the Apex Court has revisited the decision in State of T.N. and Another Vs.

Adhiyaman Educational and Research Institute and Others, . In State of T.N. and Another Vs. Adhiyaman Educational and Research Institute and

Others, , the Apex Court was dealing with a case under the All India Council for Technical Education Act, 1987 (AICTE Act). A Bench of two

Judges, inter alia, took the view that the AICTE Act (Central Act) is fairly within the scope of Enty 66 of List I and Entry 25 of List III. The Court

further held that on the subjects covered by this Statute, the State could not make a law under Entry 11 of List II prior to the 42nd amendment,

nor could make a law under Entry 25 of List III after the 42nd amendment. The Court also, inter alia, held as follows:

The contention that while it may be open for the Council to lay down the minimum standards and requirements, to achieve the object as mentioned

in Entry 66, it does not debar the State from prescribing higher standards and requirements while making a law under Entry 25 of List III cannot be

accepted. So far as technical institutions are concerned, the norms and standards and the requirements for their recognition and affiliation

respectively that the State Government and the University may lay down, cannot be higher than or be in conflict and inconsistent with those laid

down by the Council under the Central Act. Unnecessarily high norms or standards, say for admission to the educational institutions or to pass the

examinations, may not only deprive a vast majority of the people of the benefit of the education and the qualification, but would also result in

concentrating technical education in the hands of the affluent and elite few and in depriving the country of a large number of otherwise deserving

technical personnel. As the whole object of the Central Act is to determine and coordinate the standards of technical education throughout the

country, to integrate its development and to maintain certain standard in such education, such norms, standards and requirements etc. will have to

be uniform throughout the country.

28. In Dr Preeti Srivastava and Another Vs. State of M.P. and Others, , a Constitution Bench had occasion to consider the matter. The question

which was considered was whether apart from providing reservation for admission to the Postgraduate courses in Engineering and Medicine for

special category candidates, is it open to the State to prescribe different admission criteria, in the sense of prescribing different minimum qualifying

marks, for special category candidates seeking admission under the reserved category. The Apex Court proceeded to hold that it is open to the

State to provide for higher marks (higher than what was prescribed by the authority under a law made under Entry 66). The Apex Court

proceeded to hold as follows:

In view of Entry 25 of List III of the Seventh Schedule to the Constitution, both the Union as well as the States have the power to legislate on

education including medical education, subject, inter alia, to Entry 66 of List I which deals with laying down standards in institutions for higher

education or research and scientific and technical institutions as also coordination of such standards. A State has, therefore, the right to control

education including medical education so long as the field is not occupied by any Union legislation. Secondly, the State cannot, while controlling

education in the State, impinge on standards in institutions for higher education, because this is exclusively within the purview of the Union

Government. Therefore, while prescribing the criteria for admission to the institutions for higher education including higher medical admission, the

State cannot adversely affect the standards laid down by the Union of India under Entry 66 of List 1. Secondly, from 1977, education, including,

inter alia, medical and university education, is now in the Concurrent List so that the Union can legislate on admission criteria also. If it does so, the

State will not be able to legislate in this field, except as provided in Article 254.

It would not be correct to say that the norms for admission have no connection with the standards of education, or that the rules for admission are

covered only by Entry 25 of List III. Norms of admission can have a direct impact on the standards of education. Of course, there can be rules for

admission which are consistent with or do not affect adversely the standards of education prescribed by the Union in exercise of powers under

Entry 66 of List I. For example, a State may, for admission to the postgraduate medical courses, lay down qualifications in addition to those

prescribed under Entry 66 of List I. This would be consistent with promoting higher standards for admission to the higher educational courses. But,

any lowering of the norms laid down can and does have an adverse effect on the standards of education in the institutes of higher education.

Standards of education in an institution or college depend on various factors.

In State of Tamil Nadu and Another Vs. S.V. Bratheep (Minor) and Others, , a Bench of three learned Judges proceeded to refer to Adhiyaman''s

case (supra). Therein, Writ Petitions were filed seeking to quash orders of the Higher Education Department in so far as they directed the

appellants to consider their admission without reference to the minimum eligible marks prescribed by the appellants. The learned Single Judge held

that the prescription of qualifications or prescription of the minimum eligible marks for SC/ST candidates as mere pass, most backward at 50%

average marks in the related subjects, backward at 55% average marks in the related subjects and other classes at 60% average marks in the

related subjects, would not be in conflict with the Regulations of the AICTE. The Division Bench took a different view from that of the learned

Single Judge who dismissed the Writ Petition. The Apex Court proceeded to refer also to Dr Preeti Srivastava and Another Vs. State of M.P. and

Others, and held as follows:

Entry 25 of List III and Entry 66 of List I have to be read together and it cannot be read in such a manner as to form an exclusivity in the matter of

admission. If certain prescription of standards have been made pursuant to Entry 66 of List I, then those standards will prevail over the standards

fixed by the State in exercise of powers under Entry 25 of List III in so far as they adversely affect the standards laid down by the Union of India

or any other authority functioning under it. But if higher minimum is prescribed by the State Government than what had been prescribed by AICTE,

it cannot be said that it is in any manner adverse to the standards fixed by AICTE or reduces the standard fixed by it. It is, therefore, permissible

for the State Government to prescribe higher qualifications for purposes of admission to the engineering colleges than what had been prescribed by

AICTE.

If it is considered that the norms fixed by AICTE would allow admission only on the basis of the marks obtained in the qualifying examination, then

the additional test made applicable is the common entrance test by the State Government. If the standard fixed by AICTE is considered to be the

common entrance test, then the prescription made by the State Government of having obtained certain marks higher than the minimum in the

qualifying examination in order to be eligible to participate in the common entrance test is in addition to the common entrance test. In either event,

the streams proposed by AICTE are not belittled in any manner. What had been prescribed by the State is not contrary to but only complementary

or supplementary to what had been prescribed by AICTE. The manner in which the High Court has proceeded is that what has been prescribed

by AICTE is inexorable and that, that minimum alone should be taken into consideration and no other standard could be fixed even the higher.

The standards fixed should, however, always be realistic which are attainable and are within the reach of the candidates. It cannot be said that the

prescriptions by the State Government in addition to those of AICTE in the present case are such which are not attainable or which are not within

the reach of the candidates who seek admission for engineering colleges. It is not a very high percentage of marks that has been prescribed as

minimum of 60% downwards, but definitely higher than the mere pass marks.

Excellence in higher education is always insisted upon by a series of decisions of the Supreme Court. If higher minimum marks have been

prescribed, it would certainly add to the excellence in the matter of admission of the students in higher education. The State can always fix a further

qualification or additional qualification to what has been prescribed by AICTE even though there may be situations when a large number of seats

may fall vacant on account of the higher standards fixed. The mere fact that there are vacancies in the colleges would not be a matter which would

go into the question of fixing the standard of education. Therefore, it is difficult to subscribe to the view that once they are qualified under the

criteria fixed by AICTE they should be admitted even if they fall short of the criteria prescribed by the State.

