IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 17.08.2022

DELIVERED ON : 09.09.2022

CORAM :

THE HON'BLE MR.MUNISHWAR NATH BHANDARI, CHIEF JUSTICE

AND

THE HON'BLE MRS.JUSTICE N.MALA

W.P.Nos.10088, 11595, 11598, 11601, 16702, 17966, 17969 and 21517 of 2022

and

W.M.P.Nos.9782, 9784, 11074, 11075, 11078, 11079, 11081, 11082, 16010, 16011, 17308, 17310, 17314, 17315, 20537 and 20538 of 2022

W.P.No.10088 of 2022:

Education Promotion Society for India,
rep. by its Executive Secretary,
Having office at:
Jai Durga Complex, 3rd Floor,
60/2, 1st Avenue, Ashok Nagar,
Chennai - 600 083 .. Petitioner

Vs

1.Union of India,
rep. by its Secretary,
Ministry of Health and Family Welfare,
Nirman Bhavan, New Delhi-110 011.

2.Union of India,
rep. by its Secretary,
Ministry of Law and Justice,
Nirman Bhavan, New Delhi-110 011.

3.The National Medical Commission,
rep. by its Secretary,
Pocket-14, Sector-9, Dwarka Phase-1,
New Delhi-110 077.

4.The University Grants Commission,
rep. by its Secretary,
Bahadur Shah Zafar Marg,
New Delhi-110 002. .. Respondents

Prayer: Petition filed under Article 226 of the Constitution of India praying for a writ of declaration declaring that Section 10(1)(i) of the Nation Medical Commission Act, 2019 is ultra vires the Constitution of India, illegal, null and void and consequently call for the records of the third respondent in the Office Memorandum dated 03.02.2022 in reference No.NMC/ US(NMC)/ Fee-Regulating-Committee/ 2021-22 issued in exercise of the power granted under Section 10(1)(i) of the National Medical Commission Act, 2019 and quash the same.

For the Petitioner in W.P.No.10088 of 2022 : Mr.Vijay Narayan
Senior Counsel
for Mr.Abishek Jenasenan

For the Respondents in W.P.No.10088 of 2022 : Mr.R.Sankaranarayanan
Addl. Solicitor-General
assisted by

Mr.Rajesh Vivekananthan
Asst. Solicitor-General
for respondent Nos.1 and 2
and
Ms.Shubaranjani Anand
for respondent No.3
and
Ms.V.Sudha
for respondent No.4

and batch cases:

COMMON ORDER

THE CHIEF JUSTICE

A batch of writ petitions has been filed to challenge Section 10(1)(i) of the National Medical Commission Act, 2019 [for brevity, "*the Act of 2019*"] and the Office Memorandum dated 3.2.2022 issued in exercise of the power conferred under Section 10(1)(i) of the Act of 2019.

2. The writ petitions have been preferred by the Education Promotion Society for India, Pondicherry Institute of Medical Sciences, apart from various medical colleges. The Education

Promotion Society of India is a society which consists of various educational institutions across the country, including Deemed to be Universities and private self-financing institutions affiliated to the State Universities in the respective States.

3. Learned counsel appearing on behalf of the writ petitioners referred to the previous litigation in regard to the seat matrix for admission and the fee for the medical course, when a challenge was made to capitation fee charged by few medical colleges.

4. It is submitted by learned counsel for the petitioners that the Apex Court has addressed the issue aforesaid and the first judgment on it was in the case of ***Unni Krishnan J.P. and others v. State of Andhra Pradesh and others, (1993) 1 SCC 645***. In the said judgment, a scheme was devised to have 50% of the seats to be "*free seats*" and the remaining 50% of the seats to be "*payment seats*". By virtue of the said judgment, a disparity on fee arose in view of the fact that a candidate given admission against a "*free seat*" was to pay a meagre amount, while the candidate

admitted against the "*payment seat*" was to pay higher amount of fee.

5. The scheme evolved in ***Unni Krishnan J.P. and others***, supra, did not continue for long in view of the judgment of the Apex Court in the case of ***T.M.A.Pai Foundation and others v. State of Karnataka and others, (2002) 8 SCC 481***, wherein it was held that the scheme evolved in ***Unni Krishnan J.P. and others***, supra, cannot be considered to be reasonable as it cross-subsidizes the fee of the students admitted against "free seats" by those admitted against "payment seats", as the cost incurred by the institution to impart medical education has to be borne by and large by the students admitted against the "*payment seat*".

6. In the light of the said judgment, the petitioners have challenged the Office Memorandum dated 3.2.2022 issued by the National Medical Commission which provides that fee of the 50% seats in the private medical colleges and deemed universities should be at par with the fee in the government medical colleges of the

State and Union Territory and for the remaining 50% seats, guidelines are laid down for fixation of fee and other charges to cover the cost incurred by the institution. It is submitted that by virtue of the Office Memorandum under challenge, the student admitted and subjected to fee to be determined against 50% seats as per the Office Memorandum would subsidize the fee of the students admitted on the fee at par with the fee in the government medical colleges.

7. It is the stand of the petitioners that the Apex Court in the case of ***T.M.A.Pai Foundation and others***, supra, has recognised the rights of the citizens and religious denominations to establish and administer educational institutions and the same view has been endorsed by the Apex Court in the case of ***Islamic Academy of Education and another v. State of Karnataka and others, (2003) 6 SCC 697***, wherein it was held that there can be no rigid fee structure, rather each institution must have freedom to fix its own fee structure taking into consideration the factors laid down in that judgment. The said fundamental right has been completely

taken away by the impugned Office Memorandum by fixing a rigid fee structure for 50% of the seats at par with the fee of the students in the government medical colleges.

8. Learned counsel for petitioners submitted that, by virtue of the Office Memorandum under challenge, 50% of the students taking admission in the M.B.B.S. Course would be paying fee at par with the fee of the students in the government medical colleges, which may be Rs.18,000/- to Rs.20,000/-, while the students taking admission against the remaining 50% of the seats would subsidize the fee of the first 50% of the students by paying around Rs.40 Lakhs to Rs.70 Lakhs to bear the cost incurred by the institution. It is for the reason that, even according to the respondents, the expenditure on each student remains up to Rs.30 lakhs for the M.B.B.S. course which is subsidized by the government for their medical college and if the aforesaid is taken into account, then 50% of the students would be paying around Rs.60 lakhs towards fee to cross-subsidize the other 50% of students admitted on a fee at par with the fee in the government medical colleges, i.e., Rs.18,000/-

to Rs.20,000/-.

9. The aforesaid arrangement coming out of the Office Memorandum is not permissible in the light of the Apex Court judgments in the case of ***T.M.A.Pai Foundation and others*** and ***Islamic Academy of Education and another***, supra. In fact, similar arrangement was permitted by the Apex Court in the case of ***Unni Krishnan J.P. and others***, supra, where the scheme was to divide the seats in every professional college in equal proportion, treating 50% of the seats to be "free seats" and the remaining 50% of the seats to be "payment seats". By virtue of the Office Memorandum, the scheme evolved in the case of ***Unni Krishnan J.P. and others***, supra, has been brought back by the National Medical Commission. In view of the above, not only the Office Memorandum under challenge, but Section 10(1)(i) of the Act of 2019 deserves to be struck down as it offends Article 19(1)(g) of the Constitution of India.

