

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**SPECIAL CIVIL APPLICATION NO. 9506 of 2016**

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L. J. INSTITUTE OF PHARMACY....Petitioner(s)

Versus

UNION OF INDIA & 3....Respondent(s)

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Appearance:

MR DC DAVE, SR. ADVOCATE WITH MR UDAYAN P VYAS, ADVOCATE for
the Petitioner(s) No. 1MS MANISHA LAVKUMAR, LD. GOVERNMENT PLEADER WITH MS AMITA
SHAH, LD. AGP for the Respondent(s) No. 4

MR DEVANG VYAS, ASST. SOLICITOR GENERAL for the Respondent(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE N.V.ANJARIA**

Date : 25/07/2016

CAV ORDER

Heard learned senior counsel Mr.Dhaval C. Dave with learned advocate Mr.Udayan Vyas for the petitioner, learned Assistant Solicitor General Mr.Devant Vyas for the first respondent-Union of India, learned Government Pleader Ms.Manisha Lavkumar for the fourth respondent-Admission Committee for Professional Courses (Technical). None appears for the second respondent as well as the third respondent though served with the notice of this Court.

2. Learned advocates for the parties were heard and lastly heard on 21st July, 2016 for admission as well as interim relief. Following are the principal

prayers in the petition.

"(A) commanding Respondent Nos.3 and 4 to treat the total intake of the Petitioner for the concerned course in the discipline of Pharmacy at the level of graduation leading to the educational qualification of B.Pharm for the purpose of admission in the ensuing academic year 2016-17 as 240 students on the basis of the approval thereof by Respondent No.2 and, thereupon, be pleased to command Respondent No.4 not to follow any directive in respect of the same from Respondent No.3;

(B) commanding Respondent No.3 not to interfere in the intake of the Petitioner approved by Respondent No.2 for the concerned courses in the discipline of Pharmacy at the level of graduation and post graduation leading to the educational qualification of B.Pharm and M.Pharm and, thereupon, be pleased to command Respondent No.3 to annul, its decision, as reflected from its aforesaid communication dated 11th September, 2014 (Exhibit - B) to the Memorandum of the present Petition;"

3. The petitioner-L.J. Institute of Pharmacy is aggrieved by the action and the course of action on the part of fourth respondent-Admission Committee for Professional Courses (Technical), Gujarat State to permit the petitioner the intake capacity of 100 students only for the courses in the faculty of Pharmacy at the graduation as well as post graduation level, for the Academic Year 2016-17. It is the emphatic case of the petitioner that total intake of 240 students has been approved by All India Council for Technical Education (AICTE)-the second respondent, for granting admission in the petitioner's institute; however the fourth respondent Committee has restricted it to 100 students, which is, at the behest and as per the stand of the third respondent-Pharmacy Council of India.

3.1 As per the case of the petitioner, AICTE has

addressed a communication dated 05th April, 2016 to the Principal Secretary, Department of Higher and Technical Education, Government of Gujarat which pertains to extension of approval for the Academic Year 2016-17. The petitioner institute has the approval for running the courses since 2004-05 and for every academic year the intake capacity is prescribed. The said mentioned communication dated 05th April, 2016 refers to the approval of intake in the Pharmacy Courses by the petitioner institute. The total intake of 240 seats as approved by the AICTE under the said communication, is divided into 180 seats in the first shift and 60 students in the second shift for Under Graduate. It appears that for the Post Graduate level admission course, 18 seats are allowed. These courses are being conducted and imparted under the Gujarat Technological University, Ahmedabad.

3.2 The courses and education being imparted by the petitioner at the graduation and post graduation level falls within the definition for Technical Education contained in Section 2(g) of the All India Council for Technical Education Act, 1987. The petitioner also qualifies as a technical institute under Section 2(h) of the aforesaid AICTE Act. The second respondent-AICTE, deriving powers under Sections 22 and 23 of the AICTE Act, has framed Regulations called All India Technical Education (Grant of Approval for Starting New Technical Institutions, Introduction of Courses or Programmes and Approval of Intake Capacity of Seats for the Courses or Programmes) Regulations, 1994. The powers

and functions of the AICTE are mentioned in Section 10 of the Act.

