HIGH COURT OF GUJARAT

G S F MEDICAL AND PARA MEDICAL ASSOCIATION
Versus
STATE OF GUJARAT

Date of Decision: 23 June 2004

Citation: 2004 LawSuit(Guj) 364

Hon'ble Judges: Jayant Patel

Eq. Citations: 2004 3 GCD 2256, 2004 6 GHJ 675

Case Type: Special Civil Application

Case No: 6307 of 2004

Subject: Constitution

Acts Referred:
Constitution of India Art 142, Art 226, Art 19

Advocates: Nanavati Associates, Mitul Shelat, Kamal Trivedi, Sangita K Vishen, S N Shelat, P R Abichandani, Niraj J Vasu

Cases Referred in (+): 2

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[1] Since the matter pertains to the admission and career of about 750 seats in the branch of Medical and Para-medical and of about 1400 students for B.Ed. admission and with a view to see that the career of such students is not kept in uncertain position, the aforesaid matters are heard for final disposal and even otherwise also the final hearing was fixed on 17-6-2004.

[2] With a view to understand the controversy, the short facts are as under: 2.1 Special Civil Application No.6307/2004 has been preferred by an Association of Medical and Para-medical, self-financed colleges, but it is an admitted position that all self-financed institutions (hereinafter referred to as "SFIs") running colleges of that type are not members of the said petitioner Association but it is the case of the petitioner that majority colleges of such type are its members. It is the case of the petitioner that in view of the decision of the Apex Court in the case of "TMA Pai Foundation vs State of Karnataka", reported in 2002(8) SCC, 481 read with the decision of Apex Court in the case of "Islamic Academy of Education and Another vs State of Karnataka", reported in

2003(6) SCC, 697, the right of all SFIs are to admit students of their choice as right under Article 19 of the Constitution of India and it is further contended that the Apex Court, while construing such right, has held that such right can be exercised on the basis of the merit-list prepared at the Common Entrance Test, which may be held by the Association of SFIs. It has been further submitted that as per the decision of the Apex Court in the case of "Islamic Academy" (supra), the Committee was to be constituted well in time under the chairmanship of the retired Judge of the High Court, who may be nominated by the Hon'ble the Chief Justice. However, the State delayed such constitution of the Committee and it is also submitted on behalf of the petitioners that the delay is also caused in nominating the other members of the Committee and as such the Committee in full came to be constituted only in March, 2004. It has been further submitted on behalf of the petitioners that the petitioners approached the Committee during the period from 30th March, 2004 to 31st March, 2004 suggesting the proposal for holding of the Common Entrance Test. However, the Committee decided on 4-4-2004, that there is no sufficient time left to conduct such common entrance test and, therefore, the request is rejected. It was also accordingly communicated to the petitioners as per letter dated 12-4-2004. It is the case of the petitioners that the petitioners hereafter further made a representation and the petitioners also published an advertisement on 27-5-2004, inviting applications from the students for appearing in the Common Entrance Test and as per letter dated 27-5-2004, the petitioners were communicated that holding of such common entrance test, in view of the decision of the Committee, is not permissible. In the meantime, on 15-5-2004, the State Government has framed the Rules for admission to First MBBS, BDS, B.Physiotherapy, BAMS, BHMS Courses in the Government Medical/Dental/Physiotherapy/Ayurved/Homoeopathy Colleges Municipal Medical Colleges, Grant in Aid and Self-financed Institutes in the State of Gujarat for the year 2004-2005 and the said Rules 3.1, 3.2, 3.3 and 3.4, inter alia, provide for (1) charging of fees from the students of the government quota at par with the government colleges, (2) 50% quota on the Management seats, but the admission can be on the basis of Common Entrance Test (hereinafter referred to as "CET"), if approved by the Committee and it is further provided that the Committee has found that no test could be conducted or no viable proposals were received by the Committee, (3) in view of the decision of the Committee, the admission to SFI Management quota shall also be made from the merit-lists prepared by the Centralized Medical Admission Committee of the State. Under these circumstances, the petitioner Association has approached this Court for challenging the decision/communication of the Committee dated 12-4-2004 and also for challenging the validity of Rule 3.1 and 3.3 of the Admission Rules made for SFIs and the challenge is also made to the validity of Rule 3.2 of the Admission Rules to the extent of providing for approval of the CET from the Committee appointed by the State Government. The petitioners have also approached this Court for

appropriate directions that the fee in the Government and Management quota of the seats in the SFIs shall be as per the decision of the Apex Court in "TMA Pai Foundation" (supra) and it is also prayed to declare that the petitioner Association is entitled in law to grant admission of 50% seats by holding Common Entrance Test (CET) as per the decision of the Apex Court in the case of "Islamic Academy" (supra). The petitioners have consequently prayed for appropriate directions to the authority against preventing the petitioner Association from holding Common Entrance Test. 2.2 It appears that the petitions were moved in the vacation before this Court and this Court (Coram: Akil Kureshi, J.) passed an interim order on 4-6-2004 staying Rule 3.3 and gave opportunity to the Association to hold CET by supplying details latest by 5-6-2004 and gave directions to the petitioners to communicate the result to the Committee. However, it was expressly provided in the said order that until further orders are passed in this petition, neither the petitioner Association, nor Government shall grant admission to any students against the management quota as provided under the Rules and the interim order came to be passed expressly subject to the further or final order which may be passed in this petition. 2.3 It appears that during the vacation, the LPA was also preferred on behalf of the Committee against the interim order being LPA No.1221/2004 in SCA No.6307/2004 and the Hon'ble vacation Judge (Coram: D.N.Patel, J.), hearing the LPA arising from the interim order on 14-6-2004, passed the order dated 11-6-2004, whereby the order of the Hon'ble Single Judge was substituted by direction for fresh advertisement to be published in the newspaper and it was further observed that the colleges who opted for the merit order prepared by the Management Association for giving admission in their management quota are permitted to give admission in their management quota as per the merit list prepared by the Management Association in pursuance of the CET to be held by the Management Association on 10-7-2004 and LPA was adjourned to 16-7-2004. Thereafter, as the final hearing of the petitions was fixed on 17-6-2004 by the Hon'ble Single Judge (Coram: Akil Kureshi, J.), the matter is heard at this stage for final hearing. 2.4 So far as SCA No.5317/2004 is concerned, it is the case of the petitioner that it is an Association of all SFIs imparting education for B.Ed./B.P.Ed. having majority of the colleges imparting such education as its members. It is the case of the petitioner that as such no final declaration of management quota is made qua SFIs imparting education in B.Ed./B.P.Ed., but as it was last year on the basis of 50%-50%, the petitioner Association took it that this time also the management quota will be 50% and for the purpose of filling up of the seats of management quota, the petitioner Association approached the Committee and also the authority. It is the case of the petitioner that as per the decision of the Apex Court in the case of "TMA Pai Foundation" (supra) read with the decision of the Apex Court in the case of "Islamic Academy" (supra), the petitioner Association has right to hold the CET and the holding of such CET or conducting of such CET is to be supervised and overseen by the Committee. As the