10. It is further submitted that the Apex Court in the case of

Islamic Academy of Education and another, supra, even directed setting up a State Level Committee in each State as a regulatory mechanism to supervise the fee collected by medical institutions, wherein each educational institute was given a right to place before the Committee, the proposed fee structure for the medical course. The Committee can either approve or modify the proposal made by the educational institute. The Committee was not given suo motu or independent power for fixation of fee. Pursuant to the judgment in the case of ***Islamic Academy of Education and another***, supra, fee for the medical course is approved or modified by the Committee headed by a Retired High Court Judge. The said system has been done away by the respondents by bringing Section 10(1)(i) of the Act of 2019 and the Office Memorandum and now the authority to determine the fee has been given to the State Fee Regulatory Authority. In view of the above, the Office Memorandum offends the judgment of the Apex Court in the case of ***Islamic Academy of Education and another***, apart from ***T.M.A.Pai Foundation and others***, supra.

11. Learned counsel for the petitioners further submitted that as per the Office Memorandum under challenge, if the government quota seats are less than 50% of the total sanctioned seats in medical college, the remaining candidates would avail the benefit of fee equivalent to the government medical college fees up to 50% of seats based on the merit. In view of the arrangement aforesaid, if in a medical institution the government quota seats are less than 50%, then the fee up to 50% of the seats would be charged at par with the fee in the government medical colleges to cross-subsidize their fee by other 50% students.

12. It is further submitted that even if Section 10(1)(i) of the Act of 2019 is held to be constitutionally valid, the power is only to frame the guidelines and not to determine the fee. However, in the case on hand, the Office Memorandum decides the fee of the 50% seats to be at par with the fee in the government medical colleges and for the remaining 50% seats, fee is to be determined by the State Fee Regulatory Authority. Thus, the Office Memorandum determining rigid fee structure is going beyond the power conferred

under Section 10(1)(i) of the Act of 2019 to frame guidelines. The meaning of the word "guidelines" has also been given to show it to be not a regulation, but a non-binding recommendation. The Office Memorandum under challenge cannot be considered to be guidelines, but a mandate in regard to the fixation of fee by the medical institutions and, therefore, the Office Memorandum issued by the National Medical Commission is beyond the power conferred on it. Section 10(1)(i) of the Act of 2019 gives power to frame the guidelines and not the rigid fee structure.

13. Learned counsel for the petitioners further submitted that the fee in the government medical colleges is subsidized by the State utilizing the funds of public exchequer, which is nothing but tax payers money and, therefore, if at all fee of the 50% seats in the private medical colleges and deemed to be universities is to be charged at par with the fee in the government medical colleges, then it should be subsidized by the government, as otherwise there would be disparity in fee structure between two sets of students, as 50% of the seats would be charged at the rate decided by the State

Fee Regulatory Authority to cross-subsidize fee for other 50% students paying the fee at par with the government medical colleges making it an exorbitant fee to be charged from 50% seats, which may even remain unfilled in the absence of availability of students to pay huge amount of fee. Any seat that remains vacant would be a loss to the nation as well as the institution because they would not be in a position to recover the proportionate amount so as to bear the cost to run the institution after keeping some surplus amount for future expansion of the institution, as permitted by the Apex Court.

14. The further limb of the argument of learned counsel for the petitioners is in reference to the standard of education maintained by the educational institutions. In the previous regime before Section 10(1)(i) of the Act of 2019 and the Office Memorandum under challenge, the medical institution was to propose the fee structure before the Committee and after examining the books of accounts and other materials, the Committee used to approve or modify the fee structure of each

institution independently. In case a medical institution is maintaining higher standard of education and provides best possible facilities to the students at higher cost, then it was allowed to charge the higher fee, subject to the approval of the Committee. By virtue of the Office Memorandum, the fee of all the medical colleges would be one and the same and thereby it would affect those colleges which are providing better facilities and education of excellence to the students. The standard of education is going to be sacrificed by the arrangement made by the respondents through the Office Memorandum under challenge. It is in the circumstance that the government is not in a position to provide education to all the students and, therefore, necessity of private institutions was felt and even recognised by the Apex Court. Therefore, the educational institution should be given liberty to fix their own fee depending on the expenditure, subject to the approval of the Committee, and there should not be a rigid fee structure. The prayer is, therefore, to strike down Section 10(1)(i) of the Act and the Office Memorandum.

15. Per contra, learned Additional Solicitor General of India appearing on behalf of the respondents submitted that Section 10(1)(i) of the Act of 2019 is not hit by any constitutional provision, rather the National Medical Commission is empowered to frame guidelines to regulate the fee of medical courses. The aforesaid would come out from the judgment of the Apex Court in the case of ***Modern Dental College and Research Centre and others v. State of Madhya Pradesh and others, (2016) 7 SCC 353***, which was also cited by learned counsel for the petitioners.

16. It is submitted that the Apex Court has issued directions from time to time regarding the seat matrix for admission to medical courses and even the fee structure till the rules are brought for the aforesaid. In view of the above, the National Medical Commission was given liberty to frame provision for determination of the fee and, accordingly, Section 10(1)(i) of the Act of 2019 was brought to give power to the National Medical Commission to frame guidelines for determination of fees and all other charges in respect of 50% seats in private medical institutions and deemed to be

universities. Section 10(1)(i) of the Act of 2019 does not offend Article 19(1)(g) of the Constitution of India. As per the judgments of the Apex Court in the cases of ***T.M.A.Pai Foundation and others*** and ***Islamic Academy of Education and another***, supra, the fee proposed by the institution was to be approved by the Committee and even in the Office Memorandum, the same position has been maintained. The only difference is that earlier the proposed fee by the institution was to be approved by the Committee headed by a Retired Judge of the High Court and now it would be by the State Fee Regulatory Authority.

17. It was, however, admitted that the legal position in regard to a Deemed to be University was different, but now all the medical colleges – whether under the private university or Deemed to be University, would be guided by one parameter given under Section 10(1)(i) of the Act of 2019 and the guidelines for determination of fees. With the issuance of the Office Memorandum under challenge no change has been made other than change of the authority for determination of fee from a Committee headed by the Retired High

Court Judge to the State Fee Regulatory Authority. Therefore, Section 10(1)(i) of the Act of 2019 is not offending any constitutional provision, rather the Office Memorandum was issued to regulate the fee structure in a proper manner.

18. Learned Additional Solicitor General has given reference to the judgment of the Apex Court in the case of ***Modern Dental College and Research Centre and others***, supra. In the said judgment, all the earlier judgments of the Supreme Court were discussed elaborately, which includes the judgment of the Larger Bench of Seven Judges in the case of ***P.A.Inamdar v. State of Maharashtra, (2005) 6 SCC 537*** and the judgment in the case of ***Islamic Academy of Education and another***, supra, to regulate the fee structure aimed to protect the student community as a whole as also the minority institutions and to maintain the required standard of professional education on non-exploitative terms. It was with the clarity that the Committees constituted pursuant to the direction of the Apex Court were to continue for regulating fee structure until a suitable legislation is brought by the government.

The Central and State Governments were given liberty to come out with a detailed well thought legislation setting out suitable mechanism to regulate the admission procedure and also the fee structure. In view of the above, Section 10(1)(i) of the Act of 2019 was brought to regulate the fee structure and pursuant to the power conferred therein, the Office Memorandum under challenge was issued. The Apex Court in the said case also held that though "occupation" is a fundamental right which empowers the educational institutions to admit students and fix the fee, but scope of such right has been discussed and limitations were imposed therein. Thus, it is not that the medical institutions are having absolute liberty to determine the fee, thus the provision relating to fixation of fee is not unconstitutional. The medical institutions were completely barred from charging capitation fee. It was, however, with recognition of the right that cost of education may vary from institution to institution and, for that, many variable factors are to be taken into account while fixing the fee, which is permitted even under the Office Memorandum under challenge.