4. The main premise of the learned senior counsel for the petitioner is that the All India Council for Technical Education has granted approval to admit 240 students in total at the graduation and post graduation levels, divided into two shifts and that as per the said prescription and approval, the petitioner is entitled to admit the students. He submits that the Pharmacy Council of India cannot insist for admitting 100 students only since the provisions of the All India Council for Technical Education Act, 1987 has to prevail. He further submitted that the respondent-Admission Committee does not have any authority to question the approval granted by the All India Council for Technical Education and take a stand that clearance by the Pharmacy Council of India under Section 12 of the Act has to be a condition precedent and without which, the petitioner is not entitled to admit more students.

4.1 Learned senior counsel submits that similar question has arisen before different High Courts in respect of intake of students prescribed by AICTE Vs prescribed by or not approved by the Pharmacy Council of India. He relied on the following orders of different High Courts wherein High Courts have prima facie accepted that prescription of students intake by All India for Technical Education would have prevalence over what is provided in that regard by the Pharmacy Council of India- (i) Order dated 27th June,

2016 in Writ Petition No.6702 of 2016 passed by Aurangabad Bench of Bombay High Court; (ii) Order dated 27th June, 2016 in Writ Petition No.6540 of 2016 and other cognate matters passed by Aurangabad Bench of Bombay High Court; (iii) Order dated 23rd June, 2016 in Writ Petition No.6082 of 2016 and other cognate matters passed by Aurangabad Bench of Bombay High Court; (iv) Order dated 08th October, 2015 in Writ Petition No.4650 of 2014 passed by Aurangabad Bench of Bombay High Court; (v) Order dated 21st July, 2015 in Writ Petition No.6250 of 2015 passed by Aurangabad Bench of Bombay High Court; (vi) Order dated 06th July, 2015 in Writ Petition No.4917 of 2014 passed by Aurangabad Bench of Bombay High Court; (vii) Order dated 14th May, 2015 in Writ Petition No.8556 of 2015 passed by Kolkata High Court; (viii) Order dated 09th March, 2015 in Writ Petition No.5230 of 2015 passed by Andhra Pradesh High Court; (ix) Order dated 11th July, 2014 in Civil Application No.1532 of 2014 and other cognate matters passed by Bombay High Court; (x) Order dated 18th June, 2014 in Writ Petition No.4650 of 2014 passed by Aurangabad Bench of Bombay High Court; (xi) Order dated 09th May, 2014 in Special Leave Petition No.7277 of 2014 passed by the Supreme Court.

4.2 An interim order of the Apex Court in **Writ Petition (Civil) No.372 of 2014** dated 13th July, 2016 in **Indira Bahuuddeshiya Shik. Sanstha Vs Pharmacy Council of India** was relied on, in which also the Supreme Court permitted the petitioner therein to admit students through centralised admission process to the Pharmacy Courses, which was in the background

of the similar controversy as to whether intake capacity allowed by All India Council for Technical Education would have its way or the clearance given by the Pharmacy Council of India would override.

"We are informed that the Centralized Admission Process has been started.

Issue notice on the application.

In the meanwhile, we direct the respondents to permit the petitioners to admit the students through the Centralized Admission Process rounds to the course of Diploma in Pharmacy which is to be conducted in the 2nd Shift.

We make it clear that admission granted to the students shall be provisional.

We also make it clear that no equity shall be created in favour of the students by virtue of grant of such provisional admission which is liable to be cancelled.

We also make it clear that while granting admission to the students, the petitioners will clearly inform the students in writing that their admission is subject to the outcome of this petition so that the students are put to notice.

Since the issue raised in this application is a recurring issue, we are of the opinion that the matter should be heard expeditiously."

4.3 It appears that in the aforesaid matter Interim Application was filed subsequently, but the Supreme Court refused to vary the order and confirmed the same.

4.4 It was further submitted on behalf of the fourth respondent that in Special Civil Application No.7890 of 2011 filed before this Court the controversy was about sanctioned seats of 240 students by AICTE against the sanctioned strength by Pharmacy Council of India of 60. The order was passed by this

Court on 27th July, 2011 allowing the petitioner to admit students as per the recommendation of AICTE. It was the submission that the said petition came to be withdrawn on 08th July, 2013 as the petitioner was to make representation to the Pharmacy Council of India. It was pointed out from Page NO.88 of the compilation that the petitioner institute had filed an affidavit before the Pharmacy Council of India stating that admissions granted in excess of sanctioned strength, that is 60, would be neutralised in the next six academic sessions from Academic Year 2014-15 and there shall be no addition of strength. It was submitted that for the Year 2014-15, Pharmacy Council of India had sanctioned intake of only 59 students.