We may, however, take note of paragraph 11 which reads as follows:

11. The argument advanced on behalf of the respondents is that these matters are indeed governed by the decision in Islamic Academy of

Education v. State of Karnataka and T.M.A. Pai Foundation v. State of Karnataka. In fact this Court did not consider the question that has arisen

for our consideration in the present case, but was dealing with an entirely different issue in relation to fee structure of minority and non-minority

educational institutions and whether private unaided professional colleges are entitled to fill their seats to the full extent by their own method of

admission. That is not the issue before us at all. Therefore, no reliance could be placed by the respondents on the decisions either in T.M.A. Pai

Foundation or Islamic Academy case.

(Emphasis supplied)

Again, the Apex Court had occasion to consider the question in its decision in Bharati Vidyapeeth [Deemed University] and Others Vs. State of

Maharashtra and Another, where the Court was dealing with a case of the appellant therein which established a Society which had established

several Colleges and it stood affiliated to the University. It applied to the AICTE for treating the society as a deemed University. The Government

recommended. The Central Government declared it as a deemed University. Admissions were made by it as deemed University. Then, the

appellant filed Writ Petition challenging the admission rules by which the colleges were included in the admissions proposed to be controlled by the

CET authority. This was challenged by the appellant in the High Court which dismissed the Writ Petition. It was against the same that the Appeal

was filed. Therein, the Apex Court held, inter alia, as follows:

11. The expression ""coordination"" has been explained by this Court in more than one decision. Firstly, in Gujarat University v. Krishna Ranganath

Mudholkar and recently in State of T.N. v. Adhiyaman Educational & Research Institute. In these two decisions it is stated that the expression

coordination"" used in Entry 66 of List I of the Seventh Schedule to the Constitution does not merely mean evaluation. It means harmonisation with

a view to forge a uniform pattern for a concerted action according to a certain design, scheme or plan of development. It, therefore, includes action

not only for removal of disparities in standards but also for preventing the occurrence of such disparities. It will include power to do all things,

which are necessary to prevent what would make ""coordination"" either impossible or difficult. This power is absolute and unconditional and in the

absence of any valid compelling reasons, it must be given its full effect according to its plain and express intention.

Thereafter, the Court proceeded to refer to Preethy''s case and held as follows:

16. It is now settled position in law that within the concepts of coordination and determination of standards in institutions for higher education or

research and scientific and technical institutions, the entire gamut of admission will fall. Therefore, if any aspect of admission of students in colleges

would fall within Entry 66, it necessarily stands excluded as has been held in Gujarat University case. After examining the power of the State to

prescribe medium of instruction in institutions for higher education, it is stated in that decision as follows: (AIR p.715, para 23):

Item 25 of the Concurrent List confers power upon the Union Parliament and the State Legislatures to enact legislation with respect to `vocational

and technical training of labour''. It is manifest that the extensive power vested in the Provincial Legislatures to legislate with respect to higher,

scientific and technical education and vocational and technical training of labour, under the Government of India Act is under the Constitution

controlled by the five items in List I and List III mentioned in Item 11 of List II. Items 63 to 66 of List I are carved out of the subject of education

and in respect of these items the power to legislate is vested exclusively in Parliament.

17. If the power to legislate regard to those aspects are entirely carved out of the subject of education and vested in Parliament even at a time

when ""education"" fell under List II, we find no reason now not to accept the arguments advanced on behalf of the appellant that once an institution

comes within the scope of Entry 66 of List I, it falls outside the control of the provisions of Entry 25 of List III.

19. Therefore, the State could not have enacted any legislation in that regard. If that is so, neither in exercise of executive power under Article 162

of the Constitution which extends only to the extent of legislative power nor in respect of power arising under the Maharashtra Universities Act,

such rules could have been prescribed. To the extent the High Court holds to the contrary, we set aside the order of the High Court.

20. At this stage, we must strike a note of caution in regard to institutions which are exclusively owned by the Government and in respect of

institutions which stand affiliated to the university or in respect of institutions to which either affiliation or grant is made. Such institutions may be

controlled to an extent by the State in regard to admission as a condition of affiliation or grant or owner of the institutions. But those conditions,

again if they are in respect of the institutions of higher education must apply the standard prescribed by the statutory authorities such as UGC,

Medical Council, Dental Council, AICTE, governed by Entry 66 of List I of the Constitution.

29. Learned counsel for the University would draw our attention to the observations made by the Court that such institutions may be controlled to

an extent by the State in regard to admission as a condition for affiliation. We will refer to that argument after we exhaust referring to the case law.

30. In State of Maharashtra Vs. Sant Dnyaneshwar Shikshan Shastra Mahavidyalaya and Others, , the Apex Court was dealing with a case under

the National Council for Teacher Education Act, 1993. Therein, the petitioner was a public trust. It decided to start a B. Ed. Course. An

application was made to the NCTE. After inspection, recognition was granted by the NCTE. The petitioner applied to the Government for

sanction. Government took a decision not to give any NOC. Under the Maharashtra University Act, a B. Ed. College could be opened only after

permission from the State Government. The petitioner filed a Writ Petition challenging the order declining permission. The Government challenged

the decision by the NCTE granting approval. The High Court allowed the Writ Petition filed by the petitioner trust. It was against the same that the

State went up in Appeal. There, the Apex Court proceeded to consider Articles 246 and Entries 63 to 66 of List I, the various provisions of the

NCTE Act including Section 14 which, inter alia, no doubt, in sub-section (6) thereof provided that every examining authority shall on receipt of an

order granting recognition grant affiliation. The Court thereafter referred to St. Johns Teachers Training Institute Vs. Regional Director, National

Council for Teacher Education and Another, wherein a regulation made under the NCTE Act providing for obtaining NOC of the State

Government, was upheld and proceeded to thereafter refer to Adhiyaman''s case. The Apex Court has, inter alia, held as follows:

57. Relying on Adhiyaman, it was observed that the so-called ""policy"" of the State Government as mentioned in the counter-affidavit filed by the

State, could not be made a ground for refusing approval. The Court held that ""essentiality certificate"" cannot be withheld by the State Government

on any ""policy consideration"" because the policy in the matter of establishment of a new college rested essentially with the Central Government.

58. The Court stated: (Jaya Gokul Educational Trust case, SCC p.246, para 27):

Therefore, the State could not have any `policy'' outside the AICTE Act and indeed if it had a policy, it should have placed the same before

AICTE and that too before the

latter granted permission. Once that procedure laid down in the AICTE Act and Regulations had been followed under Regulation 8(4), and the

Central Task Force had also given its favourable recommendations, there was no scope for any further objection or approval by the State. We

may however add that if thereafter, any fresh facts came to light after an approval was granted by AICTE or if the State felt that some conditions

attached to the permission and required by AICTE to be complied with, were not complied with, then the State Government could always write to

AICTE, to enable the latter to take appropriate action.