19. He further submitted that the Apex Court has not permitted commercialisation of education having regard to the larger interest and welfare of the student community to promote merit, achieve excellence and curb malpractices. Giving reference to various paragraphs of the judgment in ***Modern Dental College and Research Centre and others***, supra, it is submitted that the Office Memorandum is not offending any of the judgments of the Apex Court and, for that, any provision of the Constitution.

20. An elaborate argument on all the issues was made to contest the submission of learned counsel for the petitioners, which would be dealt with by us while recording the finding in reference to the rival submissions of the parties.

21. We have considered the rival submissions of learned counsel for the parties and scanned the record carefully.

22. The challenge to Section 10(1)(i) of the Act of 2019 has been made mainly in reference to the judgment of the Apex Court

in the case of ***T.M.A.Pai Foundation and others*** and ***Islamic Academy of Education and another***, supra, whereas learned Additional Solicitor General has relied on the judgment of the Apex Court in the case of ***Modern Dental College and Research Centre and others***, supra, where all the earlier judgments of the Apex Court have been referred and summarized with a finding that the respondents can frame statutory provision to regulate fee for medical courses. The relevant paragraphs of the judgment in the case of ***Modern Dental College and Research Centre and others***, supra, are quoted hereunder for ready reference:

> *"43. In order to ensure that the said CET is fair, transparent and merit-based, T.M.A. Pai Foundation v. State of Karnataka, (2002) 8 SCC 481, also permitted the Government to frame regulations for unaided private professional educational institutions. Paras 67 and 68 which permit framing of such regulations are reproduced below: (SCC p. 549)*
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> > *"67. We now come to the regulations that can be framed relating to private unaided professional institutions.*
> >
> > *68. It would be unfair to apply the same rules and regulations regulating admission to*

both aided and unaided professional institutions. It must be borne in mind that unaided professional institutions are entitled to autonomy in their administration while, at the same time, they do not forego or discard the principle of merit. It would, therefore, be permissible for the university or the Government, at the time of granting recognition, to require a private unaided institution to provide for merit-based selection while, at the same time, giving the management sufficient discretion in admitting students. This can be done through various methods. For instance, a certain percentage of the seats can be reserved for admission by the management out of those students who have passed the common entrance test held by itself or by the State/university and have applied to the college concerned for admission, while the rest of the seats may be filled up on the basis of counselling by the State agency. This will incidentally take care of poorer and backward sections of the society. The prescription of percentage for this purpose

has to be done by the Government according to the local needs and different percentages can be fixed for minority unaided and non-minority unaided and professional colleges. The same principles may be applied to other non-professional but unaided educational institutions viz. graduation and postgraduation non-professional colleges or institutes."

44. A plea was raised by the appellants that by exercising the power to frame regulations, the State could not usurp the very function of conducting this admission test by the educational institutions. It was argued that it only meant that such a CET is to be conducted by the educational institutions themselves and the Government could only frame the regulations to regulate such admission tests to be conducted by the educational institutions and could not take away the function of holding CET.

45. This argument has to be rejected in view of the unambiguous and categorical interpretation given by the Supreme Court in P.A. Inamdar v. State of Maharashtra, (2005) 6 SCC 537, with respect to

certain observations, particularly in para 68 in T.M.A. Pai Foundation. In this behalf, we would like to recapitulate that in T.M.A. Pai Foundation, a Bench of eleven Judges dealt with the issues of scope of right to set up educational institutions by private aided or unaided, minority or non-minority institutions and the extent of government regulation of the said right. It was held that the right to establish and administer an institution included the right to admit students and to set up a reasonable fee structure. But the said right could be regulated to ensure maintenance of proper academic standards, atmosphere and infrastructure. Fixing of rigid fee structure, dictating the formation and composition of a governing body, compulsory nomination of teachers and staff for appointment or nominating students for admissions would be unacceptable restrictions. However, occupation of education was not business but profession involving charitable activity. The State can forbid charging of capitation fee and profiteering. The object of setting up educational institution is not to make profit. There could, however, be a reasonable revenue surplus for development of education. For admission, merit must play an important role. The State or the

University could require private unaided institution to provide for merit-based selection while giving sufficient discretion in admitting students. Certain percentage of seats could be reserved for admission by management out of students who have passed CET held by the institution or by the State/University. Interpretation of certain observations in para 68 of the judgment in T.M.A. Pai Foundation has been a matter of debate to which we will advert to in detail hereinafter.

46. As pointed out above, immediately after the judgment in T.M.A. Pai Foundation, a group of writ petitions were filed in this Court, which were dealt with by a Bench of five Judges Islamic Academy of Education v. State of Karnataka, (2003) 6 SCC 697 : 2 SCEC 339. Four of the Judges were the same who were party to the judgment in T.M.A. Pai Foundation. The issue considered was the extent of autonomy in fixing the fee structure and making admissions. This Court held that while there was autonomy with the institutions to fix fee structure, there could be no profiteering and no capitation fee could be charged as imparting of education was essentially charitable in nature. This required setting up of a committee by

each of the States to decide whether fee structure proposed by an institute was justified and did not amount to profiteering or charging of capitation fee. The fee so fixed shall be binding for three years at the end of which a revision could be sought.

47. With regard to the autonomy in admission, it was noted that the earlier judgment kept in mind "the sad reality that there are a large number of professional colleges which indulge in profiteering and/or charging of capitation fees". For this reason, it was provided that admission must be based on merit. It was impossible to control profiteering/charging of capitation fee unless admission was on merit. It was further observed that requiring a student to appear at more than one entrance test led to great hardship as the students had to pay application fee for each institute, arrange for and pay for the transport to appear in the individual tests. Thus, management could select students either on the basis of CET conducted by the State or association of all colleges for a particular type, for example, medical, engineering or technical, etc. Some of the institutions have their own admission procedure since long against which no

finger had ever been raised and no complaint made regarding fairness and transparency—which claim was disputed. Such institutions as had been established for 25 years could apply for exemption to the Committee directed by the Court to be constituted. This Court directed the State Governments to appoint permanent committees to ensure that the test conducted by association of colleges was fair and transparent.

48. The matter was then considered by a larger Bench of seven Judges in P.A. Inamdar v. State of Maharashtra, (2005) 6 SCC 537. It was held that the two committees for monitoring admission procedure and determining fee structure as per the judgment in Islamic Academy of Education were permissible as regulatory measures aimed at protecting the student community as a whole as also the minority themselves in maintaining required standards of professional education on non-exploitative terms. This did not violate Article 30(1) or Article 19(1)(g). It was observed that: (P.A. Inamdar case)

> *"145. … Unless the admission procedure and fixation of fees is regulated and controlled at the initial stage, the evil of unfair practice of*

granting admission on available seats guided by the paying capacity of the candidates would be impossible to curb."

(emphasis supplied)

On this ground, suggestion of the institutions to achieve the purpose for which committees had been set up by post-audit checks after the institutions adopted their own admission procedure and fee structure, was rejected. ***The committees were, thus, allowed to continue for regulating the admissions and the fee structure until a suitable legislation or regulations were framed by the States. It was left to the Central Government and the State Governments to come out with a detailed well-thought out legislation setting up a suitable mechanism for regulating admission procedure and fee structure. Para 68 in T.M.A. Pai Foundation case was explained by stating that observations permitting the management to reserve certain seats was meant for poorer and backward sections as per local needs.*** *It did not mean to ignore the merit. It was also held that CET could be held, otherwise merit becomes casualty.*

There is, thus, no bar to CET being held by a State agency when the law so provides.

