

Supreme Court of India

T.M.A. Pai Foundation vs State Of Karnataka on 5 April, 1994

Equivalent citations: 1994 AIR 2372, 1994 SCC (2) 734

Author: K Singh

Bench: Kuldip Singh (J)

PETITIONER:

T.M.A. PAI FOUNDATION

Vs.

RESPONDENT:

STATE OF KARNATAKA

DATE OF JUDGMENT 05/04/1994

BENCH:

KULDIP SINGH (J)

BENCH:

KULDIP SINGH (J)

AGRAWAL, S.C. (J)

MOHAN, S. (J)

JEEVAN REDDY, B.P. (J)

ANAND, A.S. (J)

BHARUCHA S.P. (J)

FAIZAN UDDIN (J)

CITATION:

1994 AIR 2372

1994 SCC (2) 734

JT 1994 (3) 194

1994 SCALE (2) 476

ACT:

HEADNOTE:

JUDGMENT:

ORDER

1. In these matters relating to admission to professional courses in medicine, engineering, pharmacy, nursing, etc. in educational institutions which are claimed to be Minority Educational Institutions, the petitioners have questioned the applicability of the scheme framed by this Court in *J.P. Unni Krishnan v. State of A. P.* I as well as the applicability of the rules and orders made by several State Governments on the basis of the said decision. By order dated October 7, 1993* passed by the Constitution Bench three questions were referred for consideration by a larger Bench. In pursuance of the said order, this Bench has been constituted. When the matters were taken up on

March 16, 1994, the Court felt that it was necessary to reframe the first two questions. The hearing of the matters was, therefore, adjourned to March 18, 1994, on which date the questions requiring consideration by this Bench have been reframed to highlight the several aspects of the claims put forward by the petitioners. The claim of being a "minority"

- whether based on religion or language - and the claim of being a "Minority Educational Institution" put forward by the petitioners cannot be pronounced upon without first ascertaining what the said expressions connote and signify. Having regard to the importance of the questions involved we consider it appropriate to issue notice to the Attorney General of India as well as the Advocates General for the States. It would, therefore, not be feasible to take up the hearing of these matters before the Court closes for the long vacation. Since the process of selection of candidates for admission for the next academic session is to commence soon, it is necessary to pass an interim order governing admission to the professional courses in Minority Educational Institutions for the next academic session.

2. For admission in the last academic session 1993-94, an interim order in the following terms was made by a Bench comprising Hon'ble the Chief Justice and one of us (Justice B.P. Jeevan Reddy) on May 14, 1993 in Writ Petition Nos. 350 and 355 of 1993+:

"1. We have heard Shri Soli J. Sorabjee, learned Senior Counsel for the petitioners in these two writ petitions. Issue rule.

2. There will be an interim order in the following terms:

(i) Fifty per cent of the total intake in the petitioners' educational institutions shall be permitted to be filled up by candidates selected by the agencies of the State Government on the basis of a competitive examination/test. The candidates so selected and admitted shall pay scales of fee as applicable to this class of students as determined by the State Government from time to time.

1 (1993) 1 SCC 645

* T.M.A. Pai Foundation v. State of Karnataka, (1993) 4 SCC 286

+_ Ed. : Cause title - Islamic Academy of Education, Mangalore and Others; S. Venkatesha Education Scy. and Another; and Sri Adichuchanagiri Maha-Sansthana Math and Others v. State of Karnataka and Others. This was cited in Shahal H. Musaliar v. State of Kerala, (I 993) 4 SCC 112

(ii) The remaining fifty per cent of the intake may be regulated by the petitioners to admit candidates belonging to the particular religious or linguistic minority. However, the selection shall be made strictly on the basis of merit among the candidates seeking admission to the institutions. Such merit shall be determined on the basis of the academic performance at the qualifying examination; or on the basis of any objective test that the institution might itself apply to determine such relative

and competing merits; or on the basis of performance of the results of the selection tests that the State Government may itself hold for selecting candidates for admission to technical colleges in the State. It is optional for the petitioners to adopt any one of these three modes and apply it uniformly. Candidates so selected on the basis of merit amongst the minorities shall, however, abide by such condition in the matter of payment of tuition and other fee as may be permitted by the State Government.

3. It is made clear that this order is made on the assumption that the petitioners are minority institutions. It is open to the respondents to question this status claimed by the petitioners.

4. This order shall, however, not estop the petitioners from urging all other contentions raised in the writ petitions, as, indeed, this interim interlocutory order is made on the consent of the petitioners and without prejudice to all the contentions."