Committee did not properly respond, nor did the authority take any concrete steps, the petitioner proceeded for the purpose of holding of the CET by declaring its own programme. It is further the case of the petitioner that thereafter as the petitioner was communicated as per the letter dated 13-4-2004 by the Committee that in view of the decision of the Committee, the question of holding CET for management quota does not arise, the petitioner has approached this Court for assailing the decision of the Committee communicated to it as per the letter dated 13-4-2004 and the petitioner has also prayed for appropriate directions to permanently forebear the respondents from restraining the petitioner Association for holding CET and to go ahead with the filling up of the 50% of the seats of management quota by every member institution of the petitioner Association as per the decision of the Apex Court in case of "TMA Pai Foundation" (supra) read with the decision of "Islamic Academy" (supra). In the said petition, this Court (Coram: K.M.Mehta, J.) on 6-5-2004, as nobody appeared on behalf of the respondent, admitted the petition and the interim relief was granted in terms of para 17(B)(i) and (ii), whereby the operation of the letter dated 13-4-2004 of the Committee was stayed and the respondents were fore-borne from restraining the petitioner Association from holding the CET and to go ahead with the filling up of 50% of the management quota in every member institution of the petitioner Association. It appears that the State Government preferred Civil Application No.4492 of 2004 in SCA No.5317/2004 during vacation for modification of the order to the extent that the petitioner Association should not be allowed to proceed with the CET and admission process without consulting the State Level Committee and without monitoring of the State Level Committee. In the said Civil Application on 21-5-2004, the Hon'ble Vacation Judge of this Court (Coram: K.S.Jhaveri, J.) issued Rule returnable on 4-6-2004 and recorded the statement of the learned Counsel appearing for the Original petitioners that the admission process shall not be started without the prior permission of the Court and it has been submitted by Mr.Joshi on behalf of the petitioner that in view of the pendency of the Civil Application, even the result of CET is not declared, but as per his submission, the test is conducted and the result is prepared by the agency which was assigned with the work of conducting test, but the result is not declared. Since the petitioner of SCA No.6307/2004 has made reliance upon the order dated 6-5-2004 passed by this Court in SCA No.5317/2004 and not only that but the copy of the order and the memo of the petition are also produced in the SCA No.6307/2004 for substantiating the ground and the contention raised in the petition and as both the petitions were admitted, SCA No.5317/2004 is also heard finally.

[3] It may be recorded that the learned Counsel appearing for the petitioner in SCA No.6307/2004 has made the statement at the bar that in response to the advertisement issued for conducting CET about 2300 applications are received as against 750 seats for medical and para-medical courses, whereas the learned Counsel

appearing for the petitioner in SCA No.5317/2004 has made the statement at the bar that in response to the advertisement for holding of the CET, about 9000 students applied for appearance in the test as against 1400 seats for B.Ed. and B.P.Ed. admission in SFIs. The consequence would be that if the CET is allowed to proceed and the result thereof is declared or the admissions to the students are made in pursuance of the interim orders passed by this Court, such admission and career of such students who may be admitted by that process shall remain hanging until final outcome of both the petitions. As observed earlier since the matters pertains to about admissions of 750 seats in medical and para-medical courses and about 1400 admission for B.Ed. and B.P.Ed. and with a view to see that the further complications may not arise regarding the career of the students, who may be admitted touching to the final outcome of the petitions, I have found that both the matters deserve to be heard finally with a view to conclude the controversy keeping in view the interest of the students, Institutions and the sphere of education in the State at large.

[4] As regards the contention raised by the learned Counsel appearing for both the sides and those which may arise in these petitions, they shall be dealt with at appropriate stage as stated hereinafter. However, Mr.Nanavati, learned Counsel appearing for the petitioner in SCA No.6307/2004, at the outset, raised the preliminary contention on the question of propriety by submitting that as the LPA arising from the interim order passed in the Special Civil Application is pending, this Court may not proceed with the final hearing of the matter, but may await the view of the LPA Bench upon the final decision in the LPA. As such, any interim order passed in any of the proceedings will have the life until the final outcome of the petitions and the interim orders are always subject to the final outcome in the petitions. It is not open to any of the litigants to contend for delaying of the final outcome of the petition, merely because one or another interim order is passed in favour of such litigant or otherwise. Had it been a case of pendency of the LPA against any final view taken by any Coordinate Bench of this Court, the matter can be viewed differently and this Court may consider such question which is canvassed by the learned Counsel for the petitioners but if the matter is finally heard as per the fixation of the date for final hearing, there would hardly be any question of propriety which would be involved in the matter. On the contrary, it would be expected for any of the litigants or any party to the proceedings to extend the cooperation to the Court if the matter is to be finally heard and no beneficiary to the interim order or otherwise or any party to the proceedings cannot be allowed to avoid the final hearing of the matter by raising such question which is canvassed as the question of propriety. Even otherwise also, as observed earlier, the matter pertains to the career of about 2150 students namely 750 students in the field of admission in medical - paramedical and about 1400 students in the field of B.Ed. and B.P.Ed. and if the admissions are made in pursuance of the