49. Thus, the contention raised on behalf of the appellants that the private medical colleges had absolute right to make admissions or to fix fee is not consistent with the earlier decisions of this Court. Neither merit could be compromised in admissions to professional institutions nor capitation fee could be permitted. To achieve these objects it is open to the State to introduce regulatory measures. We are unable to accept the submission that the State could intervene only after proving that merit was compromised or capitation fee was being charged. As observed in the earlier decisions of this Court, post-audit measures would not meet the regulatory requirements. Control was required at the initial stage itself. ***Therefore, our answer to the first question is that though "occupation" is a fundamental right, which gives right to the educational institutions to admit the students and also fix the fee, at the same time, scope of such rights has been discussed and limitations imposed thereupon by the aforesaid judgments***

themselves explaining the nature of limitations on these rights.

....

71. ***We may again remind ourselves that though right to establish and manage educational institution is treated as a right to carry on "occupation", which is the fundamental right under Article 19(1)(g), the Court in T.M.A. Pai Foundation had also cautioned such educational institution not to indulge in profiteering or commercialisation. That judgment also completely bars these educational institutions from charging capitation fee. This is considered by the appellants themselves that commercialisation and exploitation is not permissible and the educational institutions are supposed to run on "no profit, no loss basis". No doubt, it was also recognised that the cost of education may vary from institution to institution and in this respect many variable factors may have to be taken into account while fixing the fee. It is also recognised that the educational institutions may charge the fee that would take care of various expenses incurred by these***

educational institutions plus provision for the expansion of education for future generation. *At the same time, unreasonable demand cannot be made from the present students and their parents. For this purpose, only a "reasonable surplus" can be generated.*

72. Thus, in T.M.A. Pai Foundation, P.A.Inamdar and Unni Krishnan, profiteering and commercialisation of education has been abhorred. The basic thread of reasoning in the above judgments is that educational activity is essentially charitable in nature and that commercialisation or profiteering through it is impermissible. The said activity subserves the looming larger public interest of ensuring that the nation develops and progresses on the strength of its highly educated citizenry. As such, this Court has been of the view that while balancing the fundamental rights of both minority and non-minority institutions, it is imperative that high standard of education is available to all meritorious candidates. ***It has also been felt that the only way to achieve this goal, recognising the private participation in this welfare goal, is***

to ensure that there is no commercialisation or profiteering by educational institutions.

73. In view of the said objectives, this Court had devised the means of setting up regulatory committees to oversee the process of admissions and fee regulations in Islamic Academy of Education. However, while indirectly approving the concept of regulatory bodies, this Court in P.A. Inamdar was of the view that the scheme should not be directed by this Court exercising its powers under Article 142 of the Constitution, but must be statutorily regulated by the Centre or the State laws.

74. The principles enunciated in T.M.A. Pai Foundation and P.A. Inamdar were applied in Islamic Academy of Education, where a challenge was mounted against the directions issued by the Director of Education to the recognised unaided schools under Section 24(3) read with Sections 18(4) and 18(5) of the Delhi School Education Act, 1973, inter alia, directing that no fees/funds collected from parents/students would be transferred from the recognised unaided school fund to a society or trust or any other institution. After examining the

directions and the accounting principles in detail, this Court upheld the said directions on the ground that it was open to the State to regulate the fee in such a manner so as to ensure that no profiteering or commercialisation of education takes place.

75. To put it in a nutshell, though the fee can be fixed by the educational institutions and it may vary from institution to institution depending upon the quality of education provided by each of such institutions, commercialisation is not permissible. In order to see that the educational institutions are not indulging in commercialisation and exploitation, the Government is equipped with necessary powers to take regulatory measures and to ensure that these educational institutions keep playing vital and pivotal role to spread education and not to make money. So much so, the Court was categorical in holding that when it comes to the notice of the Government that a particular institution was charging fee or other charges which are excessive, it has a right to issue directions to such an institution to reduce the same.

76. The next question that arises is as to how such a regulatory framework that ensures no excessive fee

is charged by the educational institutions can be put in place. In Modern School v. Union of India, (2004) 5 SCC 583, this Court upheld the direction of the Delhi High Court for setting up of a committee to examine as to whether fee charged by the schools (that was a case of fixation of fee by schools in Delhi which are governed by the Delhi School Education Act, 1973) is excessive or not. The ratio of judgments in T.M.A. Pai Foundation and Islamic Academy of Education was discussed in the following manner: (Modern School case, SCC pp. 600-01, para 16)

> *"16. The judgment in T.M.A. Pai Foundation case was delivered on 31-10-2002. The Union of India, State Governments and educational institutions understood the majority judgment in that case in different perspectives. It led to litigations in several courts. Under the circumstances, a Bench of five Judges was constituted in Islamic Academy of Education v. State of Karnataka so that doubts/anomalies, if any, could be clarified. One of the issues which arose for determination, concerned determination of the fee structure in private*

unaided professional educational institutions. It was submitted on behalf of the managements that such institutions had been given complete autonomy not only as regards admission of students but also as regards determination of their own fee structure. It was submitted that these institutions were entitled to fix their own fee structure which could include a reasonable revenue surplus for the purpose of development of education and expansion of the institution. It was submitted that so long as there was no profiteering, there could be no interference by the Government. As against this, on behalf of the Union of India, State Governments and some of the students, it was submitted, that the right to set up and administer an educational institution is not an absolute right and it is subject to reasonable restrictions. It was submitted that such a right is subject to public and national interests. It was contended that imparting education was a State function but due to resource crunch, the States were not in a position to establish

sufficient number of educational institutions and consequently, the States were permitting private educational institutions to perform State functions. It was submitted that the Government had a statutory right to fix the fees to ensure that there was no profiteering. Both sides relied upon various passages from the majority judgment in T.M.A. Pai Foundation case. In view of rival submissions, four questions were formulated. We are concerned with the first question, namely, whether the educational institutions are entitled to fix their own fee structure? It was held that there could be no rigid fee structure. Each institute must have freedom to fix its own fee structure, after taking into account the need to generate funds to run the institution and to provide facilities necessary for the benefit of the students. They must be able to generate surplus which must be used for betterment and growth of that educational institution. The fee structure must be fixed keeping in mind the infrastructure and facilities available, investment made, salaries paid to

teachers and staff, future plans for expansion and/or betterment of institution subject to two restrictions, namely, non-profiteering and non-charging of capitation fees. It was held that surplus/profit can be generated but they shall be used for the benefit of that educational institution. It was held that profits/surplus cannot be diverted for any other use or purposes and cannot be used for personal gains or for other business or enterprise. The Court noticed that there were various statutes/regulations which governed the fixation of fee and, therefore, this Court directed the respective State Governments to set up a committee headed by a retired High Court Judge to be nominated by the Chief Justice of that State to approve the fee structure or to propose some other fee which could be charged by the institute."

(emphasis supplied)

77. ***This Court also held that for fixing the fee structure, the following considerations are to***

be kept in mind: (Modern School case, SCC p. 601, para 16)

(a) the infrastructure and facilities available;

(b) investment made, salaries paid to teachers and staff;

(c) future plans for expansion and/or betterment of institution subject to two restrictions viz. non-profiteering and non-charging of capitation fees.

We may hasten to add here itself that Section 9 of the 2007 Act takes care of the aforesaid parameters in abundance.