3. Thereafter the matter was considered by the Constitution Bench in its order dated August 18, 1993. In that order the writ petitions placed before the Bench were categorised into five categories, namely, (1) unaided Minority Educational Institutions, (2) Minority Educational Institutions which are in receipt of State funds by way of aid, (3) Minority Educational Institutions in respect of which it is not clear from the averments in the writ petitions whether they are aided or unaided institutions, (4) writ petitions challenging the correctness and applicability of Unni Krishnan' filed by educational institutions which do not claim to be Minority Educational Institutions, (5) writ petitions which do not fall in any of the above categories. It was directed that the order dated May 14, 1993, would not apply to educational institutions falling in categories (4) and (5) and the institutions referred to in paragraph 18 of the order dated August 18, 1993. The order dated May 14, 1993, was made applicable to the institutions falling in categories (1), (2) and (3) with the modification that following paragraphs were added in continuation of the said order: (SCC pp. 117-118, para 17)2.

"(5) In continuation of para (3) it is made further clear that whether any of the petitioner-institutions is a MEI or not is a matter for the Government to verify and determine. We do not more particularly at this stage - make any pronouncement in that behalf. This order shall be 1 Shahal H. Musaliar v. State of Kerala, (1993) 4 SCC 112 applicable only to those institutions which are found to be MEIs on verification by the Government and not to those who are not found to be MEIs on such verification.

(6) The 50% seats to be filled up by candidates selected by the agencies of the State Government on the basis of a competitive examination/test as well as the remaining 50% seats to be filled in accordance with clause

(ii) of para (2) of the said order shall be equally distributed between free seats and payment seats. In other words, out of the 50% seats to be filled up by Government, half will be payment seats and half will be free seats. Similarly, out of the 50% of the

seats to be filled up by the Management in accordance with para 2(ii) of the said order, half shall be payment seats and the other half free seats. The NRIS, if any admitted to an extent not exceeding 5% of the total seats shall be out of the payment seats to be filled under para 2(ii).

(7) After completing the admissions each of the colleges, shall submit to the competent authority, to the University to which it is affiliated and to the Government concerned statements containing full particulars of the students admitted under clause (ii) of para (2) of this order. Such statements shall contain as full a particulars as possible. The authorities to which the statements are submitted shall verify the correctness of the statements and, if they find any irregularity, they shall call upon the college concerned to rectify the same. They shall also bring any such violation to the notice of this Court by way of any interlocutory application. Any such irregularity if proved may entail serious consequences."

4. Separate directions were, however, given in respect of institutions referred to in Writ Petitions Nos. 284 and 482 of 1993. With regard to Writ Petition No. 284 of 1993 it was observed that in the said writ petition the petitioner has claimed that no capitation fee is charged from any student and the fee charged is not more than (in some cases less than) the fees charged in the government colleges and that the admission to these institutions is made on the basis of an All India Common Entrance Test separately conducted by the petitioner and admissions are made on the basis of merit as determined in the said test, and further that in view of the reputation of these institutions, thousands of students apply for and appear in the entrance test every year. It was also observed that this fact was not disputed by the learned Advocate General for the State of Karnataka. Similarly as regards Writ Petition No. 482 of 1993, it was observed that according to the petitioner in that case the medical college run by it at Vellore in the State of Tamil Nadu is a well-reputed institution, admission to which is made on the basis of All India entrance test conducted by the petitioner and that the admissions are made on the basis of merit and the fee charged by it is not more than the fees chargeable in similar governmental institutions and that there has never been any complaint about the working of this institution and it was observed that this fact was not disputed by Shri Seetharaman, learned counsel for the State of Tamil Nadu. In the order dated August 18, 1993, the following directions were given in respect of the institutions covered by the aforesaid Writ Petitions Nos. 284 of 1993 and 482 of 1993² : (SCC pp. 117, para 16) "Having regard to the above circumstances, we permit the petitioners In the above two writ petitions to admit students to their colleges on the basis of entrance test conducted by them and on the same basis on which admissions were made by them in the said colleges in the previous academic year. After completing the admissions, the petitioners shall furnish full particulars of the students admitted, the categories, if any, whereunder they were admitted and all other particulars relating to their admission. This information should be furnished to the competent authority, to the University to which the said colleges are affiliated and to the Secretary, Education Department, Government of Karnataka/Tamil Nadu. The said authorities shall verify whether the admissions have been made by the petitioners in accordance with the directions given herein. In case of irregularity, any of the said authorities shall be entitled to call upon the petitioner to rectify the said irregularity. It shall also be open to the competent authority, University and the Government of Karnataka/Tamil Nadu to bring any such

irregularity to the notice of this Court by way of an interlocutory application for appropriate orders in that behalf. It is made clear that any violation of the directions given herein by the petitioners shall entail serious consequences inasmuch as the above orders are made based upon their representations and even before a counter- affidavit has been filed by the respective respondents in view of the urgency expressed by them."

