A.F.R.

ORISSA HIGH COURT: CUTTACK

W.P.(C) Nos.12869 & 12653 of 2013

In the matter of applications under Articles 226 and 227 of the Constitution of India.

In W.P.(C) No.12869 of 2013
Sudhansu Sekhar Sabat and others ... Petitioners

In W.P.(C) No.12653 of 2013
Orissa Private Engineering College Association,
(OPECA) ... Petitioner

-Versus-

State of Odisha represented
through its Commissioner-cum- Secretary,
Department of Employment and Technical
Education and Training,
At- Niyojan Bhawan, Kharvela Nagar,
Bhubaneswar and others ... Opposite Parties.
(in both the cases)

For Petitioners : Mr. Budhadev Routray
Sr. Advocate
M/s. Sambit Kar, S.K. Barik,
S.Mohanty, B. Das, T.Sinha &
S.K. Sethi
[**In W.P.(C) No.12869 of 2013**]

M/s. Devi P. Dash & S.K. Barik
[**In W.P.(C) No.12653 of 2013**]

For opposite parties : Mr. Amiya Kumar Mishra,
Addl. Govt. Advocate [For O.P. No.1]

M/s. A.K. Mishra, A.K. Sahoo,
S. Bhanja
[For O.P.No.2-BPUT]

M/s. Subir Palit, A.K. Mahana,
A.Mishra, A.Kejariwal &
Mrs. R. Tripathy
[For O.P.No.3-OJEE]

M/s. Dillip Kumar Mohapatra &
B.K. Mishra
[For O.P. No.4]

P R E S E N T :

THE HONOURABLE MR. JUSTICE B.N. MAHAPATRA

Date of Judgment: 20.12.2013

B.N.Mahapatra, J. Petitioners in W.P.(C) No.12869 of 2013 are seven in number. Petitioner Nos. 1, 2, 4 and 7 are AIEEE-2012 merit rank holder students and other petitioners are the OJEE-2012 merit rank holder students. They have filed the present writ petition with a prayer for issuance of appropriate writ/writs in the nature of mandamus or of any other form directing opp. parties to regularize admission of the petitioners against B.Tech. Engineering Course for 2012-13 batch and also for a direction to opposite party No.2-Biju Pattnaik University and Technology (for short, "BPUT") for grant of University Registration number to the petitioners who are continuing their courses in opp. party no.4-College-National Institute of Science & Technology against non-reporting vacant seats in B.Tech Engineering course.

The Orissa Private Engineering College Association, (for short, "OPECA") has filed W.P.(C) No.12653 of 2013 representing its member-institutions. In course of hearing, Mr. D.P. Dash, learned counsel for the petitioner submitted that the facts and issues involved in both the writ petitions are similar and he adopted the arguments advanced by Mr. B. Routray, learned Senior Advocate for the petitioners in W.P.(C) No.12869 of 2013 and has restricted his prayer for regularization of admission and issuance of University Registration Numbers in favour of the present petitioners.

2. Facts, as narrated in W.P.(C) No.12869 of 2013 in a nutshell, are that after closure of second round counseling of OJEE, 2012, seats in various Private Engineering Colleges remained vacant because of non-reporting of the students in the said Colleges. In such process, 47 seats in opp. party no.4-College remained unfilled due to non-reporting of students of the said College sponsored by OJEE, 2012. OJEE, 2012 held its final round of web-based counseling starting from 12.10.2012 in which the said OJEE had not included the vacant non-reporting seats of the institution. Petitioners' further case is that they had appeared in the Counseling Centre and all of them were assured by the authorities of OJEE that a special counseling will be held in respect of non-reporting vacant seats for some of the private Engineering Colleges. As the opp. party no.4-College is one of the premier and reputed Engineering Colleges of the State and all the petitioners having willingness to get admission in the said College, did not participate in the 3rd round counseling process and waited for further counseling. As learnt by the petitioners, in pursuance of order dated 6.11.2012 passed in W.P.(C) No. 15807 of 2012, the petitioners were allowed by the authorities of opp. party no.4-College to put forth their willingness for continuing against the said vacant non-reporting seats. As known to the petitioners their willingness was duly conveyed to the State Government. However, the Policy Planning Body (in short, "PPB") in its meeting dated 1.12.2012 decided for holding a special counseling in respect of vacant non-reporting seats amongst the students having willingness to take admission against such vacant seats. Accordingly, the OJEE on 3.12.2012 issued notice for holding up a special counseling for such vacant non-reporting