4.5 The aforesaid contention may be dealt with at this stage itself. The affidavit filed by the Director of petitioner's institute cannot be characterised as an obligation not liable to be altered from; it cannot be viewed of the nature which could not be varied in any circumstances. All India Institute for Technical Education is an expert body which governs the subject matter, even as there may be a dispute as to whether its directives will prevail or the prescription of Pharmacy Council of India would have the primacy. However in such circumstances, the affidavit cannot bind the petitioner institute to contend that AICTE has prescribed particular number of intake capacity and claiming on that basis right to admit students in the Pharmacy Course. Therefore, merely because an affidavit was filed before the Pharmacy Council of India, it is not possible to

accept the position that petitioner stands ousted from contending for the prayers made in the present petition.

4.6 A stand which is being put-forth along with vehement submissions made on behalf of the fourth respondent-Admission Committee is that Pharmacy Council of India has not approved the aforesaid intake of 240 students, but has allowed intake only on the 100 seats for the petitioner institute.

4.7 Furthering the case, respondents places reliance on Section 12 of the Pharmacy Act and submitted that since there is no approval by the Pharmacy Council of India, the petitioner cannot be allowed to have the intake of 240 students and the admissions in the petitioner institute cannot be permitted beyond 100. Section 12 provides for approved course of study and examinations, saying that any authority in a State which conducts a course of study for pharmacists may apply to the Central Council for approval of the course. It further provides that Central Council, if satisfied, after such enquiry as it thinks fit, declare such course of study as approved course for the purpose of admission to an approved examination for pharmacists. It is this provision of 1948 Act, which is sought to be pitted against for according primacy thereto over the provisions of the AICTE Act, 1987.

5. The pharmacy courses are included in the definition of "Technical Education" under Section 2(3)

of the AICTE Act, 1987. The petitioner institute is 'technical institute' as defined under Section 2(45) of the Act. Section 3 of the Act provides for establishment of the Pharmacy Council of India, further provides for inclusion of a representative therein under Section 3(m)(b) of the Act. In the constitution of Pharmacy Council, included are the representative from the Central Advisory Board of Education, Association of Indian Universities, from the Indian society for technical education, the counsel of the Indian Institute of Technology, the Council of Architecture and the National Productive of Council as well as the Chairman, the Universities Grant Commission. Also happens to be the Member is the Director General, Council of Scientific and Industrial Research. Section 10 of the Act mentions the function of the All India Council for technical education. Under Section 10(1)(b), the Council has the powers to co-ordinate the development of technical education in the country in all levels. Under Section 10(1)(d), the Council is empowered to take steps to promote innovations, research and development in the established and new technologies, adoption of new technologies and for over all improvements in the standard of educational processes. It lays down norms and standards for courses, curricular, instructional facilities, staff pattern and qualifications, assessment and examinations etc. under Section 10(1)(i). The power to grant approval for starting new educational institutions, new courses or programmes is under Section sub-clause (i) of sub-section (1) of

Section 10, whereas under clause (o), the Council is empowered to provide guidelines for admissions to students to the technical institutions and universities imparting technical educations.

5.1 In exercise of powers Section 23 the AICTE has framed All India Council for Technical Education (Grant of Approval for Starting new Technical Institutions, introduction of courses or programmes and approval of intake capacity of seats for the courses or programmes) Regulations, 1994. The Regulations have been framed for grant of approval for starting the new technical institutions, introduction of courses or programmes and approval of intake capacity of seats for the courses or programmes. Regulation 2 relates to grant of approval of the Council for establishment of new technical institutions, grant of approval of the Council for introduction of any course or programme in the technical institutions, grant of approval of the Council for existing intake capacity of seats and for increase in the annual intake capacity of seats in courses and programmes. Regulation 4 prescribes the requirement for grant of approval and Regulation 6 relates to conditions for grant of approval. Section 10 mentions functions of AICTE.

5.2 A Madras High Court decision in **A. Mahesh Vs K.K. College of Pharmacy** being **W. P. No. 4248 of 2001** and others dated 10th April, 2002, relied on behalf of the petitioner, rightly observes thus in paras 10 and 11,

"10. A combined reading of objects and reasons of the AICTE Act would undoubtedly reveal that the said Act was enacted duly taking into note of the fact that most of the institutions have serious deficiencies in terms of rudimentary infrastructure necessary for imparting proper education and training and also to vest statutory powers to regulate and maintain standards of technical education in the country on the All India Council for Technical Educations which was set up during the year 1945. The said enactment is a special enactment insofar as laying down norms and standards for courses, curricula, physical and instructional facilities, staff pattern and other qualifications, quality assessment and examinations as well as for grant of approval for starting new technical institutions and for introduction of new courses of programmes in consultation with agencies concerned.