78. As can be seen in T.M.A. Pai Foundation case itself, this Court has observed that the Government can provide regulations to control the charging of capitation fee and profiteering. Question 3 before the Court was as to whether there can be government regulations, and if so, to what extent in case of private institutions? What the Court has observed in para 57 of the judgment is instructive for our purposes and the same is reproduced below: (SCC p. 545)

"57. We, however, wish to emphasise one point, and that is that inasmuch as the occupation of education is, in a sense, regarded as charitable, the Government can provide regulations that will ensure excellence in education, while forbidding the charging of capitation fee and profiteering by the institution. Since the object of setting up an educational institution is by definition "charitable", it is clear that an educational institution cannot charge such a fee as is not required for the purpose of fulfilling that object. To put it differently, in the establishment of an educational institution, the object should not be to make a profit, inasmuch as education is essentially charitable in nature. There can, however, be a reasonable revenue surplus, which may be generated by the educational institution for the purpose of development of education and expansion of the institution."

In para 69 of the judgment, while dealing with this issue, this Court again observed that an appropriate machinery can be devised by the State or university to ensure that no capitation fee is charged and that

there is no profiteering, though a reasonable surplus for the furtherance of education is permissible. Although the Court overruled the earlier judgment in Unni Krishnan, which was to the extent of the scheme framed therein and the directions to impose the same, part of the judgment holding that primary education is a fundamental right was held to be valid. Similarly, the principle that there should not be capitation fee or profiteering was also held to be correct.

79. When we come to the judgment in Islamic Academy of Education, the first question framed by this Court was whether the educational institutions are entitled to fix their own fee structure. It is pertinent to note that this judgment brought in a committee to regulate the fee structure which was to operate until the Government/appropriate authorities consider framing of appropriate Regulations. It is also material to note that in para 20 the Court has held that the direction to set up committees in the States was passed under Article 142 of the Constitution and was to remain in force till appropriate legislation was enacted by Parliament.

80. The judgment in P.A. Inamdar, though sought to review the judgment in Islamic Academy of Education, left the mechanism of having the Committees undisturbed. In para 129 of the judgment in P.A. Inamdar, this Court observed that the State regulation should be minimal and only to maintain fairness in admission procedure and to check exploitation by charging exorbitant money or capitation fees. In para 140, it has been held that the charging of capital fee by unaided minority and non-minority institutions for professional courses is just not permissible. Similarly, profiteering is also not permissible. This Court went on to observe that (SCC p. 605, para 140) it cannot shut its eyes to the hard realities of commercialisation of education and evil practices being adopted by many institutions to earn large amounts for their private or selfish ends. In respect of Question 3 framed thereunder, which was with respect to the government regulation in the case of private institutions, this Court, in para 141 of the judgment, answered that every institution is free to devise its own fee structure, but the same can be regulated in the interest of preventing profiteering and no capitation fee can be charged. In para 145, the suggestion for post-audit or checks is rejected if

the institutions adopt their own admission procedure and fee structure since this Court was of the view that fixation of fees should be regulated and controlled at the initial stage itself.

81. It is in the aforesaid context that we have to determine the question as to whether the provisions relating to fixation of fee are violative of Article 19(1)(*g*) of the Constitution or they are regulatory in nature, which is permissible in view of clause (6) of Article 19 of the Constitution, keeping in mind that the Government has the power to regulate the fixation of fee in the interest of preventing profiteering and further that fixation of fee has to be regulated and controlled at the initial stage itself. When we scan through Section 9 of the 2007 Act from the aforesaid angle, we find that the parameters which are laid down therein that have to be kept in mind while fixing the fee are in fact the ones which have been enunciated in the judgments of this Court referred to above. It is also significant to note that the Committee which is set up for this purpose, namely, *Admission and Fee Regulatory Committee*, is discharging only a regulatory function. The fee which a particular educational institution

seeks to charge from its students has to be suggested by the said educational institution itself. The Committee is empowered with a purpose to satisfy itself that the fee proposed by the educational institution did not amount to profiteering or commercialisation of education and was based on intelligible factors mentioned in Section 9(1) of the 2007 Act. In our view, therefore, it is only a regulatory measure and does not take away the powers of the educational institution to fix their own fee. We, thus, find that the analysis of these provisions by the High Court in the impugned judgment [*Assn. of Private Dental and Medical Colleges* v. *State of M.P.*, 2009 SCC OnLine MP 760], contained in para 42, is perfectly in order, wherein it is observed as under: (*Assn. of Private Dental case*, SCC OnLine MP)

> "*42.* We are of the view that Sections 4(1) and 4(8) of the 2007 Act have to be read with Section 9(1) of the 2007 Act, which deals with factors which have to be taken into consideration by the Committee while determining the fee to be charged by a private unaided professional educational institution. A reading of sub-section (1) of

Section 9 of the 2007 Act would show that the location of private unaided professional educational institution, the nature of the professional course, the cost of land and building, the available infrastructure, teaching, non-teaching staff and equipment, the expenditure on administration and maintenance, a reasonable surplus required for growth and development of the professional institution and any other relevant factor, have to be taken into consideration by the Committee while determining the fees to be charged by a private unaided professional educational institution. Thus, all the cost components of the particular private unaided professional educational institution as well as the reasonable surplus required for growth and development of the institution and all other factors relevant for imparting professional education have to be considered by the Committee while determining the fee. Section 4(8) of the 2007 Act further provides that the Committee may require a private aided or unaided professional educational

institution to furnish information that may be necessary for enabling the Committee to determine the fees that may be charged by the institution in respect of each professional course. Each professional educational institution, therefore, can furnish information with regard to the fees that it proposes to charge from the candidates seeking admission taking into account all the cost components, the reasonable surplus required for growth and development and other factors relevant to impart professional education as mentioned in Section 9(1) of the 2007 Act and the function of the Committee is only to find out, after giving due opportunity of being heard to the institution as provided in Section 9(2) of the 2007 Act whether the fees proposed by the institution to be charged to the student are based on the factors mentioned in Section 9(1) of the 2007 Act and did not amount to profiteering and commercialisation of the education. The word "determination" has been defined in *Black's Law Dictionary*, Eighth Edn., to mean a final decision by the

Court or an administrative agency. The Committee, therefore, while determining the fee only gives the final approval to the proposed fee to be charged after being satisfied that it was based on the factors mentioned in Section 9(1) of the 2007 Act and there was no profiteering or commercialisation of education. The expression "fixation of fees" in Section 4(1) of the 2007 Act means that the fee to be charged from candidates seeking admission in the private professional educational institution did not vary from student to student and also remained fixed for a certain period as mentioned in Section 4(8) of the 2007 Act. As has been held by the Supreme Court in *Peerless General Finance and Investment Co. Ltd.* v. *RBI*, (1992) 2 SCC 343, the Court has to examine the substance of the provisions of the law to find out whether provisions of the law impose reasonable restrictions in the interest of the general public. The provisions in Sections 4(1), 4(8) and 9 of the 2007 Act in substance empower the Committee to be only satisfied

that the fee proposed by a private professional educational institution did not amount to profiteering or commercialisation of education and was based on the factors mentioned in Section 9(1) of the 2007 Act. The provisions of the 2007 Act do not therefore, violate the right of private professional educational institution to charge its own fee."

...

91. Thus, when there can be regulators which can fix the charges for telecom companies in respect of various services that such companies provide to the consumers; when regulators can fix the premium and other charges which the insurance companies are supposed to receive from the persons who are insured; when regulators can fix the rates at which the producer of electricity is to supply the electricity to the distributors; we ***fail to understand as to why there cannot be a regulatory mechanism when it comes to education which is not treated as purely economic activity but welfare activity aimed at achieving more egalitarian and prosperous society by empowering the***

people of this country by educating them. In the field of education, therefore, this constitutional goal remains pivotal which makes it distinct and special in contradistinction with other economic activities as the purpose of education is to bring about social transformation and thereby a better society as it aims at creating better human resource which would contribute to the socio-economic and political upliftment of the nation. The concept of welfare of the society would apply more vigorously in the field of education. Even otherwise, for economist, education as an economic activity, favourably compared to those of other economic concerns like agriculture and industry, has its own inputs and outputs; and is thus analysed in terms of the basic economic tools like the laws of return, principle of equimarginal utility and the public finance. Guided by these principles, the State is supposed to invest in education up to a point where the socio-economic returns to education equal to those from other State expenditures, whereas the individual is guided in his decision to pay for a type of education by

the possibility of returns accruable to him. All these considerations make out a case for setting up of a stable regulatory mechanism.