seats for which all the students have exercised their willingness to get admission in the opp. party no.4-College. Since PPB in its meeting dated 01.12.2012 took a decision for not deviating academic calendar of BPUT, undertakings were taken from the petitioners as well as their parents by opp. Party no.4-College and the petitioners were allowed to continue their courses against such vacant non-reporting seats awaiting regularization of their admission by the authorities concerned. The petitioners-students anticipating their regularization of admission by the State Government along with 10% Management quota have been continuing their B.Tech. Engineering Course in opp. party no.4-College. However, in the month of April, 2013, the State Government has only regularized the admission of 10% Management quota seats ignoring the case of the present petitioners.

3. When the matter stood thus, on 23rd May, 2013, opp. party No.1-Commissioner-cum-Secretary to Government of Odisha, Department of Employment and Technical Education and Training (for short, "Secretary") took a unilateral decision not to regularize the admission of the petitioners notwithstanding their continuance of course since 1st week of December, 2012 basing upon the decision of PPB and the notification of OJEE. In this process, petitioners on 01.6.2013 made a representation to the concerned Secretary for consideration of their admission to such non-reporting approved seats in the opposite party No.4-College. Further case of the petitioners is that they have all qualified OJEE/AIEEE-2012 Entrance Examination and are having valid rank cards. Petitioners' continuation of studies is against the approved AICTE intakes available in opposite party No.4-College for the reason of non-reporting of the OJEE sponsored

students. Therefore, there is no legal impediment for giving admission to the petitioners against such vacant seats. The admission against such vacant non-reporting seats is legally justified in view of Sec. 9(5) of the Odisha Professional Educational Institution (Regulation of Admission and Fixation of Fee) Act, 2007 (for short 'the 2007 Act').

4. The BPUT has also issued Notification for holding of 1st Semester Examination from 17.6.2013, hence, the petitioners will sustain irreparable loss and also be highly prejudiced if they are not allowed to appear in the BPUT 1st Semester B.Tech. Examination. Petitioners have also deposited 1st Semester Examination fees in the BPUT in shape of Bank Draft through opposite party No.4-College. They have also attended more than 90 days regular classes. Hence, there is no deviation of BPUT calendar as alleged by the State Government.

5. M. B.Routray, learned Senior Advocate appearing for the petitioners submitted that opposite party No.4-College being a Private Professional Educational Institution, Section 9 of the 2007 Act is applicable in respect of the said institution. For the academic session 2012-13, OJEE 2012 did not hold any counseling for filling up of non-reporting vacant seats in the institutions, though PPB in its meeting dated 01.12.2012 has decided for filling up of such non-reporting seats through OJEE web-based counseling. In view of Section 9(5) of the 2007 Act, the vacant non-reporting AIEEE quota reserved seats shall be filled up by candidates belonging to the general category from the merit list of OJEE. In view of the principle and ratio decided by this Court in judgment dated 31.03.2009 passed in W.P.(C) No.15532 of 2008, admission of seven petitioner-students is justified and

lawful. In W.P.(C) No.15532 of 2008 filed by OPECA, present opposite party No.1, i.e., the State of Odisha, opposite party No.2, i.e., BPUT and opposite party No.3-OJEE had been arrayed as opposite parties and therefore, the principles and ratios decided by this Court in the aforesaid writ petition are binding upon the present opposite parties. In support of his contention, Mr.Routray relied upon judgments of the Hon'ble Supreme Court in the cases of *Daryao and others v. State of U.P. and others, AIR 1961 SC 1457 and Hope Plantations Ltd. v. Taluk Land Board, Peermade and another, (1999) 5 SCC 590*.