interim order and if, as a final outcome of the petition, the result is otherwise it would create not only irreversible situation, but it may also result into damaging the career of large number of students for no fault on their part and if on account of the importance of the matter and if on account of considering the aspects that the career of the students should not be kept hanging on account of the pendency of the matter, this Court has taken up the matter for final hearing as fixed at the time of admission, I am of the view that there is no involvement of question of propriety, nor any bar operates against proceeding with the final hearing of the case, more particularly when in the LPA the final hearing of this petition is not stayed. If such contention is entertained, the consequences would be that the Court will not be able to proceed with any matter in which the interim orders are passed or not passed and when the appeal is pending against such interim order. The same would also result into encouraging the litigant to delay the proceedings of the Court by preferring appeal though appellate Bench has not granted stay against further proceedings. Therefore also the aforesaid contention of Mr.Nanavati is not only lacking merit, but is also lacking bonafide on the part of the petitioners with a view to avoid and delay the final hearing of the petitions which are otherwise fixed.

[5] The aforesaid takes me to examine the contentions raised on behalf of the petitioners on merits. The first aspect which deserves consideration is on the question of validity of Rule 3.1 qua charging of the fees for admission in SFIs at par with the fees in government colleges. To examine the said contention Rule 3.1 is required to be considered which reads as under: "3.1 In Self-Financed Medical Medical/Dental/Physiotherapy/ Ayurved/ Homoeopathy Institutes State quota seats (50% - percent of sanctioned seats) will be filled by the Centralized Medical Admission Committee, as per merit-cum-preference basis. (see Rules No.4 and 5) Fees for these students will be at par with the Fees in Government Colleges."

[6] As per the decision of the Apex Court in "TMA Pai Foundation" (supra) read with the decision of the Apex Court in the case of "Islamic Academy" (supra), the charging of the fees by SFIs is permitted as per its own yardstick and such right is read. However, the restriction upon such right, as provided by the Apex Court, under Article 142 of the Constitution, is with the condition that such fee structure should have been approved/fixed by the Committee constituted for such purpose (hereinafter referred to as Fees Committee). It is the contention of the learned Addl. Advocate General appearing on behalf of the State Government that at the time when the Rules were framed, the State Government was not having the information regarding the approval/fixation of any fee structure by the Fees Committee for concerned SFIs. However, the learned Addl. Advocate General is unable to dispute the proposition that as per the decision of the Apex Court in the above referred two cases, even for

government quota as well as for management quota, the fees chargeable will be such as approved/fixed by the Fees Committee. In the present case, as on today, when the matter is being considered for final hearing, there is no dispute on the point that fee structure for respective college is considered and finally decided by the Fees Committee headed by the Hon'ble Retired Judge of this Court as provided in the decision of the Apex Court in the case of "Islamic Academy" (supra). Therefore, when approved/fixed fee structure for the concerned SFIs is in existence or, in any event, may be after framing of the Rules, the State Government would not be justified in insisting for implementation of Rule 3.1 for charging of the fees in self-financed Medical/ Dental/ Physiotherapy/ Ayurved/Homoeopathy Colleges at par with the Government colleges in respect to the colleges for which the fee structure is approved/fixed. I would have examined the matter further in this regard, however, the learned Addl. Advocate General, Mr.Trivedi appearing for the State has not seriously resisted the proposition on the question of charging of fee as per the fee structure approved/fixed for the concerned colleges by the Fees Committee. Normally, when the validity of any statutory rule is under challenge, in case the Court finds that such Rule is illegal or invalid, the Court may strike down the rule and may direct the authority to reconsider the matter and to take the decision again on such aspects. However, in view of the peculiar circumstances that Rule 3.1, to the extent of compelling the acceptance of fees in SFIs, in spite of approved/fixed fee structure being available for such colleges, is running counter to the view taken by the Apex Court and as such proposition is not seriously resisted by the State through the learned Addl. Advocate General and as the admission process is to begin in a short time, I find that while striking down Rule 3.1 so far as it related to compelling the acceptance of fee at par with the government colleges in respect to the colleges run by unaided SFIs, even though approved/fixed fee structure is available, it is required to be simultaneously observed that the fees for self-financed Medical/Dental/ Physiotherapy/ Ayurved/ Homoeopathy Colleges on State quota will be as per the fee structure which is approved/fixed by the Fees Committee for such concerned colleges with the further clarification that in the event if any SFI has not applied or fee structure is not approved/fixed for concerned college, the fee required to be collected from the student shall be at par with the government colleges, subject to the adjustment of the difference, if any, in the event if any other fee structure is approved/fixed by the Fees Committee. The aforesaid would equally and accordingly apply on the same reasoning in respect to SFIs imparting education in B.Ed. and B.P.Ed.

[7] The next aspect which is required to be considered is regarding the validity of Rules 3.2 and 3.3 and for examining the validity of Rules 3.2 and 3.3, it is required to be examined and considered the ratio laid down by the Apex Court in above referred two cases on the question of right of SFIs under Article 19 of the Constitution and

restriction, if any, for such purpose and also for holding of the CET. The learned Counsel appearing on behalf of the petitioners have contended that SFIs have right to admit the students of their choice. However, it has been further submitted that as per the view taken by the Apex Court in the above referred cases, the merit cannot be sacrificed, but self-financed colleges have right to judge the merit by holding CET and such CET is to be overseen and supervised by the Committee. It has been submitted on behalf of the petitioners that such right flowing from Article 19 is read by the Apex Court and, if there is any laxity or inaction on the part of the Committee in either not giving any time for CET or for not approving the holding of CET, the decision of the petitioner concerned for its members should be allowed to operate for holding of CET and the member of petitioners be allowed to fill up the management quota by giving admission on the basis of merit list which may be prepared at such CET.