92. In this sense, when imparting of quality education to cross-section of the society, particularly, the weaker section and when such private educational institutions are to rub shoulders with the State managed educational institution to meet the challenge of the implementing ambitious constitutional promises, the matter is to be examined in a different hue. It is this spirit which we have kept in mind while balancing the right of these educational institutions given to them under Article 19(1)(g) on the one hand and reasonableness of the restrictions which have been imposed by the impugned legislation. ***The right to admission or right to fix the fee guaranteed to these appellants is not taken away completely, as feared. T.M.A. Pai Foundation gives autonomy to such institutions which remains intact****. Holding of CET under the control of the State does not impinge on this autonomy. Admission is still in the hands of these institutions. Once it is even conceded by the appellants that in admission of*

students "triple test" is to be met, the impugned legislation aims at that. After all, the sole purpose of holding CET is to adjudge merit and to ensure that admissions which are done by the educational institutions, are strictly on merit. This is again to ensure larger public interest. It is beyond comprehension that merely by assuming the power to hold CET, fundamental right of the appellants to admit the students is taken away. Likewise, when it comes to fixation of fee, as already dealt with in detail, the main purpose is that the State acts as a regulator and satisfies itself that the fee which is proposed by the educational institution does not have the element of profiteering and also that no capitation fee, etc. is charged. In fact, this dual function of regulatory nature is going to advance the public interest inasmuch as those students who are otherwise meritorious but are not in a position to meet unreasonable demands of capitation fee, etc. are not deprived of getting admissions. The impugned provisions, therefore, are aimed at seeking laudable objectives in larger public interest. Law is not static, it has to change with changing times and changing social/societal conditions.

...

173. Right to be treated fairly and to get admission through a non-arbitrary, non-discriminatory, fair and transparent procedure is a fundamental right of the students under Article 14. Any law which creates an artificial classification between private unaided institutions and other institutions and creates a disparity in the matter of admission whereby a meritorious student could be denied admission to pursue higher education in a private unaided institution solely because such institution has an unfettered right to choose its own students without following a uniform and transparent admission procedure would be violative of the rights of the aspiring students guaranteed under Article 14. Right of the students to admission in private unaided medical colleges is a right of equality in opportunity. On many occasions, this has led to a conflict between fundamental rights of private educational institutions on the one hand and the rights of students and public at large on the other. However, the law is now settled. In such cases where there is a conflict between fundamental rights of two parties, this Court in para 59 in Sharda v. Dharmpal, (2003) 4 SCC 493 held that only that right which would advance public morality or public interest would

prevail. In para 39 in State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat, (2005) 8 SCC 534, this Court held that when ***a fundamental right clashes with the larger interest of society, it must yield to the latter. The interest of citizens or section of community, howsoever important, is secondary to the interest of the nation and public at large and of the right of the students to avail opportunity of merit-based admission in professional unaided educational institutions would advance the public interest and as such the rights of the students would prevail over the rights of the private unaided professional educational institutions.****"*

[emphasis supplied]

23. The paragraphs quoted above make a reference of the earlier judgments of the Apex Court starting from the case of ***Unni Krishnan J.P. and others***, supra, and all the subsequent judgments referred by learned counsel for the petitioners.

24. In the judgments in the cases of ***T.M.A.Pai Foundation and others*** and ***Islamic Academy of Education and another***,

supra, apart from ***P.A.Inamdar***, supra, it has been held that till provisions are brought by the respondents to regulate the fee of the private medical colleges, the determination of fee would be by a Committee headed by a Retired Judge of the High Court, apart from a Chartered Accountant and the Secretary of the department concerned. The National Medical Commission under Section 57 of the Act of 2019 has been given power to frame rules and Section 10(1)(i) of the Act of 2019 empowers framing of the guidelines for determination of fees and all other charges in respect of 50% seats in private medical institutions and Deemed to be Universities which are governed by the Act of 2019.

25. Section 10(1)(i) of the Act of 2019 is quoted hereunder for ready reference:

> *"10. Powers and functions of Commission.*
> *(1) The Commission shall perform the following functions, namely:-*
> *(a) to (h) ...*
> *(i)* ***frame guidelines for determination of fees and all other charges in respect of fifty per cent***

of seats in private medical institutions and deemed to be universities which are governed under the provisions of this Act.”

[*emphasis supplied*]

The provision aforesaid gives power to the National Medical Commission to frame guidelines for determination of fees of the private medical colleges and deemed to be universities.

26. At this stage, the argument of learned counsel for the petitioners in reference to the special character of Deemed to be Universities and to regulate the fee structure in reference to the University Grants Commission (Regulation of Admission and Fees in Private Non-Aided Professional Institutions) Regulations, 1997 [for brevity, “*the UGC Regulations of 1997*”] would be relevant. Regulation 7 of the Regulations of 1997 provides for determination of fair tuition fee for the courses. However, medical education is a specialised professional course and National Medical Commission was constituted to regulate the standard of medical education and related matters. The special legislation would prevail over the general and, accordingly, the fee structure of the medical

institutions under a private university or a Deemed to be University, apart from State medical university, can be regulated by the National Medical Commission as per Section 10(1)(i) of the Act of 2019.

27. The aforesaid provision does not take away the power of the medical colleges or, for that, even the university, rather they are having liberty to establish and administer the institution in the manner provided under law and otherwise Section 10(1)(i) of the Act of 2019 does not control the fee structure, but gives power to the National Medical Commission to frame guidelines. Therefore, we hold that the provision under challenge does not offend any of the judgments of the Apex Court, which may include the judgment in the case of ***Islamic Academy of Education and another***, supra.

28. The issue in regard to the validity of the provision and the Office Memorandum needs to be considered even in the light of the recent judgment of the Apex Court in the case of ***Modern Dental***

College and Research Centre and others, supra, where a reference of the earlier judgments of the Apex Court in regard to the right of the educational institution to admit students and determine fee structure on their own was addressed.

29. In the case of ***Modern School v. Union of India, (2004) 5 SCC 583***, referred in the judgment of ***Modern Dental College and Research Centre and others***, supra, four questions were formulated, out of which the first question was whether the educational institutions are entitled to fix their own fee structure. It was held that there could be no rigid fee structure and each institution must have freedom to fix its own fee structure after taking into account the need to generate funds to run the institution and to provide facilities for the benefit of the students. The institutions may generate surplus to be used for betterment and growth of that educational institution. The fee structure must be fixed keeping in mind the infrastructure and facilities available, investment made, salaries paid to teachers and staff, future plans for expansion and/or betterment of institution, subject to two

restrictions, namely non-profiteering and non-charging of capitation fees. The Apex Court noticed that various statutes/regulations govern the fixation of fee and, therefore, the Court in the case cited above, directed the respective State Governments to set up a Committee headed by a retired High Court Judge to be nominated by the Chief Justice of that State to approve the fee structure or to propose some other fee which could be charged by the institute.