Thereafter, the Apex Court proceeded to hold as follows:

62. From the above decisions, in our judgment, the law appears to be very well settled. So far as coordination and determination of standards in

institutions for higher education or research, scientific and technical institutions are concerned, the subject is exclusively covered by Entry 66 of List

I of Schedule VII to the Constitution and the State has no power to encroach upon the legislative power of Parliament. It is only when the subject

is covered by Entry 25 of List III of Schedule VII to the Constitution that there is a concurrent power of Parliament as well as the State

Legislatures and appropriate Act can be made by the State Legislature subject to limitations and restrictions under the Constitution.

63. In the instant case, admittedly, Parliament has enacted the 1993 Act, which is in force. The preamble of the Act provides for establishment of

National Council for Teacher Education (NCTE) with a view to achieving planned and coordinated development of the teacher-education system

throughout the country, the regulation and proper maintenance of norms and standards in the teacher-education system and for matters connected

therewith. With a view to achieving that object, the National Council for Teacher Education has been established at four places by the Central

Government. It is thus clear that the field is fully and completely occupied by an Act of Parliament and covered by Entry 66 of List I of Schedule

VII. It is, therefore, not open to the State Legislature to encroach upon the said field. Parliament alone could have exercised the power by making

appropriate law. In the circumstances, it is not open to the State Government to refuse permission relying on a State Act or on ""policy

consideration"".

Thereafter, the Court, in fact, referred to Regulation 6 which required production of a No Objection Certificate from the State Government and

also held that there is power with the NCTE to deal with the matter even if there was no Objection Certificate produced from the Government. No

doubt, we may notice the argument of Shri P. Sreekumar that the Court was dealing with the provisions of the NCTE Act which in Section 14,

mandated that once approval is given by the Body constituted under the said Act, the University is bound to give recognition. In fact, the learned

counsel also would draw our attention to the Judgment of the Apex Court in Chairman, Bhartia Education Society and Another Vs. State of

Himachal Pradesh and Others, , wherein the Apex Court has, in fact, held, inter alia, as follows:

22. Sub-section (6) of Section 14 no doubt mandates every examining body to grant affiliation to the institution on receipt of the order of NCTE

granting recognition to such institution. This only means that recognition is a condition precedent for affiliation and that the examining body does not

have any discretion to refuse affiliation with reference to any of the factors which have been considered by NCTE while granting recognition. For

example, NCTE is required to satisfy itself about the adequate financial resources, accommodation, library, qualified staff, and laboratory required

for proper functioning of an institution for a course or training in teacher education. Therefore, when recognition is granted by NCTE, it is implied

that NCTE has satisfied itself on those aspects. Consequently, the examining body may not refuse affiliation on the ground that the institution does

not have adequate financial resources, accommodation, library, qualified staff, or laboratory required for proper functioning of the institution. But,

this does not mean that the examining body cannot require compliance with its own requirements in regard to eligibility of candidates for admission

to courses or manner of admission of students or other areas falling within the sphere of the State Government and/or the examining body. Even the

order of recognition dated 17-7-2000 issued by NCTE specifically contemplates the need for the institution to comply with and fulfill the

requirement of the affiliating body and the State Government, in addition to the conditions of NCTE.

24. The examining body can therefore impose its own requirements in regard to eligibility of students for admission to a course in addition to those

prescribed by NCTE. The State Government and the examining body may also regulate the manner of admissions. As a consequence, if there is

any irregularity in admissions or violation of the eligibility criteria prescribed by the examining body or any irregularity with reference to any of the

matters regulated and governed by the examining body, the examining body may cancel the affiliation irrespective of the fact that the institution

continues to enjoy the recognition of NCTE. Sub-section (6) of Section 14 cannot be interpreted in a manner so as to make the process of

affiliation, an automatic rubber-stamping consequent upon recognition, without any kind of discretion in the examining body to examine whether the

institution deserves affiliation or not, independent of the recognition. An institution requires the recognition of NCTE as well as affiliation with the

examining body, before it can offer a course or training in teacher education or admit students to such course or training. Be that as it may.

We may notice that the said Judgment was rendered by a Bench of two Judges. There is no reference to the decision of the Apex Court in State of

Maharashtra Vs. Sant Dnyaneshwar Shikshan Shastra Mahavidyalaya and Others, which we have referred to, which was rendered by a Bench of

three Judges. In the decision rendered by a Bench of three Judges, the Apex Court, inter alia, took the view that the field is fully and completely

occupied by the NCTE Act and it was held that it was not open to the State Legislature to encroach upon the said field.

We may further refer to the decision in Visveswaraya Technological University and Another Vs. Krishnendu Halder and Others, . Therein, a

Bench of two Judges of the Apex Court proceeded to reiterate the power with the Government/University in fixing higher standards. The Court

held in paragraph 10 as follows:

We may in this context refer to two subsequent decisions which have the effect of clarifying the decision in Adhiyaman.

Thereafter, the Court referred to Dr. Preethy"s case (supra) and also State of Tamil Nadu and Another Vs. S.V. Bratheep (Minor) and Others, .

The Court, inter alia, held as follows:

13. The object of the State or University fixing eligibility criteria higher than those fixed by AICTE, is twofold. The first and foremost is to maintain

excellence in higher education and ensure that there is no deterioration in the quality of candidates participating in professional engineering courses.

The second is to enable the State to shortlist the applicants for admission in an effective manner, when there are more applicants than available

seats. Once the power of the State and the examining body, to fix higher qualifications is recognised, the rules and regulations made by them

prescribing qualifications higher than the minimum suggested by AICTE, will be binding and will be applicable in the respective State, unless

AICTE itself subsequently modifies its norms by increasing the eligibility criteria beyond those fixed by the University and the State.

This was, no doubt, a Judgment rendered under the provisions of the AICTE Act.

31. Now let us examine, how the Apex Court has viewed the principle laid down in Jaya Gokul"s case in later decisions.

The first occasion for considering the decision in Jaya Gokul"s case was provided in the decision in Mata Gujri Memorial Medical College v. State

of Bihar And Others ((2009) 16 SCC 309). Even though the said decision, going by the year of the citation is 2009, we notice that actually the

decision was rendered on 12.12.2002. Therein, a Bench of two Judges was dealing with a case where the appellant, a trust which has set up a

Medical College having failed to obtain affiliation from the University, sought a writ to the Government of the State to grant approval to the

proposal for affiliation and also a direction to the University to grant affiliation. In the State of Bihar, under the Bihar State Universities Act 1976,

Section 21 dealt with the powers and the duties of the Senate. It, inter alia, provided that affiliation or disaffiliation of colleges shall not take effect

unless it is approved by the State Government. It was further provided that no Medical College shall be affiliated except with the prior approval of

the State Government. The Government was to consider financial viability of the college, the proposed management of the college, the viability of

the academic standard and all other conditions which are likely to have an adverse effect on the interest of the student admitted to such college.