[8] Whereas on behalf of the Committee as well as on behalf of the State, it has been submitted that as such there is no absolute right to admit the student to SFI in the management quota and such right is subject to the restriction as may be put by the State and also for holding of CET, if it is so approved and permitted by the Committee. It has been further submitted that as per the decision of the Apex Court in the above referred two cases, the conditions precedent for permitting the Association to hold the CET are not satisfied in the opinion of the Committee and as such there is no delay or inaction on the part of the Committee and it was for the Association to move well in time by fulfilling the conditions precedent. It was also submitted by the learned Advocate General for the Committee and the learned Addl. Advocate General for the State that the interest of the students and the merit in the field of education would be the paramount consideration and, if the petitioners are to admit the students on the basis of the merit and are not to sacrifice the merit, there will not be any prejudice or peril, if the admissions are made on the basis of merit order prepared at H.S.C. Examinations which in the decision of the State is to be treated as CET. It has been further submitted that the separate CET as sought to be canvassed is not accepted and approved by the Committee, which is an expert body and in absence of any malafide against the Committee, Court would consider the view expressed by the Body of the experts which is in the present case the Committee. It was also alternatively submitted that even if some inaction is found on the part of either side, the Court would not entrust the writ or would not issue the mandamus in such a manner which would seriously damage the interest of the students at large in the State and as against he same the colleges would be entitled to charge the fees as per the fee-structure, which is approved/fixed by the Committee and, therefore, in reality it cannot be said that any serious prejudice will be caused to the petitioners or the members of the Association, if the admissions are made on the basis of merit order prepared of the marks obtained at the H.S.C. Examinations or the C.B.S.E., as the case may be.

[9] So as to understand the controversy in details, certain observations of the Apex Court in the case of "TMA Pai Foundation" (supra) are required to be considered. At para 40 of the said decision, it has been observed as under: "40. Any system of student selection would be unreasonable if it deprives the private unaided institution of the right of rational selection, which it devised for itself, subject to the minimum qualification that may be prescribed and to some system of computing the equivalence between different kinds of qualifications, like a common entrance test. Such a system of selection can involve both written and oral tests for selection, based on principle of fairness." So far as right to admit the students is concerned, it has been referred to at para 50 of the said decision of the Apex Court which reads as under: "50. The right to establish and administer broadly comprises the following rights: (a) to admit students; (b) to set up a reasonable fee structure; (c) to constitute a governing body; (d) to appoint staff (teaching and non-teaching); and (e) to take action if there is dereliction of duty on the part of any employees."

[10] However, if the observations of the Apex Court at paras 58, 59, 60 and 68, are read keeping in view the subsequent decision of the Apex Court in the case of "Islamic Academy" (supra), it appears that it is within the power of the State to provide for system of student selection on rational basis, subject to the minimum qualification that may be prescribed and to provide for some system of computing the equivalence between different kinds of qualifications, like a common entrance test. Such a system of selection can involve both written and oral tests for selection, based on principle of fairness. The emphasis is that the merit must play an important role even in the admission of private, unaided institutions like SFIs. In case of "Islamic Foundation" (supra) at para 16 it has been observed as under: "16. ...The words "common entrance test" clearly indicate that each institute cannot hold a separate test. We thus hold that the management could select students, of their quota, either on the basis of the common entrance test conducted by the State or on the basis of a common entrance test to be conducted by an association of all colleges of a particular type in that State e.g. medical, engineering or technical etc. The common entrance test, held by the association, must be for admission to all colleges of that type in the State. The option of choosing, between either of these tests, must be exercised before issuing of prospectus and after intimation to the concerned authority and the Committee set up hereinafter. If any professional college chooses not to admit from the common entrance test conducted by the association then that college must necessarily admit from the common entrance test conducted by the State."

[11] The aforesaid view as observed in para 16 is required to be considered keeping in view the observations made by the Apex Court (speaking through Mr. Justice S. B. Sinha) under the head "Common Entrance Test and the Percentage of Seats" beginning

from para 164 to 180 and 182 to 188. [Since the Court time is over, for further dictation, S.O. to 24-6-2004.]

[12] In view of the aforesaid two decisions of the Apex Court in the case of "TMA Pai Foundation" (supra) and "Islamic Academy" (supra) it appears that the right to admit the students and the right to charge the fees of SFI un-aided is read under Article 19 of the Constitution of India. So far as the right to charge the fees is concerned, the restriction so provided is approval/fixation of the fee structure by the Fees Committee as referred to in the said judgement and the said aspect has already been dealt with hereinabove and no further discussion is required. So far as the right to admit the students is concerned, such right is also made subject to the restriction. Even otherwise also any right provided by Article 19 of the Constitution of India is subject to the reasonable restriction as may be imposed by the legislature, but when the Apex Court considered the matter, there was no legislature providing for such restriction and, therefore, in the judgement of the Apex Court in the case of "Islamic Academy" (supra), it has been expressly provided that the direction shall remain in force under Article 142 of the Constitution till appropriate legislature is enacted by the Parliament. Therefore, upon the right to admit students by SFI un-aided, the restriction as read by the Apex Court until the other legislature is made substituting for such purpose or otherwise, would continue to operate. If the matter is considered accordingly and upon the overall reading of the aforesaid two decisions of the Apex Court, it appears that the restriction read or provided are as under: (i) Under no circumstances, merit of the students is to be compromised or is to be given a go-by, because the ultimate intension is to maintain quality and standard of education in all professional colleges. (ii) It is within the power of State to provide for quota of government and of management so far as un-aided SFIs are concerned. It has been provided that the State, based on its local need, may provide for quota subject to the right of any minority institutions to approach before the Committee for alteration of the quota and the Committee is clothed with such power to alter the quota after hearing the State. Since, as such, on the question of quota so far SCA No.6307/2004 is concerned, there is no dispute raised and even the government the Rule has provided for 50% government quota and 50% management quota and, therefore, it may not be necessary for this Court to consider the said aspect in detail qua the petitioners of SCA No.6307/2004. However, so far as petitioners of SCA No.5317/2004 is concerned, it is an admitted position that no quota, either of government or of management is provided on the date when the petitioners therein were to proceed for holding of the test or on the date when the matter was earlier considered by this Court. Not only that but even as on today no material is coming on record to show that for the year of 2004-05 in case of B.Ed. and B.P.Ed. SFIs the quota has been prescribed or declared by the government. Upon query made by this Court to the learned Addl. Advocate