5. Dealing with Writ Petition No. 598 of 1993, the Court, after noticing that an agreement was entered into between the institution and the Government of Kerala according to which while 85% of the seats were to be filled by the Government and the remaining 15% of the seats were left for the management to fill up in its discretion, observed that since the basic principle in Unni Krishnan' as well as the order dated August 18, 1993 is that merit shall be the guiding principle in the matter of admission, a plea for discretionary quota could not be countenanced and it was directed that the said writ petition shall also be governed by the order dated May 14, 1993, as modified by addition of paragraphs 5, 6 and 7.

6. By order dated October 7, 1993 the Constitution Bench having regard to the fact that the year 1993 being a year of transition and adjustment and also in view of the orders of the Government of India permitting admission of foreign students to the extent of as much as 50% of the seats as well as the time that had already elapsed, permitted the private professional colleges to admit non-resident Indians and foreign students up to a maximum extent of 15% of the intake capacity of that year i.e. 1993, with the direction that the basis of the said selection would be as indicated in order dated May 14, 1993 on the basis of merit leaving to the management of the college 3 T.M.A.Pai Foundation v. State of Karnataka,(1993) 4SCC276 4 Unnikrishnan, J.P. v. State of A.P., (1993) 4 SCC 111 concerned to adjudge the merit of these candidates having regard to the relevant factors. It was further made clear that this was a special provision made only for that year. In the aforesaid order dated October 7, 1993, with reference to the Minority Educational Institutions in the State of Kerala (such as those covered by Writ Petition No. 598 of 1993) it has been observed: (SCC p. 281, para 16) "The system obtaining in Kerala appears to be altogether different which was unfortunately not brought to our notice on August 18, 1993. There are only two private engineering colleges in the State, said to be Minority Educational Institutions. The system obtaining in this State appears to be that the entire fees collected by these private engineering colleges has to be made over to the Government while the Government bears the entire expenditure for running the colleges. Under this system, the colleges were allowed to admit students of their own choice to the extent of 15%."

7. We have heard learned counsel for the parties and we are of the view that except for the Minority Educational Institutions in Kerala which are governed by the terms of the agreements with the Government of Kerala, the directions given by this Court with regard to admissions for the academic session 1993 can continue and govern admissions for the next academic session commencing in 1994. As regards the institutions in the State of Kerala which are governed by the terms of agreements with the Government of Kerala, the admissions to such institutions would be made in accordance with those agreements. It is, therefore, directed that the admission for the academic session commencing in 1994 to the professional courses in the institutions which are claimed to be Minority Educational Institutions shall be made on the following basis:

(i) In the institutions referred to in Writ Petitions Nos. 284 of 1993 and 482 of 1993 admission shall be made as per the directions given in the order dated August 18, 1993, for the academic session commencing in 1993.

(ii) In the institutions referred to in Writ Petition No. 598 of 1993 and similar Minority Educational Institutions in the State of Kerala which are governed by an agreement with the Government of Kerala the admissions shall be made in accordance with the terms of those agreements. In respect of the seats which are left for management to fill in its discretion, merit shall be the guiding principle. Since the entire, expenditure of the colleges is borne by the State - the entire fees collected are also made over to the State - these colleges must be required to draw the students even with respect to the seats to be filled by the management from out of the State merit list, if any. In the absence of such list, they can themselves devise the method for such selection. We make it clear that regarding the character of these institutions - whether they are Minority Educational Institutions - we express no opinion.

That is a matter between the institutions and the Government of Kerala. It is enough to record that Shri Vellapally, learned counsel for the State of Kerala, disputes the minority character of these institutions.

(iii) In rest of the Minority Educational Institutions falling in categories (1), (2) and (3) indicated in paragraph 5 of the order dated August 18, 1993, admission shall be made in accordance with the directions contained in the order dated May 14, 1993 in Writ Petitions Nos. 350 and 355 of 1993 as modified by order dated August 18, 1993, but the directions would not apply to the institutions referred to in paragraph 18 of the order dated August 18, 1993. In this context, we would like to impress upon the managements of the institutions concerned that while assessing the merit of a candidate for admission the objective should be to promote the excellence of the institution as a vehicle of general secular education.