The High Court took the view that the prior approval of the Government was necessary, and that the State Government had rightly refused

approval, and dismissed the Writ Petition. The Medical Council of India came to be impleaded before the Apex Court. The appellant drew

support from the decision in Jaya Gokul''s case. The Court, inter alia, held as follows:

5. In the matter of medical education in the country, the India Medical Council, 1956 has been enacted by Parliament and it is for obtaining greater

efficiency in the medical education throughout the country. The said Medical Council, before granting permission for recognition of any medical

institution, is required to inspect the intending applicants for establishment of the new medical college or even new course of study in any medical

college under the regulation framed in the Act called the Establishment of Medical Regulation Act, 1999. A detailed procedure has been indicated

and the procedure prescribed therein covers the entire gamut including the very three indicia which were required to be gone into by the State

Government under the second proviso to Section 21 of the Bihar State Universities Act. Having regard to the purpose for which the Indian

Medical Council Act, 1956 has been enacted and looking at the procedure adopted by the said Council before granting the permission in question

as engrafted in the regulation referred to earlier, it would be difficult for us to hold that notwithstanding those stringent provisions and stringent

requirements being complied with and the Medical Council on being satisfied, yet the State Government has its say in the matter of affiliation of the

institution to the University in exercise of its powers under the second proviso to Section 21 of the Act.

6. Be it stated that in the case in hand there are materials on record to indicate that both the Medical Council as well as the Central Government

had held due inspection of the appellant Institution and were fully satisfied about the capability of the Institution to impart MBBS course for 60

students annually. After having examined the aforesaid materials on record, we really faila to understand how the State Government can prevent

the grant of affiliation to the Institution in question. Mr. B.B. Singh, learned counsel appearing for the State in the course of his arguments has

contended that the Institution may deteriorate either in its management amounting to maladministration or even with regard to taking appropriate

steps (sic) so far for academic and curricular activities and, therefore, the State cannot be denuded of its power even to derecognise/deaffiliate the

said Institution. Such a situation had been considered by this Court in the second case i.e. Jaya Gokul and it was observed that if, on account of

fresh facts which come to light after the Institution receives affiliation to the University on the basis of recommendations made by MCI or any

capable body, the State Government can always bring that to the notice of the competent authority and the power of the competent authority to

derecognise or deaffiliate is always there in a given case. This being the position and in view of the subsequent events which have happened in the

case in hand, while the matter was pending in this Court, in relation to the so-called inspection and recommendations made by MCI as well as by

the Central Government, we direct that the appropriate authority, namely, the University may grant permanent affiliation to the Institution which has

not been granted so far because of the pendency of the matter in this Court. The affiliation would necessarily be in relation to the intake capacity as

recommended and approved by MCI. This appeal stands disposed of accordingly.

In I.I.T.T. College of Engineering Vs. State of H.P. and Others, , the Apex Court was called upon to pronounce on the legality of the direction

issued by the High Court to check mal-administration which had the effect of depriving the management of the private body which had established

the institution. The High Court had issued an order appointing an Administrator to manage the affairs of the college. The attention of the Court was

drawn to Jaya Gokul''s case (supra) to the effect that the University should not have withheld the affiliation in spite of the approval given earlier by

the AICTE. But, the Court did not consider the matter in view of the stand taken by the AICTE and the approval/affiliation given by the AICTE as

well as the University during the tenure of the Administrator for Courses other than I. T. In Government of Andhra Pradesh and Another v.

Medwin Educational Society and Others (AIR 2004 SC 613) a Bench of two Judges of the Supreme Court was dealing with a case under the

Medical Council of India Act. The Full Bench of the High Court, relying on the decisions of the Court in Jaya Gokul''s case and another, took the

view that the State could not withhold the essentiality certificate on any policy consideration, as the policy in the matter of establishment of a new

Medical College now rests with the Central Government alone. The Apex Court noted that there is no abdication of parliamentary powers in

favour of the State, and that the State has a positive role in the selection of the location, that an essentiality certificate to set up a Medical College at

the proposed site, is required to be obtained in Form 2 appended to the Regulations made under the Medical Council of India Act. The Form 2

lays down the conditions as to how the establishment of the College would resolve the problem of deficiency of qualified medical personnel in the

State and improve the availability of such medical man-power in the State and full justification for opening of the proposed College. The Court

after an exhaustive review of the case law, found that the High Court was in error in taking the view that the State has no role to play in the matter

of identification of the location of the sites where the Medical Colleges are proposed to be established. No doubt, a final decision was to be taken

by the Central Government. The Court highlighted the importance of appreciating the local needs. In this context, it is necessary to bear in mind the

facts which led to the said principles being laid down. The Government of Andhra Pradesh approved certain locations for establishment of Medical

and Dental Colleges. This was on the basis of the recommendations of a Committee. This was challenged in a large number of Writ Petitions. The

Writ Petitions were allowed. Therefore, the said decision turned on the provisions contained in the Regulations made under the concerned Central

Legislation which contemplated a role for the State Government by insisting upon an essentiality certificate.

32. We further find that the Apex Court had referred to the decision in Jaya Gokul"s case in its decision in Govt. of A.P. and Another Vs. J.B.

Educational Society and Another etc., . The writ petitioners before the High Court were Educational Institutions. They wanted to establish

Engineering Colleges in the State. Approval was granted to them for the academic year 1997 - 1998 by the AICTE Council. They made

applications u/s 20 of the Andhra Pradesh Education Act, 1982 for permission to establish the Institution. The permission was rejected on the

ground that the permission was sought in respect of places where there were number of colleges and the State Government was not satisfied about

the educational needs of that locality. It was the said decision which was successfully questioned before a Division Bench of the Andhra Pradesh

High Court. The Andhra Pradesh Act had received the assent of the President. Section 20, inter alia, contemplated the issuance of the Notification

by the competent authority after a survey to identify the educational needs, calling for applications for establishment of Educational Institutions. The

said Section also contemplated the educational agencies satisfying the authority that there is a need for providing educational facilities to the people

in the locality. The Section further provided that no educational institution could be established except in accordance with the provisions of the Act.

The Apex Court referred to the provisions of the AICTE Act, Entry 25 of the Concurrent List, and held as follows:

7. The petitioners in the Writ Petitions contended that in view of Section 10 of the AICTE Act, no permission of the State Government u/s 20 of

the Act was required as the field is completely covered by the AICTE Act. It was argued that once the approval was granted by the Council, the

State Government cannot refuse permission on the ground that the proposed educational institution may not subserve the educational needs of the

locality. The learned Counsel for the State, on the other hand, contended that Section 20 of the AP Act and Section 10 of the AICTE Act operate

in different fields, there is no conflict between these provisions and that they are not repugnant to each other and the decision of the Division Bench

is erroneous. It was also contended by the appellant''s Counsel that the State Legislature has legislative competence to pass the enactment and

that, in view of Entry 25 of the Concurrent List, the State alone would be competent to say whether an institution should be established in an area

to serve the educational needs of that locality.

9. There is no doubt that both Parliament and the State legislature are supreme in their respective assigned fields. It is the duty of the Court to

interpret the legislations made by the Parliament and the State legislature in such a manner as to avoid any conflict. However, if the conflict is

unavoidable, and the two enactments are irreconcilable, then by the force of the non-obstante clause in Clause (1) of Article 246, the

Parliamentary legislation would prevail notwithstanding the exclusive power of the State legislature to make a law with respect to a matter

enumerated in the State List.