General, Mr.Trivedi, it was stated that the appropriate decision in this regard by the competent authority shall be taken, providing for quota in SFIs imparting education in B.Ed. and B.P.Ed.. In view of the aforesaid factual position the very premises of the petitioners of SCA No.5317/2004 proceeding to assert the right and entitlement to hold CET and to give admission on the basis of CET to the 50% of the seats in the respective colleges, in my view, would fail and unless such declaration of the quota is made by the Competent Authority, the petitioner cannot successfully assert their right to fill up the seats on 50% quota of the Management which is not supported by the policy of the Government in the academic year 2004-05. As none of the colleges imparting education in B.Ed. or B.P.Ed. is reported as minority institution, nor any application is made to the Committee. Such question, for the present, would not arise in the present group of petitions. Mr.Joshi, learned Counsel appearing for the petitioners in SCA No.5317/2004 during the course of the hearing submitted before the Court that there is a newspaper report regarding the declaration of 25% quota by Gujarat University for B.Ed. colleges affiliated in the State of Gujarat and, therefore, he submitted that no communication for such purpose is made. The learned Addl. Advocate General appearing for the State Government submitted that the proper decision in this regard shall be taken by the competent authority, but suffice it to say that at this stage, even as per the petitioners as stated in the petitions, at the time when right to hold CET was asserted there is no authenticated material is produced on record to show that a particular quota is declared for government quota or management quota in respect to SFIs imparting education in B.Ed. (iii) The reading of para 59 of the decision of the Apex Court in the case of "TMA Pai Foundation" (supra) read with para 171 of the subsequent decision of the Apex Court in the case of "Islamic Academy" (supra) shows that: (a) merit can either be decided on the basis of the marks obtained by the students at the qualifying examination; (b) merit can also be decided on the basis of the marks obtained at the School Leaving Certificate State followed by interview; (c) the CET can be conducted by the Institution; (d) the CET can also be conducted by the Government Agencies. The observations made by the Apex Court at para 171 in the decision of "Islamic Academy" (supra) provides that the aforesaid criteria for judging the merits of the student as referred to in para 59 of the decision of the Apex Court in the case of "TMA Pai Foundation" (supra) are by giving illustrations and the language used in para 171 by the Apex Court is: "...Thus, it does not rule out any other method for determining the merit which may also include the marks obtained in qualifying examination". Therefore, the criteria for judging the merits of the student on the basis of the marks obtained at the qualifying examination is not a concept foreign to the assessment of the merits of the students. It is required to be noted that the learned Addl. Advocate General rightly submitted during the course of hearing that in the State of Gujarat, since about more than two decades the admissions in all under graduate Medical and Para-Medical and in majority of the

professional colleges, may be Government or SFIs, have been given on the basis of marks obtained by the students concerned at the qualifying examination, which in the present case for graduation in Medical and Para-medical, is 12th (H.S.C.) Science Stream and for admission to B.Ed. and B.P.Ed. is on the basis of the marks obtained at the graduation level by the students concerned, whose examination is being held by the concerned University in the State. The language used at para 177 of the decision by the Apex Court in the case of "Islamic Academy" (supra) is as under: "177. ...Merit for any purpose and in particular, for the purpose of admission in a professional college should be judged as far as possible on the basis of same or similar examination. In other words, inter se, merits amongst the students similarly situated should be judged applying the same norm or standard. Different types of examinations different sets of questions, different ways of evaluating the answer-books may yield different results in the case of the same student." Therefore, what is conveyed is that in judging the merits of the students, inter se, as far as possible, the basis should be of the same or similar examination. Further, the observations made by the Apex Court at para 180 in the case of "Islamic Academy (supra) is as under: "180 While granting the right to determine the suitability of a candidate on the basis of marks obtained in the qualifying examination or on the basis of their own examination, or an examination conducted by the State, merit cannot be sacrificed. Some mechanism as far as practicable must be found out also for the purpose of judging the inter se merit." Therefore, in view of the aforesaid observations of the Apex Court, it appears that under no circumstances, merit is to be sacrificed and some mechanism as far as practicable is to be found out for judging inter se merit of the students. (iv) If the observations made by the Apex Court in the case of "Islamic Academy" (supra) at para 12 is read with the observations made at para 16 of the said decision it appears that: (a) certain percentage can be reserved for management quota (such proposition is not in dispute); (b) student on the Management Quota can be admitted on the basis of merit at CET held by itself or by the Government Agencies. One view of the aforesaid observations which can be taken is that such a situation is envisaged in a State, where CET is held by the State or is permitted. There is no dispute on the point that in the State of Gujarat, so far as for last two decades, no CET is being held or permitted until the last academic year for giving admissions to professional colleges including the Government owned SFIs and the only criteria remained up till now is the marks obtained at 12th (HSC) standard examinations or the marks obtained at graduation level as the case may be. Therefore, one view which is possible is that since in this State CET is not held by the State or is not permitted, the observations made in para 16 in the said decision may not apply. The another view which can be taken and which is rather canvassed on behalf of the petitioners is that it has nothing to do with the holding of the CET by the State of otherwise and as such the right is given to the management of the SFIs to hold CET, if it decides to do so. Even if such contention is considered for the purpose of scrutiny

and examination, the language used by the Apex Court at para 16 is as under: "16. ...We thus hold that the management could select students, of their quota, either on the basis of the common entrance test conducted by the State or on the basis of a common entrance test to be conducted by an Association of all Colleges of a particular type in that State e.g. medical, engineering or technical, etc. The common entrance test, held by the Association, must be for admission to all colleges of that type in the State. (emphasis supplied). Therefore, it appears that even if such CET is to be conducted it must be by the Association of all colleges of that type in the State and it is not open to the Association representing some or majority of such colleges to hold a common entrance test for such purpose unless and until all SFIs running colleges of that type become members of that Association and agree for holding of such CET in the State. The holding of such CET separately for only for a particular number of colleges is neither conceived, nor permitted. The major reason being that the students concerned are not put to inconvenience and one of the strongest reasons would be that there should be as far as practicable, the common yard-stick for judging the merits of the students and no merit of the students is sacrificed or student may not have to suffer, though otherwise meritorious, on account of different CET or otherwise at the whims of the colleges opting for CET or not.