Placing reliance on the Office Order dated 15.03.2007 issued by the State Government through its concerned Department, Mr.Routray submitted that all vacant seats, after centralized counseling of All India Engineering Entrance Examination (for short, 'AIEEE') / other All India Examinations and Tests / Joint Entrance Examination, will be filled up from AIEEE/ other All India Examinations and Tests/ Joint Entrance Examination (JEE) list at College level. In W.P.(C) No.14587 of 2008 filed by opposite party No.4-College, this Court while taking note of the aforesaid Order dated 15.03.2007, has directed the University, i.e., BPUT to issue registration numbers in respect of 19 students admitted in opposite party No.4-College against vacant non-reporting seats and directed the BPUT to allow the said students to appear in B.Tech semester examinations.

6. Mr. Routray further submitted that BPUT has reduced working days from earlier 180 days to 150 days, i.e., 75 working days per semester and also indicated therein that any short-fall would be compensated through extra classes to be conducted by the College. Therefore, the plea of

violation of academic calendar of the BPUT is incorrect. In the academic year 2012-13, students up to OJEE 2012 merit rank No.58690 and AIEEE 2012 merit rank No.1019570 got admitted into opposite party No.4-College through process of OJEE 2012; whereas the merit ranks secured by the petitioner-students go to show that they have secured higher rank than the students who got admitted in opposite party No.4-College through the OJEE 2012. Thus, petitioners are more meritorious than their counterparts/students admitted in opposite party No.4-College through OJEE-2012. Therefore, the plea of serious rank violation is incorrect and unjust. The reason assigned by the Secretary in its order dated 23rd May 2013 to the effect that continuance of the students in different institutions as submitted by OPECA is illegal *ab initio* being not backed by any Order/judgment of this Court is wholly misconceived and per se illegal. Opposite party No.2 has undertaken before this Court for holding special semester examination for the petitioner-students in the event they succeed in the Writ petition. Concluding his argument, Mr. Routray prayed for issuance of appropriate writ /direction as indicated above.

7. Mr.S.Palit, learned counsel appearing on behalf of OJEE submitted that earlier OPECA had moved this Court in W.P.(C) No.15807 of 2012 with the same prayer which was disposed of on 11.04.2013 remanding the matter to the Commissioner to take a fresh decision in the matter after hearing all the parties. The recommendation of PPB has been rejected by the Government vide Order dated 23.05.2013. Under Section 3 of the 2007 Act, final approving authority is the Government. Therefore, the Government has acted well within its jurisdiction while rejecting

recommendation of PPB. The admission of the petitioners having not been made through OJEE in terms of Section 3 of the Act, the same is not only illegal but also *ab initio* void. Section 11 of the 2007 Act clearly stipulates that any admission made contrary to provisions of the said Act is void. Despite several vacancy round counselings, these students have failed to turn up and have also not undertaken admission in the Colleges where they were allotted seats initially by OJEE.

8. Mr.Palit emphatically argued that the petitioners and institutions in question have indulged in practice of seat blocking and in the process less meritorious students have got admission after counseling for admission process is over. The practice of seat blocking by these Colleges may amount to rank violation. College level counseling is not permissible under the provisions of the 2007 Act. A similar attempt has been made before the Hon'ble Supreme Court in the year 2011 on the very same issue raised by the Association in I.A. No.9 of 2011 arising out of Civil Appeal No.2873 of 2007. The said I.A. was rejected by the Hon'ble Supreme Court vide Order dated 18.11.2011. Placing reliance on the judgment of the Hon'ble Supreme Court in the case of *Gurdeep Singh Vs. State of Jammu & Kashmir, AIR 1993 SC 2638,* Mr.Palit submitted that admission of candidates by illegal means cannot be retained and candidates as well as the authority who resort to illegal methods cannot be permitted to plead sympathy to retain their admission. Further placing reliance on the judgment of the Hon'ble Supreme Court in the case of *A.P.Christian Medical Educational Society Vs. Government of A.P., 1986 (2) SCC 667*, Mr.Palit submitted that the Courts cannot issue direction to the University to protect