12. It is in this background that the provisions contained in the two legislative enactments have to be scrutinised. The provisions of the AICTE Act

are intended to improve the technical education and the various authorities under the Act have been given exclusive responsibility to co-ordinate

and determine the standards of higher education. It is a general power given to evaluate, harmonise and secure proper relationship to any project

of national importance. Such a co-ordinate action in higher education with proper standard is of paramount importance to national progress.

Section 20 of the AP Act does not in any way encroach upon the powers of the authorities under the Central Act. Section 20 says that the

competent authority shall, from time to time, conduct a survey to identify the educational needs of the locality under its jurisdiction notified through

the local newspapers calling for applications from the educational agencies. Section 20(3)(a)(i) says that before permission is granted, the authority

concerned must be satisfied that there is need for providing educational facilities to the people in the locality. The State authorities alone can decide

about the educational facilities and needs of the locality. If there are more colleges in a particular area, the State would not be justified in granting

permission to one more college in that locality. Entry 25 of the Concurrent List gives power to the State Legislature to make laws regarding

education, including technical education. Of course, this is subject to the provisions of Entries 63, 64, 65 and 66 of List I. Entry 66 of List I to

which the legislative source is traced for the AICTE Act deals with the general power of the Parliament for co-ordination, determination of

standards in institutions for higher education or research and scientific and technical educational institutions and Entry 65 deals with the union

agencies and institutions for professional, vocational and technical training, including the training of police officers, etc. The State has certainly the

legislative competence to pass the legislation in respect of education including technical education and Section 20 of the Act is intended for general

welfare of the citizens of the State and also in discharge of the constitutional duty enumerated under Article 41 of the Constitution.

(Emphasis supplied)

The Court further held as follows:

13. The general survey in various fields of technical education contemplated u/s 10 (1)(a) of the AICTE Act is not pertaining to the educational

needs of any particular area in a State. It is a general supervisory survey to be conducted by the AICTE Council, for example, if any IIT is to be

established in a particular region, a general survey could be conducted and the Council can very much conduct a survey regarding the location of

that institution and collect data of all related matters. But as regards whether a particular educational institution is to be established in a particular

area in a State, the State alone would be competent to say as to where that institution should be established. Section 20 of the AP Act and Section

10 of the Central Act operate in different fields and we do not see any repugnancy between the two provisions.

19. In Jaya Gokul Educational Trust Vs. The Commissioner and Secretary to Government Higher Education Department, Thiruvananthapuram,

Kerala State and Another, , and in Government of Andhra Pradesh and Another Vs. Medwin Educational Society and Others, , similar views

were expressed by this Court.

20. The educational needs of the locality are to be ascertained and determined by the State. Having regard to the regulations framed under the

AICTE Act, the representatives of the State have to be included in the ultimate decision making process and having regard to the provisions of the

Act, the Writ Petitioners would not in any way be prejudiced by such provisions in the A.P. Act. Moreover, the decision, if any, taken by the State

authorities u/s 20(3)(a)(i) would be subject to judicial review and we do not think that the State could make any irrational decision about granting

permission. way repugnant to Section 10 of AICTE Act and it is constitutionally valid.

(Emphasis supplied)

33. The last decision where there is reference to Jaya Gokul''s case, is State of Maharashtra Vs. Sant Dnyaneshwar Shikshan Shastra

Mahavidyalaya and Others, . We have already referred to the said decision. We need only say that therein, no doubt, the case arose under the

NCTE Act which, in Section 14, mandates that once approval is granted by the Body, the University is bound to give approval. In the said

decision, the Court had referred to Jaya Gokul''s case. The Court, inter alia, held as follows:

64. Even otherwise, in our opinion, the High Court was fully justified in negativing the argument of the State Government that permission could be

refused by the State Government on ''''police consideration''''. As already observed earlier, policy consideration was negatived by this Court in

Thirumuruga Kirupananda Trust as also in Jaya Gokul Educational Trust.

Jaya Gokul''s case was rendered by a Bench of two Judges. In case of conflict between two Judgments rendered by Benches of equal strength, it

is the later which will prevail in case of conflict between the two (See the decision in Raman Gopi v. Kunju Raman Uthaman (2011 (4) KLT 458

FB). Learned Government Pleader would also rely on the Judgment of the Apex Court in Vijay Kumar Sharma and others Vs. State of Karnataka

and others, in support of his argument that actually there is no repugnancy between the provisions contained in the AICTE Act and Circular. He

would submit that the decision in Jaya Gokul''s case, is not attracted to a situation wherein the Government provides for securing of its No

Objection Certificate. In the decision in Jaya Gokul''s case, it is submitted that what was required by the Statute was obtaining the views of the

Government by the University before it granted affiliation and all that the Apex Court held was that if the said provision was interpreted to mean

that Government must give its approval, then such a statutory provision would be void. Here, it is not approval, but a No Objection Certificate, it is

contended.

34. Learned senior counsel for the petitioners when confronted with the Judgment in Govt. of A.P. and Another Vs. J.B. Educational Society and

Another etc., , would submit that it may be that in Jaya Gokul''s case, the Apex Court has declared the principle of repugnancy in a general or

wide manner. It may also be that in the later decision, the Apex Court was dealing with a Statute providing for permission from the State

Government before starting an educational institution on the basis that the State was best equipped to appreciate the local needs. He would submit

that the principle, however, which is treated as enunciated in Jaya Gokul''s case that once there is approval under the AICTE Act, it is not open to

the State to mandate its approval as a condition for the University granting affiliation, must still hold good.

35. This is a case where the petitioners have obtained approval for the conduct of Courses in M. Pharm from the statutory authority acting under a

law made by the Parliament, traceable to Entry 66 of List I of the Constitution. On the one hand, the Apex Court has held, as already referred to in

Inamdar''s case, that the State cannot compel an unaided educational institution to share seats with it or provide for reservation. Equally, it was

held impermissible for the Government to regulate the fees. No doubt, the Apex Court in Inamdar''s case, has clarified that it will always be open

to the institution concerned, voluntarily to enter into a seat sharing agreement with the Government. But, no State can compel any unaided

educational institution to share the seats with it. Be it a minority institution or a non-minority institution, they have the right to admit students to the

college. Quite clearly, it is one of the most important right which an unaided institution has, namely to admit students. But, the unaided institutions

are bound to have a fair and transparent method of selecting students. The methods have been indicated in the decisions of the Apex Court. At any

rate, there cannot be any compulsion to share seats. As far as the dictum in Inamdar''s case that Government cannot provide for reservation in

unaided and self-financing institutions are concerned, considerable inroad has been made into the said position by virtue of the incorporation of

Article 15(5). As per Article 15(5) which is undoubtedly an enabling provision, the State may provide for reservation for the Scheduled Castes

and Tribes and also members of socially and educationally backward sections in all educational institutions. But, the said provision is not applicable

to institutions run by minorities. Article 15(5) has been upheld by the Apex Court and it was also considered by a three Judges Bench in Society

for Un-aided Private Schools of Rajasthan Vs. Union of India (UOI) and Another, . We may notice in fact that in the majority judgment, it is, inter

alia, stated as follows:

36.4. Lastly, the fundamental right to establish an educational institution cannot be confused with the right to ask for recognition or affiliation. The

exercise of a fundamental right to establish and administer an educational institution can be controlled in a number of ways. Indeed, matters relating

to the right to grant of recognition and/or affiliation are covered within the realm of statutory right, which, however will have to satisfy the test of

reasonable restrictions (see Article 19(6)).