11. An analysis of both the provisions of the Pharmacy Act and the AICTE Act would lead to a definite conclusion that while the Pharmacy Act is an Act occupying the field for regulating the profession of pharmacy, the AICTE Act is an Act enacted with a view to proper planning and co-coordinated development of the technical education in relation to planned quantitative growth and the regulation and proper maintenance of norms and standards in technical educational system and for matters concerned therewith."

6. What falls for consideration of the Court and what was debated in the rival submissions was whether Section 12 of the Pharmacy Act, 1948 would prevail over the All India Council for Technical Institute Act, 1987 or that AICTE's approval to the courses would have a primacy over Section 12 of the Pharmacy Act, 1948. The said Act enacted in the year 1948, appears to have been for making provisions for the regulation of profession and practice of Pharmacy. The Pharmacy Council of India is constituted under this Act. The AICTE was set up in the year 1945 by a Government Resolution as an expert-body. The AICTE Act of 1987 is enacted to secure coordinated development of technical education throughout the country. Both

the Acts prima facie occupy the same sphere. When two Central statutes occupy the same field, their working will have to be harmonised. In absence of possibility of harmony, it is the later Act which will prevail, as, by enacting the Act on the same subject matter, the Parliament can be said to have evinced its intention to displace the prevalence of provisions of the previous Act. *Prima facie* it is possible to apply the said principle in the present case.

6.1 In **Gandhi College of Pharmacy Vs All India Council of Technical Education [AIR 1995 Punjab & Haryana 315]**, the Punjab & Haryana High Court the very issue was addressed as to whether Pharmacy Council of India or All India Council for Technical Education, after coming into force of the AICTE Act, 1987, has power to approve the courses, in that case two years Diploma Course of Pharmacy conducted by the said petitioner-Gandhi College of Pharmacy.

6.1.1 This court is in complete agreement with the following observations of the Punjab & Haryana High Court, to endorse to the view that it is the AICTE Act of 1987 which would have a primacy over the Pharmacy Act, 1948. In paragraph 11, it is observed,

"Article 372 of the Constitution provides that notwithstanding the repeal by the Constitution of the enactments referred to in Art. 395, all the laws that were in force in the territory of India immediately before the commencement of the Constitution shall continue to remain in force until altered or repealed or amended by a competent Legislature or other competent authority. The 1948 Act is undoubtedly an existing law which was in force in the territory of India prior to the commencement of the Constitution. This law was thus to continue to operate till it was

altered or repealed or amended by a competent Legislature. Parliament in exercise of its powers under Entry-66 of List-I (Union List) has enacted the 1987 Act. As already noticed above, this Act covers same field which was earlier covered by the 1948 Act, namely, to lay down norms and standards for studies in the field of pharmacy. Therefore, in terms of Art.372 of the Constitution, the 1987 Act to the extent it covers the same field as covered by the existing law, i.e., the 1948 Act, will prevail and the provisions of the 1948 Act to that extent stand repealed/ altered. Alteration, repeal or amendment contemplated by Art. 372 of the Constitution may be express, i.e., the existing law may be expressly altered, repealed or amended by a competent Legislature. An existing law may also be modified by necessary implication and this can be done even by a separate enactment as in the present case. When two Acts are inconsistent or repugnant to each other, the existing law will be deemed to have been altered, repealed or amended by the later law enacted by the competent Legislature. Even when there is no repugnancy or inconsistency between the two enactments, the later law enacted by the competent Legislature will prevail provided that law covers the same field as is covered by the existing law since it is last expression of the will of the Legislature that must prevail."

6.1.2 In paragraph 12, it was further stated by the High Court,

"Looking at the background in which the 1987 Act was enacted, the object of Parliament was to co-ordinate and determine the standards of education in technical institutions including that of pharmacy in the country and it was intended that all technical institutions including the college should be governed by its provisions. The view that I am taking finds support from a Division Bench judgment of Madras High Court in Adhi-yaman Educational and Research Institutions v. State of Tamil Nadu, AIR 1991 Madras 246, which has since been approved by the Apex Court in (1995) 3 JT (SC) 136 : (1995 AIR SCW 2179).