(iv) Insofar as non-resident Indians and foreign students are concerned, the permissible limit would be only 5% of the total intake for a given year as per the direction contained in paragraph 6 of the order dated May 14, 1993 as modified by order dated August 18, 1993. The admission against these seats shall be made on the basis of merit but it would be open for the management of the institution to adjudge the merit of the candidates having regard to the relevant factors.

8. The matters be listed for hearing on July 20, 1994. Notice be issued to the Attorney General of India and the Advocates General for the States on the questions as reframed. Written submissions (in brief) should be submitted by learned counsel by July 13, 1994.

MAKAR DHWAAJPAL v. NEER YADAV (K.Ramaswamy, J) The Judgment of the Court was delivered by K.RAMASWAMY, J.- The Contempt Petition Nos. 65, 100 and 126 of 1992 arise out of the judgment of this Court in Keshav Chandra Joshi v. Union of India' in which this Court had directed to determine inter se seniority of the direct recruits and promotee Asstt. Conservators, Forests, U.P. rendered on November 6, 1990. It would appear that at present there are 215 direct recruits and 100 promotee Asstt. Conservators, Forest working in the forest department. In K.C.

Joshi case' it was concluded that the promotees were appointed on ad hoc basis as a stop-gap arrangement in substantive posts. Their appointments were dehors the rules. Until they are appointed by the Governor according to the rules, they do not become the members of the service in a substantive capacity. Their continuous length of ad hoc service from the date of their initial appointment cannot be counted towards seniority. The direct recruits were appointed in accordance with Rule 5(a) read with Appendix A of U.P. Forest Service Rules, 1952 for short 'the Rules'. Their seniority shall be counted from the date of their discharging duties of the post of Asstt. Conservators, Forest and the seniority of direct recruits shall accordingly be fixed. The Governor was directed to make appointment by promotion to substantive vacancies to the post of Asstt. Conservators, Forest, if not already made, in accordance with Rule 5(b) read with Appendix B and Rule 6. We are informed that till date no appointments in terms thereof have been made. The seniority of the 1992 Supp (1) SCC 272: 1993 SCC (L&S) 694: (1993) 24 ATC 545 : AIR 1991 SC 284 promotee Asstt. Conservators, Forest shall be counted from the respective dates of appointment to the substantive posts in their quota under Rule 6 of the rules. The inter se seniority of the direct recruits and promotees shall be determined in accordance with Rules 5, 6 and 24 as per the judgment in K. C. Joshi case'. All the employees are entitled to all consequential benefits. Later when Raj Narayan Singh and others filed Writ Petition (Civil) No. 641 of 1991, this Court on June 6, 1991 directed to convert the writ petition as a contempt case for non-implementation of the direction issued in K. C. Joshi case' which was numbered as Contempt Petition No. 164 of 1971. When it came up for hearing on August 23, 1991, this Court observed thus :

"We are told by the counsel for the State of U.P. that for the purpose of working out the seniority draft list has been prepared and was in circulation inviting objections."

2. The petitioners therein had not filed any objection, despite giving time, but it was directed that the State would consider their cases even if they make any representation. In the light of that stand while dismissing the contempt petition, this Court directed the State Government to dispose of the matter on the basis of the representation that may be received from the petitioners therein against the draft seniority list within six months from that date. In these contempt petitions the promotees as well as some of the subsequent direct recruits complain against fixation of their inter se seniority by the State Government.

3. Shri R.K. Garg for the promotees contended that as on August 31, 1982 selection of the promotees on regular basis to fill up the posts of Asstt. Conservator, Forest for the years 1973-74 to 1979-80 had taken place by a regularly constituted selection committee which selected 140 candidates for appointment. Therefore, they are entitled to the seniority from the respective years. It is also contended that the promotees are entitled, in terms of the judgment in K.C. Joshi case' for appointment by promotion to substantive vacancies within their quota in the respective years and that therefore, their seniority should be counted from the years in which they started discharging their duties as Asstt. Conservators, Forest, as they were initially appointed to the substantive vacancies. Shri Verma appearing for some of the later direct recruits, contended that the direct recruits were appointed to the substantive vacancies as held in K.C. Joshi case' and their seniority was fixed in the judgment from the date on which they started discharging the duties of the post as Asstt. Conservators, Forest. Treating them to be temporary as shown in the seniority list prepared

by the State is in utter contempt of the directions in Joshi case¹.