We may notice that after the declaration of the law by the decision in Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, which

interpreted Articles 14, 19 and 21, any State action which is arbitrary would per se become unconstitutional and invalid. As far as the regulation of

fees is concerned, it was undoubtedly subject to the qualification that while it is open to the self-financing institutions to charge their fees which may

be such an amount as may generate a surplus, it must, however, not be diverted for any other purpose other than for the purpose of the educational

institutions. More importantly, the self-financing institutions cannot collect capitation fees or indulge in profiteering.

36. If these principles are applied, then the impugned Circular must perish, for, the entire purpose of securing the No Objection Certificate is to

secure incorporation of two constitutionally impermissible conditions, namely seat sharing and regulation of fees.

37. The dilemma, however, with which the petitioners are faced, is the argument of the respondent that the aforesaid propositions of law cannot be

availed of by the petitioners, as they cannot claim the fundamental right under Article 19(1)(g) as they are not citizens within the meaning of Article

19. Learned senior counsel for the petitioners did not make an attempt to proceed on the basis that the petitioners are citizens. In fact, he would

point out to us the piquant plight of the petitioners. In the aftermath of the decision of the Apex Court in Unnikrishnan''s case, wherein the Apex

Court declared that educational institutions cannot be run by individuals, Regulations have been framed by the Government of India. These

Regulations based on Unnikrishnan''s case, no doubt, came to be pronounced as unconstitutional by the eleven Judges Bench in T.M.A. Pai''s

case. Therefore, the concepts, like free seats, payment fees, etc. which were part of Unnikrishnan''s scheme, were found to be unconstitutional.

However, the regulations in its present incarnation (regulations of the year 2010) still provide that only Trusts, Societies and Government Bodies

are allowed to apply for approval for running technical institutions. Individuals cannot apply. The corporate body or a society cannot be treated as

a citizen. The Apex Court in T.M.A. Pai''s case declared that citizens have a fundamental right to run an educational institution. Call it a profession

or name it an occupation, it is beyond dispute that all citizens have a fundamental right to run an educational institution. However, the regulations, as

we have noted, do not contemplate the running of educational institutions by individuals. It was held by the Apex Court that a firm could claim the

fundamental rights under Article 19 on the basis that in substance, the firm must be treated as collection of the partners and if the partners are

citizens, they can maintain an action for an enforcement of the fundamental right under Article 19 (See A.I. Works v. Chief Controller of Imports

(AIR 1973 SC 1539). Even a firm is not entitled to maintain an application for running an educational institution under the regulations made by the

AICTE. The net result is that once we hold that the declaration of the law made by the Apex Court in T.M.A. Pai"s case that there is a

fundamental right under Article 19 (1)(g) to run an educational institution and compelled seat sharing or regulation of fees, would occasion a

violation of Article 19(1) (g) and it would not be a reasonable restriction under Article 19(6), then, the petitioners who invoke Article 19(1)(g) may

not be entitled to protection of the decision of the Apex Court, as they do not claim to be citizens.

38. No doubt, in the case of Companies, the Apex Court has taken the view that it is open to the Company along with one or more of its share-

holders to maintain a petition for enforcement of rights under Article 19 (See Bennett Coleman and Co. and Others Vs. Union of India (UOI) and

Others,).

39. There is another aspect. Article 19(1)(g) would take in the right to run the institution. But, it may not include the right to affiliation of the

institution to the University. Even the seemingly absolute fundamental right under Article 30 bestowed on linguistic and minority communities to

establish an educational institution of their choice would not include a fundamental right to seek affiliation.

40. We would think that we can dispose of these cases on the basis that there is no authority with the State Government to insist upon the

petitioners producing No Objection Certificate from the State for the grant of affiliation in a case where there is approval from the AICTE. Under

the 2010 Regulations made by the AICTE, there is no requirement in respect of the M. Pharm Course that application for AICTE approval must

be accompanied by NOC of the State Government. No doubt, the State Government"s views are to be ascertained. There can be, no doubt, that

in Jaya Gokul"s case, the Apex Court has held that even if there is a law made by the State by which it claims authority to seek its approval for

establishing technical institutions, such a law would be repugnant to the AICTE Act and void to that extent. Thereafter, the Court proceeded to

refer to Clause 9(7) of the Kerala University First Statute which required that the University must ascertain the views of the Government.

Considering the matter further, the Apex Court also held that the said provision only means that the University must obtain the views of the

Government. It was further held that it could not be understood as meaning that there must be approval of the Government. More importantly, it

was held that if the Statute is to be so interpreted, such a provision requiring approval of the Government would be repugnant to the provisions in

Section 10(K) of the AICTE Act and would again be void. The Court also proceeded to hold that the University could not, therefore, in any

event, seek the approval of the State Government.

41. No doubt in Govt. of A.P. and Another Vs. J.B. Educational Society and Another etc., the Apex Court did refer to Jaya Gokul"s case. It

observed that similar views were expressed in it and apparently another decision and left the matter there. The principle which was enunciated in

the said case is, no doubt, that there is no conflict between the State Act and the provisions of the AICTE Act. Section 20, in particular, of the

State Act which required permission from the State Government to establish the technical college was found to be not in conflict with the

provisions of the AICTE Act, in a case where approval was obtained under the latter Act. The said Act, no doubt, provided for establishing the

institution with reference to the local needs of the area. The Apex Court took the view that the State Government was best suited to assess the

local needs and there was nothing impermissible for the State by a law, to require its permission for establishing the college. Undoubtedly, as we

understand, there is some deviation from the view taken by the Apex Court in Jaya Gokul"s case, in that, repugnancy was couched in absolute

terms in Jaya Gokul"s case. The Apex Court in the subsequent decision has allowed room for the State to enact law requiring its permission on the

basis of the local need for establishing technical college. In fact, in Jaya Gokul"s case, the Apex Court considered the question whether there is

power with the State to seek its approval. The Court, inter alia, held as follows:

25. As already stated, in view of the judgment of this Court in Tamil Nadu case, it is obvious that there is no need to approach the State of Kerala

for its approval for starting the Engineering Colleges. There is no power vested in the State under any State Law to grant approval and even if it

was so vested, it would have been in view of Tamil Nadu case. This ground of repugnancy alone would be sufficient to quash the State

Government"s letter dated 16.8.1996 refusing to give their approval.