It must, therefore, be held that the provisions of the 1987 Act govern the college and the provisions of the 1948 Act stand repealed and altered to the extent they provide for the minimum standard of education and approval of courses and examinations in pharmacy. In this view of the matter, AlCTE was well within its rights to grant approval to the college and was also competent to lay down the conditions enumerated in the communication dated 7-1-1994 (Annexure P5 with the writ

petition)."

6.2 Reverting to the facts of the case, the petitioner was allowed the intake for the past years as per the approval of All India Council for Technical Education. Communications dated 01st September, 2011 in respect of Academic Year 2011-12, dated 10th May, 2012 in respect of Academic Year 2012-13 and dated 19th March, 2013 in respect of Academic Year 2013-14 are on record, the petitioner institute has imparted education throughout these years as per the intake approved. For the Academic Year 2014-15 also approval was granted by AICTE by letter dated 04th June, 2014. Similar is the approval granted for the subsequent Academic Year 2015-16. The Pharmacy Council of India approved rise in the intake from 60 to 100 seats for the Academic Year 2013-14 and the excess admissions were ordered to be spread over for the subsequent years. As far as the current Academic Year 2016-17 is concerned, AICTE has approved the aforesaid intake capacity of 240 students as per communication dated 05th April, 2016 addressed to Principal Secretary of Higher and Technical Education, State of Gujarat; however the Pharmacy Council of India has taken an adverse stand which is of not allowing the petitioner to have the intake capacity of students as per AICTE approval. The petitioner feels aggrieved thereby.

6.3 Learned advocates for the first respondent- Admission Committee as well as the Pharmacy Council of India relied on decision of this Court in **Rahul Kumar Jasvantlal Panchal Vs State of Gujarat [2012 (5) GLR**

4413] to harp that Section 12 of the Pharmacy Act, 1948 has to be complied with beforehand and the same will have prevalence over the approval or clearance granted by the AICTE. In view of the above-referred decision of Madras High Court in **A. Mahesh (supra)** and of the Punjab & Haryana High Court in **Gandhi College of Pharmacy (supra)**, as well as in light of the issue having been pending before different High Courts as well as before the Apex Court about the prevalence and primacy of provisions of the AICTE Act, 1987 vis-a-vis that of the Pharmacy Act, 1948, the decision in **Rahul Kumar Jasvantlal Panchal (supra)** may have to be tested further and finally on the anvil of scrutiny.

6.4 In view of the above reasons and considerations and from the prima facie position of law, the stand of the respondents cannot be countenanced that without approval from the Pharmacy Council of India, the petitioner cannot be allowed to intake of students which is otherwise approved and permitted by AICTE. The approved by the Pharmacy Council of India cannot be taken as a condition precedent. It is also not possible to accept prima facie that Section 12 of the Pharmacy Act 1948 has a swaying and overriding effect against the provisions of All India Council for Technical Education Act, 1987. On the contrary having regard to the totality of the wholesome provisions of the AICTE Act, which is statute in later point of time, the position clearly appears to be otherwise to be threshed out finally.

7. For all the aforesaid reasons, a strong prima facie case is made out. The petition requires consideration, therefore Rule, returnable on 26th September, 2016.

(i) The petitioner shall be allowed to admit students as per the total intake of 240 admissions as per the approval granted by All India Council for Technical Education in its communication dated 05th April, 2016. In all 240 students are permitted to be admitted bifurcated into 180 students in the first shift and 60 students in the second shift;

(ii) Admissions to the students beyond 100 seats shall be treated as provisional admissions;

(iii) The petitioner shall clearly inform the students who are at serial number on merits 101 onwards that their admission subject to outcome of the present petition, so that the students are put to notice about the pendency of the present petition;

(iv) Pharmacy Council of India is not precluded from making such inquiry as it seeks by exercising its powers under Section 12 of the Act and thereby consider the question of approval to the petitioner in respect of higher intake during the pendency of the petition. However, any such decision taken adverse to the petitioner, shall be subject to final outcome of the petition.

(v) The petitioner shall file necessary undertaking/affidavit that it will abide by the

prescriptions of All India Council for Technical Education, and if prescribed further by the Pharmacy Council of India.

(N.V.ANJARIA, J.)

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