[13] It was also submitted on behalf of the petitioners that the subsequent observations made at para 16 in the decision of the Apex Court in the case of "Islamic Academy" (supra) shows that the option is left to the colleges concerned before the prospectus is issued and colleges have an option of admitting the students, if they opt for choosing the merit not at the CET conducted by the Association, but by the merit as decided by the State authorities in government quota and, therefore, it was submitted that it is not obligatory that there must be an Association of all colleges in the State of that type. It appears that interpretation as sought to be canvassed of the latter portion of the aforesaid observations made in the para 16 by the Apex Court is not correct, because at para 17, a room is left to the college concerned, which may be a minority institution or otherwise to opt for applying its own settled admission procedure prevailing for the period of at least 25 years. As there is no dispute on the point that there is any SFI is in existence for a period of last 25 years, in my view, unless such college is having settled norms of admission procedure for at least for 25 years, it would not be possible for any college to opt for a different yard-stick for filling up of the management quota, if the association of all colleges opts for holding of CET and, therefore, the interpretation as sought to be canvassed of the latter portion of para 16 of the observations made by the Apex Court in the aforesaid decision does not appear to be correct. Even otherwise also in view of the reasons recorded hereinafter, if holding of CET is declined and the conditions for permitting CET are not satisfied and,

therefore, whether association of all Colleges should be there or not, would be of no much importance for deciding these petitions.

[14] It is an admitted position that neither the petitioners of SCA No.6307/2004, nor the petitioners of SCA No.5317/2004 is an Association having all colleges of that type in the State as its members and not only that but there is material on record to show that a number of colleges imparting education of the very type in the State have decided not to opt for giving admission on the basis of merits at the CET, which is proposed to be held by the Association concerned. Even when this group is being heard simultaneously with the other group of SCA No.6722/2004, SCA No.6743/2004, SCA No.6492/2004 and SCA No.6464/2004, which relates to the colleges who have not opted for CET proposed to be held by the petitioners of SCA No.6307/2004. However, the orders for the aforesaid group shall be separately passed, but suffice it to say that this makes it clear that there are number of colleges, who have not opted for giving admission on management quota on the basis of marks obtained at CET and, therefore, when in both the petitions, the petitioners are not the Association of all colleges of that type in the State, the petitioner Association cannot assert as of right to hold CET as sought to be canvassed and prayed in the petitions.

[15] Apart from the above, even in the matter of holding of the CET or for permitting of such CET, the Committee is enjoined with the duty to consider that the students are informed separately well in time who may be aspirant to opt for admission by appearance through CET and at the same time, they get opportunity to prepare themselves for appearance at such CET. Mr.Shelat, learned Advocate General appearing for the Committee rightly submitted that the students concerned who were aspirant to get admission never knew about the holding of such CET well in time and on the contrary considering the basis as marks obtained in the 12th Standard (HSC) or marks obtained at the graduation level, as the case may be, the student must have prepared themselves, and now it would be too late to allow the holding of the CET, where students would be taken by surprise. Ultimately, it would for the Committee which is clothed with such power to grant permission of CET to decide, but it appears that not providing sufficient time to the students and non-giving of sufficient notice in general to the students well in time, during the previous six months to one year prior to the holding of the CET, can be said to be one of the circumstances which has nexus to the decision to be taken in the larger interest of the students ultimately whose merit is to be judged by the CET. I find it proper to leave the matter at that stage, without observing further on the said aspects, since it is for the Committee which is an expert body to decide each proposal on the basis of the circumstances prevailing at the relevant time, but the facts remain that in the present case, it appears that no sufficient time is left for the students to prepare, nor the students are put to notice

well in time regarding holding of the CET by the Association of the Management for filling up of the seats of Management quota.

[16] Further observations made at para 182 of the decision of the Apex Court in the case of "Islamic Academy" (supra) show that the Committee may be required to undertake the exercise of its own or through the Association of the expert body to determine the equivalence of several examinations, since the Standard of education varies from State to State or from University to University or from Board to Board. The observations made at para 184 in the very decision of the Apex Court shows that it may be open to the State/University to fix up higher cut-off marks than prescribed by MCI or AICTE and even for CET, the modalities and the detailed procedure thereof is to be worked out well in advance, so that it may not cause any inconvenience to the students or to the Institutions. The observations made at para 187 in the very decision of the Apex Court, shows that the Committee may be required to undergo the exercise of prescribing suitable method for the purpose of determining the merit in a fair and transparent manner at the examination, which may be permitted as CET by the Committee. The aforesaid are only some of the relevant and illustrative aspects which may be required to be considered by the Committee and it will be for the Committee to consider the matter and to take appropriate decision.

[17] The language used by the Apex Court at para 19 of the said decision shows that the concerned Committee for the purpose of fixing the fee structure or for permitting or over-seeing the CET, are given status as that of the expert body in the field. Two Committees are contemplated, one is for approval/fixation of the fee structure and another is for permitting or monitoring or over-seeing of CET. As such the status of the Committee is not like that of adversary respondent in both these petitions. Normally when the expert body has taken decision, the Court while exercising power under Article 226 would not substitute its own wisdom in place of the expert body, because such Committee is headed by the former Judge of this Court and the composition of the Committee includes the Vice Chancellor of the University and the Secretary of the Education Department etc. As observed, earlier, even otherwise also, if it is considered that the CET could be applied by the concerned petitioners, then also from the observations made hereinabove, it appears that the condition precedent for granting of such permission for holding of CET were not satisfied and, therefore, if the Committee has rejected the proposal for holding of CET, may be on the ground that no sufficient time is left, it cannot be said that such decision would arbitrary or unreasonable, which would call for interference by this Court under Article 226 of the Constitution.