interest of students who had been admitted erroneously, as that would be clear transgression of provisions of the Act and Regulations. The Court cannot by its fiat direct University to disobey the statute which would be destructive of rule of Law. The Government by its well-reasoned, sound and legal order has clearly rejected the prayer of the institution to permit regularization of such admission.

Learned Single Judge in his judgment dated 31.03.2009 passed in W.P.(C) No.15532 of 2008 has failed to deal with interpretation of Section 3 and Section 11 of the 2007 Act. It also failed to take into account the effect of Sections 3, 9 and 11 of the 2007 Act. Interpretation of Section 9 of the 2007 Act given by the learned Single Judge is not correct. The said judgment does not lay down correct position of law. Moreover, the said judgment pertains to a different year and different set of students and the constituent statutory body was also different. In the Doctrine of Precedence under Article 133 of the Constitution, subsequent Bench of equal strength can disagree or distinguish an earlier judgment when it appears to the Hon'ble Bench that the earlier judgment does not lay down correct proposition of law. Placing reliance on the judgment of the Hon'ble Supreme Court in *State Financial Corporation Vs. M/s Jagadamba Oil Mill*, AIR 2002 SC 834, Mr. Palit submitted that before the judgment can be applied to the fact of a particular case the colours must match. Concluding his argument, Mr.Palit submitted for dismissal of the Writ Petition.

9. Mr.A.K.Mishra, learned Counsel for opposite party No.2-BPUT submitted that non-reporting seats involved in the present case are meant for the General Category students and therefore, the

procedure laid down in the 2007 Act for admission of general category students to the Engineering Colleges apply to the facts of the present case. Placing reliance upon the Preamble of 2007 Act, Mr.Mishra submitted that the said Preamble indicates the object and purpose of enacting the 2007 Act by the State Legislature. Therefore, while applying/interpreting the provisions of the 2007 Act, the intention behind having such an Act is to be kept in mind. Provisions of the 2007 Act, more particularly Section 9 are to be applied and interpreted in such a manner that the same would not have any conflict/collision with the Preamble of 2007 Act. Placing reliance upon the judgment of the Hon'ble Supreme Court in the case of *Reserve Bank of India vs. Peerless General Finance and Investment Co. Ltd.,* AIR 1987 SC 1023, it was submitted that interpretation depends on the test and context. A statute would best interprete when the interpreter knows why it was enacted. Neither any part of a statute nor any word thereof can be construed in isolation. The OJEE has been constituted under 2007 Act to regulate all admission to all professional educational institutions either Government or Private in the State of Odisha through a centralized single window system. Section 3 of 2007 Act makes it mandatory that all admissions shall be made through JEE conducted by the PPB followed by centralized counseling in order of merit. Section 11 of the 2007 Act creates an embargo, i.e, any admission made in violation of the provisions of 2007 Act shall be invalid. Admission under Section 9 of the 2007 Act is to be done either by OJEE or under its direct supervision. Any admission in violation of such procedure is illegal.

The main objective of BPUT is to achieve excellence in academics and the same could only be achieved if a merit based, transparent admission mechanism is adopted by OJEE. The academic calendar which is applicable to the students shows that a number of teaching weeks in each semester shall be fifteen to eighteen with a minimum of 90 teaching days excluding the period of examination. The academic calendar of the institution is non-negotiable. The aforesaid provision is provided under Clauses 1.1 and 1.2 of the Academic Regulation of the University which has the colour and force of a statute and as such binding on all concern. Letter bearing No.406 dated 15.03.2007 issued by the Industries Department, Odisha under the Ordinance, 2007 has already been repealed by the 2007 Act. The said letter has not been saved/protected and as such the same has no bearing in the present case. The decision rendered in earlier writ petitions will have no binding effect on the present case since some of the provisions of 2007 Act has not been rightly construed. Placing reliance upon the judgment of the Hon'ble Supreme Court in the case of *National Council for Teacher Education and Training vs. Venus Public Education Society and others,* (2013) 1 SCC 223, Mr. Mishra submitted that when there is a conflict between the law and sympathy, law must prevail in the greater interest of the society.