30. In the case of ***T.M.A.Pai Foundation and others***, supra, the Apex Court observed that the Government can provide regulations to control the charging of capitation fee and prevent profiteering by the institution. The third question before the Apex Court in the aforesaid case was as to whether there can be government regulations and, if so, to what extent in case of private institutions. The question was answered holding that the occupation of education, in a sense, is charitable. The government can provide regulations that will ensure excellence in education, while forbidding the charging of capitation fee and profiteering by the institution. The object behind the establishment of an educational institution

should not be to make profit, as education is essentially charitable in nature. However, there can be reasonable revenue surplus, which may be generated by the educational institution for the purpose of development of education and expansion of the institution.

31. In the case of ***Islamic Academy of Education and another***, supra, the first question framed by the Apex Court was whether the educational institutions are entitled to fix their own fee structure. The said judgment introduced a Committee to regulate the fee structure which was to operate until the government/ appropriate authorities consider framing of appropriate regulations. In paragraph (20) of the said judgment, it was specified that setting up of the Committee in the State was an order passed under Article 142 of the Constitution of India and would remain in force till appropriate legislation is enacted by the Parliament.

32. In the case of ***P.A.Inamdar***, supra, though the Apex Court sought to review the judgment in the case of ***Islamic***

Academy of Education and another, supra, it left the mechanism of having the Committees undisturbed. It was with an observtaion that the State regulation should be minimal and only to maintain fairness in admission procedure and to keep a check on the exploitation of students by charging exorbitant money or capitation fees. It was further observed that it cannot shut its eyes to the hard realities of commercialisation of education and evil practices being adopted by many institutions to earn large amounts for their private or selfish ends. It was held that every institution would be free to devise its own fee structure, but the same can be regulated to prevent profiteering and charging of capitation fee.

33. In the context aforesaid, the Apex Court in the case of ***Modern Dental College and Research Centre and others***, supra, addressed the issue whether the provisions relating to fixation of fee are violative of Article 19(1)(g) of the Constitution of India. It was held that the government has the power to regulate the fixation of fee in the interest of preventing profiteering and that the fixation of fee has to be regulated and controlled at the initial

stage itself. In the aforesaid judgment, the challenge was to the provisions of the Niji Vyavasayik Shikshan Sanstha (Pravesh Ka Viniyaman Avam Shulk Ka Nirdharan) Adhiniyam, 2007, which were brought to regulate the admission of students in private professional educational institutions and fix the fees. In the case on hand, Section 10(1)(i) of the Act of 2019 and the Office Memorandum were brought for the same purpose.

34. In the case of ***Modern Dental College and Research Centre and others***, supra, the Apex Court addressed the need for a regulatory mechanism when it comes to education, which cannot be treated as a purely economic activity, but is a welfare activity aimed at achieving a more egalitarian and prosperous society by empowering the people of this country by educating them. While answering the issue on challenge to the provisions of the Act of 2007 in reference to Article 19(1)(g) of the Constitution of India, it was held that the right to admission or right to fix the fee is not taken away completely and the judgment in the case of ***T.M.A.Pai Foundation and others***, supra, gives autonomy to the institutions

and the same remains intact. In the said judgment, a reference was made to the earlier judgment in the case of ***State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat, (2005) 8 SCC*** 534, wherein it was held that when a fundamental right clashes with the larger interest of society, it must yield to the latter. The interest of citizens or section of community, howsoever important, is secondary to the interest of the nation and public at large and of the right of the students to avail opportunity of merit-based admission in professional unaided educational institutions to advance the public interest and, as such, the rights of the students would prevail over the rights of the private unaided professional educational institutions.

35. In the light of the judgments, referred to above, it becomes clear that the Parliament was having power to bring the provision to regulate the fee structure in the medical institutions and, therefore, Section 10(1)(i) of the Act of 2019 cannot be held to be unconstitutional.

36. We may now refer to the UGC Regulations of 1997 to regulate the fee. A reference of the UGC Regulations of 1997 has been given in a petition filed by the Deemed to be University to submit that when legislation exists under the University Grants Commission Act, 1956, then it could not have been encroached by the Act of 2019, more specifically Section 10(1)(i) of the Act of 2019, and thereby Section 10(1)(i) of the Act of 2019 so as the Office Memorandum would not apply to the Deemed to be Universities.

37. To appreciate the argument, we have gone through Regulation 7 of the UGC Regulations of 1997 which provides the procedure for determination of the fee and the criteria given therein is by and large similar to what has been given in the Office Memorandum. Therefore, there would be no conflict in regard to the procedure for determination of the fee. However, it is submitted that the Office Memorandum so as Section 10(1)(i) of the Act of 2019 has divided students into two categories for the purpose of fee, which arrangement does not exist in the UGC Regulations of

1997. As per the Office Memorandum, the fee of the 50% seats would be at par with the fee in the government medical colleges and for the remaining 50% seats, the fee is to be determined by the State Fee Regulatory Authority.

38. To understand the issue, we need to refer to the Act of 2019 brought by the Parliament to govern the medical education and more especially the standard of education. The Act of 2019 is a special act to govern the medical education, while the UGC Regulations of 1997 are general provisions for determination of the fee of the courses taken by Deemed to be Universities. After the enactment of the Act of 2019, what will prevail is the special act over the general act and otherwise the UGC Regulations of 1997 cannot be read in contrast to the Act of 2019. It is no doubt true that the University Grants Commission Act, 1956 gives power for framing of the regulations and by virtue of it, the UGC Regulations of 1997 were framed. It is, however, applicable for all the courses imparted by the Deemed to be Universities, while the Act of 2019 is a specialised act for the medical courses. Till the Act of 2019 was

brought with a provision empowering the National Medical Commission to frame guidelines even for Deemed to be Universities, the UGC Regulations of 1997 were governing the subject, however therein also it is guided by the principles brought for the medical courses. It cannot be imagined that despite the judgments of the Apex Court from time to time and, for that, the last judgment in the case of ***P.A.Inamdar***, supra, followed by the judgment in the case of ***Modern Dental College and Research Centre and others***, supra, the Deemed to be Universities should be governed differently for determination of fee for medical courses.

39. We do not find that Section 10(1)(i) of the Act of 2019 offends the UGC Regulations of 1997, rather those regulations would operate for all the courses imparted by the Deemed to be Universities other than medical courses. The view aforesaid has been taken for the reason that the medical colleges operated by the private university and the Deemed to be University should have same standard of fee to avoid exploitation of the students taking admission.

40. In view of the above, we do not find that Section 10(1)(i) of the Act of 2019 is to be struck down for its application on Deemed to be Universities.

41. The issue that now remains is in reference to the Office Memorandum to regulate the fee structure of 50% seats on the criteria given therein.

42. A perusal of the Office Memorandum would show that all the relevant factors to determine the fee have been taken into account, as otherwise considered by the Apex Court in the case of ***P.A.Inamdar***, supra, apart from the cases of ***T.M.A.Pai Foundation and others*** and ***Islamic Academy of Education and another***, supra. The Office Memorandum does not rigidly fix the fee structure against 50% seats, rather it would depend on the amount spent on different heads to determine the fee. If a medical institution is providing better facilities to the students or maintaining higher standard of education by spending huge

amount, the Office Memorandum does not exclude consideration of those aspects for determination of the fee. The Office Memorandum is taking care of all the aspects for determination of the fee against the 50% of the seat and it would not take away the right of the educational institution to get the fee fixed after taking into consideration the cost they incur to maintain high standard of education.

43. The Office Memorandum, however, does not contemplate a fee structure to be proposed by the medical college to be scrutinized by the State Fee Regulatory Authority, which was the system under the old regime of a Committee headed by the Retired Judge of the High Court. The question would be as to whether this would take away the right of the institution to fix the fee, because now it would not be proposed by them.