[18] Even otherwise also, as observed earlier, on facts, the petitioners concerned, which is not the Association of all colleges of that type in the State would not be entitled to assert as of right of holding of CET and even if such proposal for CET is to

be considered, as observed earlier, the relevant aspects are to be examined and considered by the Committee before any such decision is taken for granting of permission coupled with the sufficient general notice to the students concerned well in advance. Since the Committee, as observed earlier, is given status as that of the expert body in the filed of education, even if it is accepted that there is some inaction on the part of the Committee in not considering the matter or even if it is considered that there is some delay in constitution of the Committee, the petitioners cannot validly contend as of right for permitting of holding of CET, as on facts, as observed by this Court hereinabove, for academic year 2004-05, holding of CET at this stage is neither permissible, nor advisable and, therefore, when the Committee has declined for holding of the CET, it would be in the larger public interest for maintaining quality and standard of education in the State, for academic year of 2004-05 to allow the merits of the students concerned to be judged on the basis of marks obtained at the concerned qualifying examination as HSC (12th Standard) or C.B.S.E., or at graduation level, as the case may be, as such method of judging merit of the student is prevailing in the State since last more than two decades.

[19] Mr.nanavati as well as Mr.Joshi, learned Counsel for the petitioners made an attempt to submit that all requite formalities for permitting of holding of CET at the level of the petitioner Association was completed by submitting the scheme of CET and in spite of the same, there was inaction on the part of the Committee and not only that, but the decision taken is without proper application of mind. As observed earlier, the status of the Committee is that of an expert body and no judicial review is permissible as sought to be canvassed. Normally Court would not substitute its own wisdom in place of the wisdom of the Committee, which is given the status of an expert body in the field of education. Apart from the above, as observed earlier, the status of the Committee is not as that of adversary respondent and merely because some action is not taken or there is a delay in taking action would allow the petitioners to, assert as of right, in view of the observations made by this Court hereinabove, to hold CET unless and until all the requite formalities and conditions are satisfied for such purpose.

[20] In view of the above, if in absence of any such permission for holding of CET, if the State has framed Rules 3.2 and 3.3 for grant of admission in the management quota from the merit list prepared by the Centralized Medical Admission Committee on the basis of qualifying HSC examination, it cannot be said that Rules 3.2 or 3.3 are arbitrary or contrary to the decision of the Apex Court in the case of "TMA Pai Foundation" (supra) or "Islamic Academy" (supra), more particularly because this Court on facts having also found that for the academic year of 2004-05, holding of CET is rightly declined and the petitioners, as such, on facts would not be justified in

asserting for holding of CET for filling up of the seats of the management quota, for the academic year of 2004-05.

[21] So far as the petitioners of SCA No.5317/2004 is concerned, there is an additional aspect, namely that there is a report of the Inspection of the CET, produced on record with the affidavit by Shri M.R.Upadhyay, O.S.D., which is carried out by the State at the instance of the Committee and it shows that initially the programme for CET was for subject-wise for giving admission to B.Ed., which provided for more than eight subjects separately and it was scheduled as 16-5-2004, 17-5-2004, and 18-5-2004 and thereafter the question papers were changed on the basis of general knowledge only and not subject-wise. Even the schedule for holding of the examination is also changed to 23-5-2004 and the venue of the examination which was earlier at the concerned colleges was changed to one place. It is also stated in the said report that the association is reported to have been conducting the examination for only 37 colleges in the State and the merit list cannot be justifiably prepared only on the basis of the CET, since the students may have prepared on the basis of the test which was to be conducted subject-wise and it is further stated that since the candidates are to work as teachers, the importance is the test of the concerned subject and the assessment of merit cannot be made on the basis of general knowledge. It is stated that the transparency of the agency conducting the examination is also not maintained. Mr.Joshi, learned Counsel for the petitioners did make an attempt to submit that all students were informed well in advance by post separately as well as by public notice. He also submitted that as such the petitioners anticipated that there will be more number of students and, therefore, examination centres were fixed at the relevant colleges, but on account of the less number of students, the examination centres were to be changed and since number of subjects were there, it was ultimately decided to hold on the basis of general knowledge. If upon the report of the inspection carried out at the instance of the Committee, it is found that CET held is not meeting with the requirement of testing the merits of the students who are to work as teachers and if the transparency and reliability of CET itself is in doubt, it would not be proper of this Court to permit the concerned petitioners to fill up the seats in the management quota on the basis of merit of such CET.

[22] Even otherwise also, it is true that right to admit the students of the choice of the institutions is right under Article 19 of the Constitution subject to the restrictions as referred to hereinabove and the observations are already made for such purpose, but at the same time, even for management quota, in view of the observations made by this Court hereinabove for charging of the fees as per the fee structure approved/fixed by the Fees Committee, the members of the petitioner Association, who are SFIs would be entitled to charge fees and, therefore, it would not cause any great peril or financial

prejudice to the colleges concerned. Mr.Nanavati and Mr.Joshi learned Counsel appearing for the petitioners submitted that as such once the right is read as fundamental right, the prejudice is irrelevant and non-observance of the right itself is a prejudice and, therefore, the petitioners cannot be denied of holding of CET merely because there is no financial prejudice to the petitioners. Had it been a case where the Court, on facts, found that there is entitlement to hold CET for the academic year 2004-05 and valid approval is granted by the Committee constituted for the purpose, the matter could have been viewed differently, but considering the facts and circumstances, when this Court has found that the decision of the Committee does not call for interference and the Rules so framed by the State Government namely; Rules 3.2 and 3.3 cannot be said as illegal or invalid for the academic year 2004-05. I find that it may not be necessary for this Court to examine the larger issue as to whether this Court would issue the writ in futility when the prejudice is not demonstrated before the Court.