It may also be noted that the Court proceeded to consider the case of the State on merits. The stand of the State was that it was not in the interest

of the students and employment to permit new Engineering Colleges to be established, and that the Government policy was not to grant fresh

approvals. If more approvals were granted, it would lead to commercialisation of education. Commenting on the same, the Apex Court, inter alia,

held as follows:

27. The so called `policy'' of the State as mentioned in the counter affidavit filed in the High Court was not a ground for refusing approval. In

Thirumuruga Kirupananda Variyarthavathiru Sundara Swamigalme Vs. State of Tamil Nadu and Others, , which was a case relating to Medical

Education and which also related to the effect of a Central Law upon a law made by the State under Entry 25 List III, it was held (see p.35 para

34) that the ""essentiality certificate cannot be withheld by the State Government on any policy consideration because the policy in the matter of

establishment of a new medical college now vests with the Central Government alone."" Therefore, the State could not have any ""policy"" outside the

AICTE Act and indeed if it had a policy, it should have placed the same before the AICTE and that too before the latter granted permission. Once

that procedure laid down in the AICTE Act and regulations had been followed under Regulation 8(4), and the Central Task Force had also given

its favourable recommendations, there was no scope for any further objection or approval by the State. We may however add that if thereafter,

any fresh facts came to light after an approval was granted by the AICTE or if the State felt that some conditions attached to the permission are

required by the AICTE to be complied with, were not complied with, then the State Government could always write to the AICTE, to enable the

latter to take appropriate action.

We have already referred to the three Judges'' decision in State of Maharashtra Vs. Sant Dnyaneshwar Shikshan Shastra Mahavidyalaya and

Others, which was decided on 31.3.2006. Therein, the Apex Court has approved the decision in Jaya Gokul''s case that permission could not be

refused by the State Government on policy consideration (see paragraph 64).

42. There is no law made by the State of Kerala providing for its consent. No doubt, the State''s executive power is coextensive with its legislative

power. Unless its executive power is used in violation of a fundamental right under Article 19 or any provision in the Constitution, the executive

power can be resorted to. No doubt, executive power cannot but perish, if it were a law instead, it is repugnant to any central law or it is in conflict

with executive power exercised by the Central Government. Learned senior counsel for the petitioners made an attempt to contend that the

decision in Govt. of A.P. and Another Vs. J.B. Educational Society and Another etc., must be considered on the basis that it was a State law

which had received the assent of the President. Our attention is drawn to Article 254 of the Constitution of India, the relevant portion of which

reads as follows:

254. Inconsistency between laws made by Parliament and laws made by the Legislatures of State.-

(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision

repugnant to the provisions of an earlier law made by parliament or an existing law with respect to that matter, then, the law so made by the

Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State.

The said argument is fallacious. The AICTE Act, even according to the petitioners, falls under Entry 66 of List I. List I deals with Entries conferring

exclusive legislative power on the Parliament. What Article 254 contemplates is, if a legislation is made in respect of a matter falling under the

concurrent list where both the Parliament and State Legislatures can made law, the law made by the Parliament will prevail over the law made by

the State Legislature. The exceptional case is when a law made by the State Legislature in respect of a matter falling under the concurrent list

receives the assent of the President. It is only in such an eventuality that the law made by the State Legislature will prevail over the law made by the

Parliament within the State concerned. But, such supremacy of State which made the law which has the assent of the President is bestowed only

upon the law made by the State in the exercise of the concurrent legislative power falling under the concurrent list, vis-Ã¯Â¿Â½-vis, the law made by the

Parliament which it has made with reference to its power drawn from the concurrent list. But, in this case, the AICTE Act, as we have noted, is a

law made even according to the petitioners" version, in exercise of the powers under the Union List.

43. We are not impressed by the argument of the learned counsel for the University based on some observations that the State may provide for

admissions. We hold that it may be out of context in the facts of these cases. We would think that the matter is squarely covered by the embargo

against the State intervening by any demand of a compulsory nature, on the basis of a law, when it relates to the grant of affiliation by the

University. We are of the view that the State would not have the legislative power to legislate by which it can say to the University that its approval

be obtained for the grant of affiliation. We may bear in mind in this context that though originally the Apex Court in the Adhiyaman"s case had

taken the view that it is not open to the State to prescribe for higher standards than prescribed by the Central Authority under the Central Law

covered by Entry 66 of List I, in subsequent judgments, the Apex Court has taken a different view. The Apex Court has taken the view that to

achieve excellence in higher education, it is open to the State and the University to fix higher criteria than fixed by the AICTE. The said prescription

of higher standards, would also help the State to shortlist the applicants in an effective manner, if there are applicants more than the available seats

(see Visveswaraya Technological University and Another Vs. Krishnendu Halder and Others,). To that extent, certainly the decision in

Adhiyaman"s case stands clarified. But, we may notice that this is not a case where we can hold that the State is attempting to prescribe any higher

standard for admission than the one fixed by the AICTE under the AICTE Act. Therefore, it cannot by any standard be held that in a matter where

approval under the AICTE has been obtained as in these cases, it would be open to the State to thwart the consideration of the applications for

affiliation by the University by proscribing the consideration of the affiliation without obtaining the No Objection Certificate. We would think that

there is no merit in the contention of the respondents that in Jaya Gokul"s case, the Court was dealing with a case of a law where views had to be

obtained and the Court only must be treated as laying down the law that if it is interpreted as a requirement of approval, it must be void and,

therefore, the said decision would not apply to a case where instead of approval, the State commands the University that it need not give affiliation

without its No Objection Certificate being obtained. We would think that the matter cannot be reduced to a mere semantic play. The University is

an autonomous body established under the Act and which is the body which is primarily concerned with the question of affiliation. This is not a

case where the State is seeking that its permission be obtained so that the local needs are addressed as was the position in Govt. of A.P. and

Another Vs. J.B. Educational Society and Another etc., . In the said Judgment, it is clear that the Court took the view that the general survey

contemplated u/s 10 of the AICTE Act does not pertain to the educational needs of any particular area in a State and it is the State which alone

would be competent where the institution should be established, having regard to the need. It was in regard to the said aspect alone that the Apex

Court took the view that there was legislative competence for the State. The purpose of insisting on NOC, it is plain, is to compel the educational

institutions to agree for seat sharing and fee regulation. Even without pronouncing on the permissibility of those conditions, in view of the obstacle

faced by the petitioners that Article 19(i)(g) is inapplicable to the petitioners as such, and that Article 30 also does not confer a fundamental right to

affiliation, we would think that there cannot be power with the State to interdict the University against grant of affiliation without obtaining its NOC.

Call it a No Objection Certificate or approval or permission, all these concepts involve the State Government being in a position to prohibit the

University from taking an independent decision in a matter where approval was obtained from the AICTE.