4. In the rejoinder the promotees have stated that as on December 31, 1974 a total number of 140 posts of Asstt. Conservators, Forest were available and their quota as per the existing rules was 25 per cent. As on December 1, 1980, 186 posts, namely, 140 and 46 posts created during the period were available. As per the ratio, the promotees are entitled to $33\frac{1}{3}$ per cent quota. As on March 11, 1985, 32 more posts were created and the total posts available were 218. On December 1, 1986, 40 more posts were created. Therefore, as on March II, 1985, the total posts available were 258. On March 1, 1985, the quota was increased by 50 per cent. The promotees, therefore, are entitled to 50 per cent of the posts. As in the year 1990, 72 more posts were created and the total posts are now 330. Therefore, they are entitled to 50 per cent of the quota in the tentative list. But that was not done. Thereby, the action of the State is in defiance of the direction issued by this Court. In the counter- affidavit filed by the State it is stated that as on December 1, 1980 both permanent and temporary posts were

131. As on February 12, 1986, 203 posts were existing. The permanent posts are 102 and temporary posts are 173 and the total would come to 275. As per Rules 5 and 24 only permanent posts should be counted as substantive posts and temporary posts cannot be counted for fixation of the seniority. It is further contended that though decision was taken to give 50 per cent quota to the promotees, the statutory rules have not been made. Therefore, they are entitled to only $33\frac{1}{3}$ per cent quota. Since the seniority, as per the direction of this Court, was made only to substantive posts, some of the direct recruits became temporary direct recruits and the seniority was determined accordingly.

5. In the light of the respective contentions, the question arises whether the determination of the seniority is in accordance with the directions issued by this Court. In the light of the background scenario, we cannot strictly take it to be a case of contempt but in working out the directions issued by this Court, the State Government committed a mistake in law. We have to consider, therefore, whether the procedure adopted by the State to determine the inter se seniority is in accordance with the rules and the law laid down in K. C Joshi case'. The directions issued in K. C Joshi case' have already been extracted and their need to reiterate is obviated. From the averments it would appear that 100 promotee Asstt. Conservators, Forest are awaiting appointment to substantive vacancies. The total number of direct recruits appears to be 215. Prior to December 31, 1974, the quota was 75 per cent to the direct recruits and 25 per cent to the promotees. Similarly as on January 1, 1975, the ratio was increased to $33\frac{1}{3}$ per cent, namely, $66\frac{2}{3}$ per cent to the direct recruits and $33\frac{1}{3}$ per cent to the promotees. Indisputably a decision was taken on March 1, 1975 to increase the quota to 50 per cent but no amendment to the statutory rules to give effect to it was made. Therefore, the operative rule as on that date appears to be $33\frac{1}{3}$ per cent in respect of promotees. Therefore, the procedure to be adopted by the State in fixing the inter se seniority of the direct recruits and the promotees in their respective quota is the sole question. There is no rota prescribed in the rules. Therefore, the State is enjoined to implement the judgment of this Court in the light of the statutory rules. It is clear from the counter-affidavit filed by the State that the posts are both permanent and temporary. If the temporary posts are likely to continue for long, normally, as per the law laid down by this Court, they be treated, for the purpose of counting seniority, as permanent posts unless they are likely to be abolished. It is a policy matter. Therefore, the State has to determine whether the

posts are likely to be made permanent or abolished. In the event of converting them as permanent under Rule 24, the quota prescribed in Rule 6 would be applied to substantive posts. The seniority shall be determined in accordance with the quota rule to the posts available in the respective years in which the vacancies had arisen otherwise existing substantive posts should be filled up applying Rule 6. It is, therefore, incumbent upon the State Government to find out how many vacancies were existing in the year 1974-75 and thereafter every year and to determine as to how the respective posts stood reserved for the direct recruits and promotees in accordance with the quota. On so determining, the direct recruits would go en block as seniors to the promotees and the promotee officers in the order of their inter se seniority be appointed by the Governor under Rule 5(b) read with Rule 6 and would be placed below the direct recruits. Similar exercise for each year in which the substantive vacancies had arisen should be done. The officers, be they direct recruits or promotees would rank below the juniormost officer in the list of the previous year. After this exercise is exhausted; appointments should be made; posts are to be filled up to substantive vacancies. It would be open to the State Government to fix tentatively the inter se seniority in the temporary posts according to the ratio between the direct recruits and the promotees in the same manner of filling the substantive posts as indicated above. As and when the temporary posts are converted either into permanent posts or the vacancies arise due to superannuation of the senior officers, they should be fixed in the respective vacancies and fitment made. After exhausting the exercise the remaining candidates awaiting appointment would continue to be temporary until they get due placement or fixation of their seniority. These directions would meet the exigencies. The State Government is directed to undertake fresh exercise in the light of the above directions and complete the same within a period of four months from the date of the receipt of the order. The contempt petitions are accordingly disposed of.