[23] However, with a view to see that some discretion is left to the management of choosing students having equal merits, learned Addl. Advocate General has declared before the Court that for management quota at the time of counselling, the authorized representative of the college will be permitted to remain present and if the students concerned standing in the equal merit are more than one, the choice will be given to the college concerned through its authorized representative to opt for the student concerned having equal merit and, therefore, in my view, considering the facts and circumstances, it will take care of the situation of the right of the management to admit the students for the academic year 2004-05, more particularly in view of CET not permitted by the Committee and this Court having found the decision as not unreasonable or arbitrary.

[24] Mr.nanavati, learned Counsel appearing for the petitioners made an attempt to submit that the Apex Court by interim order in SLP(C) No.9932/2004 dated 28-5-2004 in the case of " Inamdar and Others vs. State of Maharashtra and Others" has permitted holding of the CET by one management of the college and, therefore, that itself shows that it is not necessary that all the colleges must be the members of that Association which are desirous to hold CET and he also submitted that in view of the order passed by the Apex Court, the petitioners may also be permitted to hold CET. No material is placed on record regarding the fact situation of the aforesaid SLP considered by the Apex Court while passing the interim order. Further, in the State of Maharashtra, CET is also being held by the Government for Government quota. Not only that, but even in the very decision of the Apex Court in case of "TMA Pai Foundation" (supra) read with the decision in case of "Islamic Academy" (supra), exception is made out to the institution having settled norms of admission for at least

25 years. Therefore, unless all facts are placed on record, it is not possible for this Court to accept the submission of Mr.Nanavati. The aforesaid is coupled with the settled legal position that no interim orders can be cited as precedent and even if this Court has to consider as if it is a precedent, then also unless and until all facts are placed on record, such contention as it is cannot be accepted and hence rejected. 24.A) In view of the aforesaid discussion, SCA No.6307/2004 deserves to be partly allowed to the extent of permitting the charging of the fees even in government quota as per the fee structure approved/fixed by the Fees Committee for the concerned colleges and other reliefs prayed in the petition cannot be granted and hence they deserve to be rejected, but the State Government is directed to act as per declaration made by learned Addl. Advocate General for counselling and for giving option in management quota as recorded hereinabove. As observed earlier, so far as the petitioners of SCA No.5317/2004 are concerned, as on today, since the quota for management is not declared and, therefore, it will be open for the authority concerned to take appropriate decision for fixing of the quota in accordance with law. The petitioners of SCA No.5317/2004 have not made any prayer for allowing of charging of the fees as per the fee structure approved by the Fees Committee or otherwise and the petition mainly relates to permit holding of CET and the petitioners would not be entitled to any of the reliefs as prayed for in this petition.

[25] As CET was permitted by interim order of this Court and as at the final outcome of the petition it is found by the Court that the petitioners are not entitled to hold CET, nor the decision of the Committee refusing permission to hold CET deserves to be set aside and as it is found by the Court to dismiss the petitions qua reliefs for holding of CET and filling up of seats on management quota or so-called management quota qua petitioners of Special Civil Application No.5317/2004, the interim orders passed are vacated. It is settled legal position that no party should be allowed to take any benefit received on account of interim order passed pending the petition if at the final outcome of the petition such relief is vacated. Therefore, while vacating the interim order passed in the concerned petitions, further order is also required to be passed for directing the refund of the fees collected by the college concerned or the concerned petitioner association, as the case may be, from the students for holding of CET in pursuance of the interim order passed by this Court. Of course, the concerned petitioners would be entitled to get set off the amount of expenses already incurred. It may not be convenient for this Court to examine the record and to arrive at the exact figure and, therefore, it is directed that the relevant accounts for such purpose of income and expenditure already incurred till today qua CET shall be produced before the Committee and it will be for the Committee to examine the same and the surplus balance, as the outcome of the scrutiny whatsoever remains, is to be refunded proportionately to the students concerned on the basis of the number of students.

Therefore, the petitioners shall comply with the aforesaid directions, accordingly for refund of the fees collected for CET minus expenses approved and allowed by the Committee. Such refund shall be disbursed within one month from the communication of the decision of the Committee for finalizing the income and expenditure in this regard. In view of the above and subject to aforesaid observations and directions, Rule in SCA No.6307/2004 is partly made absolute accordingly and Rule in SCA No.5317/2004 is discharged. In view of the order passed in SCA No.5317/2004 finally today, Civil Application No.4492/2004 does not survive and shall stand disposed of accordingly. After the pronouncement of the judgement, Mr.Nanavati as well as Mr.Joshi, learned Counsel for the petitioners, submitted that the interim order may be granted directing the State authorities or Centralized Admission Committee for not to fill up the management quota on condition that the concerned colleges which are members of the petitioner Association shall also not admit any student and Mr.Nanavati submitted that such interim order will avoid further complications and he also submitted that earlier another Association in more or less factual situation had approached Apex Court and the Apex Court, as per the order dated 6-10-2003 had passed order in SLP No.17845/2003 restraining the government from making any admission over and above 50% quota namely; in the management quota. Mr.Trivedi, learned Addl. Advocate General opposed the said request made by Mr.Nanavati by contending that in the SLP of "GSF Dental College Association vs. Association of Management of Self Financing Technical Insti. & Anr.", which was considered by the Apex Court at the time of passing interim order, it was contended that the CET in pursuance of the earlier resolution was already held. However, the said aspect is denied by Mr.Nanavati stating that the contention raised is incorrect and factually no CET was conducted by GSF Dental College Association and for supporting the same he produced the copy of the final order passed by the Apex Court on record. Considering the facts and circumstances, as even the admission process for government has also not begun and upon query, it is stated that the same is to begin on 1st July onwards, I find that at this stage the request made by Mr.Nanavati prohibiting the State Government from filling up of the management quota is premature and, therefore, the said request is not accepted and hence rejected.