44. We would now have to consider another aspect of the matter. In WP(C). No. 12323/12, the petitioner had originally obtained Ext. P1. That is

a letter of consent. It is dated 24/4/2010. The University of Kerala had stipulated that affiliation will be considered subject to, inter alia, fulfillment

of condition by the State Government. Learned senior counsel would submit that subsequently the University Act established the Kerala University

of Health And Allied Sciences Act which issued Ext. P2. No doubt, the learned Government Pleader would point out that Ext. P2 must be

understood as issued in continuation of Ext. P1. Learned senior counsel for the petitioner would then point out that at the time when Ext. P1 was

issued, the impugned Circular was not issued. But, the Circular was issued in November, 2010. We further notice that Ext. P5 as such is not

challenged. Ext. P5, as already noted, is a letter by the University calling upon the petitioner to produce the permission from the Government of

Kerala after executing agreement. Learned senior counsel for the petitioners would contend that the petitioners had joined issue with the

Government by sending Exts.P6 and P7 issued by the Registrar. We notice, in fact, that Ext. P7 has already been challenged in the other Writ

Petition. Petitioner had, in fact, challenged Ext. P7 in this case also. Learned senior counsel would put it as an oversight. We are not deciding the

Writ Petition challenging Ext. P7 wherein the petitioner obtained interim order. It was pointed out that we need consider the question of grant of

affiliation sought, for the batch for which the approval is granted for this year. The same is based on the impugned Circular. In the other Writ

Petition filed by the Ezhuthachan National Academy, the petitioner had in fact written to the University agreeing to produce the No Objection

Certificate. Learned senior counsel for the petitioner would submit that it could not be obtained as it was not issued. We may notice that even as

on the date of Ext. P7, the Circular had not been issued (in WP(C). No. 12323/12). In WP(C). No. 13371/12, when Ext. P3 dated 04/6/2011

was sent by the petitioner, it was stated that the NOC from the Government will be produced. The Circular was in existence. In WP(C). No.

13371/12 is concerned, it was so done as the NOC was given in so far as the B. Pharm Course is concerned for which NOC was insisted upon

and given also after signing the agreement, it is submitted. More importantly, we have already noted the stand of the University that it is acting on

the basis of the Government Circular and we are also only pronouncing on the power of the State Government. We would also think that in the

view we are taking about the lack of power with the Government and the facts of the cases, it would not be appropriate to refuse to grant relief,

when the Government has no power under the constitutional scheme.

45. Shri P. Sreekumar, learned counsel drew our attention to the recent order passed by a Division Bench of this Court. Therein, a Bench of this

Court apparently disturbed by the fall in standards in imparting education in Engineering Colleges in the State of Kerala, proceeded to make certain

observations and directions and the same was brought to our notice. We notice that the Court has issued interim prohibitory orders against the

Government issuing NOC for starting new colleges. The Court has also ordered, inter alia, as follows:

In any case, if the Government proposes to issue/consider NOC for any new Engineering College, it should permit it only after being convinced

that buildings, laboratory and teaching staff are provided in advance, and the Government should also insist that the Management should produce

bonds from qualified teaching staff to serve the College in the event, NOC, recognition and affiliation are granted by the Government, AICTE and

University.

We may also notice that, that was a case of Writ Appeals filed by Managements of two newly set up Engineering Colleges challenging orders

declining NOC even after the colleges obtained approval from the All India Council for Technical Education (AICTE). Learned senior counsel for

the petitioners would submit that the issue which we are called upon to decide, namely the effect of the Judgment in Jaya Gokul"s case (supra),

was not considered by the Bench and, on the other hand, we are called upon specifically to decide the effect of the dictum in Jaya Gokul"s case. In

this case also, we may notice that we are deciding the issue relating to affiliation.

46. We are of the view that the issue which we are called upon to decide, did not arise before the Division Bench. Undoubtedly, we share the

anxiety of the Division Bench that there is a deplorable fall in the standards of education in Engineering Colleges in the State. We would, in this

regard, notice that the powers of the University include the power to prescribe conditions for recognition of institutions for conducting research or

other programmes of the University and to grant recognition to institutions satisfying the conditions and to withdraw such recognition (Section 6

Clause (ix) of the Kerala University of Health Sciences Act, 2010). Section 6(xx) deals with the power to monitor and evaluate the academic

performance of affiliated colleges and recognised institutions for granting continuation of affiliation and periodical accreditation. Section 6(xxi) deals

with the power to inspect, where necessary, affiliated colleges and recognised institutions through suitable machinery established for the purpose,

and take measures to ensure that proper standards of instruction, teaching and training are maintained by them and adequate library, laboratory,

hospital, faculty and other academic facilities are provided for. Section 6(xxviii) deals with power to prescribe a code of conduct for managements

of affiliated or recognised colleges or institutions. Section 6(xxxi) deals with power to rescind affiliation granted to the colleges in violation of

Statutes of the University. Section 50 deals with affiliation and recognition. Section 50 provides for wide powers to the University. Section 53

deals with continuation of affiliation and finally Section 56 deals with the power to withdraw affiliation. We would think that there are ample powers

with the University to deal with the problem of fall in standards which we would expect the University to adopt all possible measures in accordance

with law, so that the alarming fall in standards is arrested. There are also ample powers with AICTE.

47. But, all this will not result in the conclusion which we have arrived at on the basis of the decision of the Apex Court in Jaya Gokul''s case that it

is not open to the State Government to insist for NOC as is done in this case. We would think, therefore, that the Circular issued by the

Government in so far as it relates to the Courses which are specifically covered by the provisions of the AICTE Act and covered by the decision in

Jaya Gokul''s case, is clearly beyond the powers of the State Government. In the light of our conclusion regarding the absence of power with the

State to insist on a NOC as adumbrated above, we are not pronouncing on the other questions.

48. In view of the fact that we are holding that Government does not have the power to insist upon NOC in the matter of affiliation, necessarily the

conditions subject to which the NOC can be given would also automatically not survive, as the question of imposing conditions would arise only if

the power is ceded to the Government to demand NOC. Resultantly, we allow WP(C). No. 12323/12 and WP(C). No. 13371/12 as follows:

We quash Exts.P15 Circular in WP(C). No. 12323/12 in so far as the same insists on compliance of the condition of production of NOC imposed

by the Government as a condition for grant of affiliation. Ext. P7 also is quashed. The respondent/University will consider the question of grant of

affiliation to the M. Pharm Course in the petitioner''s College sanctioned by the AICTE vide Ext. P12 for the year 2012-2013 as expeditiously as

possible and in accordance with law. We make it clear that we have not pronounced on the powers of the University and it will be open to the

University to pass such orders and stipulate such conditions as are lawful as it may be advised to impose.

We also quash Ext. P8 in W.P.(C). No. 13371/12 in so far as it insists on the NOC from the State Government to grant affiliation. Ext. P11

Circular is also quashed in so far as it insists on the compliance of the condition imposed by the Government, namely the production of NOC from

the Government as a condition for grant of affiliation. We direct the University to consider the question of grant of affiliation for the M. Pharm

Course in the petitioner''s college as sanctioned by the AICTE for the academic year 2012-2013 at the earliest. We make it clear that we have not

pronounced on the powers of the University and it will be open to the University to pass such orders and stipulate such conditions as are lawful as

it may be advised to impose.

By way of abundant caution and to allay the apprehension of the learned Government Pleader, we make it clear that the law which we have

declared on the basis of which we have granted relief, will be applicable only in respect of Courses which are governed by the AICTE Act. We

make it further clear that we must not be understood as having quashed the Circular in so far as it relates to other Courses.

We record our appreciation for the assistance rendered by the learned counsel appearing for the parties.