44. In our considered opinion, the Office Memorandum gives criteria for determination of fee and all that has been referred to therein would take care of the cost incurred by a medical institution

for imparting education. The fee would be determined based on the aforesaid and thereby, for clarification, the fee would be determined for each institution based on the record produced by it. The only difference would be that earlier the production of record before the Committee headed by the Retired High Court Judge was with indication of the proposed fee, which feature has been eliminated in the Office Memorandum. However, the aforesaid would not take away the right of the institution to fix the fee. In fact, earlier also it was to be determined by the Committee based on the criteria laid down by the Apex Court from time to time.

45. The next issue that pops up for consideration is about the 50% of the seats to be governed with the fee at par with the fee of the students in the government medical colleges.

46. The recommendation of the Expert Committee constituted by the National Medical Commission makes a reference of the judgments of the Apex Court that fee structure should not be such which may result in cross-subsidizing of fee by one set of students

for the other set of students. The recommendation of the Expert Committee shows variation of fee for government quota seats in different States. It has further made a mention about the fee against the management quota seats. A statement giving the data of different States was also prepared. The statement aforesaid shows difference of fee between government quota seats and management quota seats and if the difference is of a nature which may result in cross-subsidization of fee by one set of students for other set, then it would be opposed to the judgments of the Apex Court starting from ***T.M.A.Pai Foundation and others, Islamic Academy of Education and another***, ***P.A.Inamdar***, supra, till the last judgment in the case of ***Modern Dental College and Research Centre and others***, supra.

47. The aforesaid may have a serious consequence because the poor may subsidize the fee of the rich, as fee structure for 50% of the seats would be at par with the fee in the government medical colleges and obviously those seats would be taken by the students who secured merit position. The Apex Court analyzed the aforesaid

by giving illustration that a rich candidate would be in a position to take coaching and may secure higher merit position and based on the aforesaid if he occupies government seat, then he would be paying a meagre amount, while the rest of the 50% of seats would be filled by the remaining candidates and they would be paying higher amount of fee to subsidize the fee of the first 50% students and in that event the poor may subsidize the fee of the rich. This aspect could not be taken into consideration by the Expert Committee while making recommendations, though it has referred the judgments of the Apex Court on the issue.

48. Learned Additional Solicitor General submitted that the purpose of bringing Section 10(1)(i) of the Act of 2019 is to regulate the fee of 50% of the seats of the management quota, as otherwise the fee of the first 50% of seats is to be at par with the fee of the students in the government medical colleges. The fees would be regulated in the same manner as was obtaining before bringing the Act of 2019 and thereby it was submitted that the Office Memorandum is basically to regulate the fee of 50% of the

management quota seats.

49. We do not find a clarification of that nature in the Office Memorandum and otherwise it rigidly talks about the fee for first 50% of seats at par with the fee in the government medical colleges. A perusal of the fee structure of different States given in the report of the Expert Committee would show a meagre fee charged in the government medical colleges for the reason that it is subsidized by the government out of the money of the tax payer. The government is not subsidizing it for the private medical colleges and by virtue of it, if the Office Memorandum would operate, the 50% of the students would pay fee at par with the fee in the government medical colleges, which even as per the report of the Expert Committee would be one-sixth or one-tenth of the fee charged from the students taking admission against the management quota seats. The result of the aforesaid would be nothing but cross-subsidizing of the fee by one set of students for another set, which was the position obtaining after the case of ***Unni Krishnan J.P. and others***, supra. The Apex Court in the

subsequent judgments in the cases of ***T.M.A.Pai Foundation and others, Islamic Academy of Education and another***, and ***P.A.Inamdar***, supra, did not approve the aforesaid. In the recent judgment in the case of ***Modern Dental College and Research Centre and others***, supra, while the National Medical Commission is allowed to bring the regulation, it was not to cross-subsidize the fee of one set of students by another.

50. In view of the above, there is a need for the National Medical Commission to give a re-look to the Office Memorandum under challenge, when it would be operating not in one State, but in all the States of the country having different seat matrix arrangement as well as fee structure for government quota and management quota seats. The aforesaid has been elaborately referred by the Expert Committee in its report. In few States, the management quota seats are limited to 15% and the government quota seats are at 85% and in variation, in few States, the government quota seats were 30% and the remaining were management quota seats, apart from NRI quota, etc. The intention

behind bringing Section 10(1)(i) of the Act of 2019 is to determine the fee of the management quota seats, which was earlier determined by the Committee headed by the Retired High Court Judge.

51. In view of the foregoing discussion, we find reason to direct the National Medical Commission to re-visit the Office Memorandum dated 3.2.2022 in the light of the observations made by us and if the intention of the Parliament was to make provision for determining the fee structure for all the seats in the medical colleges, then to amend Section 10(1)(i) of the Act of 2019 appropriately. However, the provision now operating and held to be constitutionally valid allows the National Medical Commission to regulate fee of 50% of seats and if such regulation of fee is permitted in regard to the management quota seats, then the Office Memorandum under challenge can operate, but the question would be for determination of fee for the remaining 50% seats to be at par with the fee in the government medical colleges. To avoid confusion of any nature, it would be appropriate for the respondents

to take a decision on it at the earliest so that a proper fee structure is determined for the students, which may not result in cross-subsidization of fees.

52. The aforesaid is required even for the reason that if there would be a huge difference of the fee structure between two sets of students, then it may even result in sacrificing the merit of the candidates in view of the fact that after filling of first 50% of seats of government quota at par with the fee of the government medical colleges, the remaining would be offered to the next meritorious candidate and if the next meritorious candidate is not in a position to bear the burden of high fee, he/she would be unable to take admission in the medical college and then the seat would go to the next meritorious candidate, who may be below the caliber of the candidate who could not afford to pay high fee. This would ultimately result in sacrificing the merit and the worst scenario would be when no candidate down in the merit list is ready to take the burden of paying high fee and the seat remains vacant, which would be a loss to the institution and the nation.

53. The aforesaid aspects have not been taken into consideration by the Expert Committee while making recommendation, though it has undertaken extensive work not only for collection of data from different States, but even considering the suggestions and objections from the medical colleges. The Expert Committee while making recommendation, however, could not visualize that if there would be huge different in the fee structure between two sets of students, it may result in sacrificing the merit.

54. In the result, the writ petitions are disposed of with the direction that in the light of the observations and finding recorded in the preceding paragraphs, the National Medical Commission should at the earliest come out with a fresh Office Memorandum after giving a re-look to the Office Memorandum under challenge. Till the exercise aforesaid is undertaken, the fee structure may be governed by the present system.

There will be no order as to costs. Consequently, connected miscellaneous petitions are closed.

(M.N.B., CJ.) (N.M., J.)
09.09.2022

Index : Yes
sasi

To:

1.The Secretary,
Union of India,
Ministry of Health and Family Welfare,
Nirman Bhavan, New Delhi-110 011.

2.The Secretary,
Union of India,
Ministry of Law and Justice,
Nirman Bhavan, New Delhi-110 011.

3.The Secretary,
National Medical Commission,
Pocket-14, Sector-9, Dwarka Phase-1,
New Delhi-110 077.

4.The Secretary,
University Grants Commission,
Bahadur Shah Zafar Marg,
New Delhi-110 002.

THE HON'BLE CHIEF JUSTICE
AND
N.MALA, J.

(sasi)

W.P.Nos.10088, 11595, 11598, 11601,
16702, 17966 17969 and 21517 of 2022

09.09.2022