10. Mr. A.K. Mishra, learned counsel appearing for opposite party No.1-State relied upon the arguments and contentions made by the learned counsel appearing for opposite party No.3-OJEE.

11. On the rival contentions of the parties, the following questions fall for consideration by this Court:

(i) Whether admission of the seven petitioner-students in the opp. party no.4-College for the academic year 2012-13 against non-reporting vacant seats in B.Tech Engineering Course at college level are valid in law and they are entitled to be issued with Registration number by the B.P.U.T. in view of order/judgment of this Court dated 31.03.2009 passed in W.P.(C) No.15532 of 2008 and Misc. Case No.14595 of 2008?

(ii) Whether provisions under Section 9 of 2007 Act dealing with reservation of seats and admission against unfilled seats are subject to provisions of Section 3 of the 2007 Act?

(iii) Whether any admission made to any Private Professional Institution, Government Institution and sponsored institution in violation of Section 3 of 2007 Act, i.e., not through OJEE is valid?

(iv) Whether petitioners are entitled to get any relief on the basis of Office Order dated 15.03.2007 issued by the State Government through its concerned Department ?

(v) Whether the reasons assigned by the Secretary in its order dated 23 May, 2013 for not regularizing the admission of the petitioners are valid and cogent?

(vi) What order?

12. To deal with the above questions, it may be relevant to note here certain undisputed facts.

13. After closure of second round counseling of OJEE, 2012 seats in various private Engineering Colleges remained vacant because of non-reporting of the students sponsored by OJEE, 2012 to colleges. In such process 47 seats in opp. party no.4-College remained unfilled. The PPB in its

meeting dated 1.12.2012 decided for holding a special counseling in respect of vacant non-reporting seats among the students having willingness to take admission against such vacant seats. Accordingly, OJEE on 3.12.2012, issued notice for holding a special counseling for such vacant non-reporting seats. Pursuant to such notice, petitioners took admission in the said College and were continuing their B.Tech. Engineering Course. Recommendation of PPB dated 01.12.2012 was placed before the Government for approval and the Government after consideration of such recommendation of PPB and taking into account non-negotiable academic calendar of the BPUT did not approve such recommendation. OPECA and others approached this Court vide W.P.(C) No.15807 of 2012 inter alia assailing the decision of the Government. This Court vide order dated 11.04.2013 remanded the matter back to the Commissioner to look into the matter afresh and take a decision after giving opportunity of hearing to the representative of OPECA and other stake holders like OJEE and BPUT. Pursuant to such direction of this Court, the Commissioner took a decision on 23rd May, 2013 not to regularize the admission of the petitioners.

14. Question Nos. (i), (ii) and (iii) being interlinked they are dealt with together.

Learned Senior Advocate, Mr. Routray placing strong reliance on the order/judgment of this Court dated 31.3.2009 passed in W.P.(C) No. 15532 of 2008 and Misc. Case No.14595 of 2008 submitted that under similar circumstances the admission of students like petitioners during academic year 2009 was held to be valid and the B.P.U.T. has been directed to issue registration number to the students who have been

admitted in the member-colleges of Orissa Private Engineering Colleges Association (OPECA).

According to Mr. Routray, this order/judgment of the learned Single Judge has not been challenged before any higher forum. Thus, it attained finality and principle of res judicata applies. The said judgment is binding on the parties. In support of his contention, Mr. Routray relied upon the judgment of Hon'ble Supreme Court in the cases of ***Daryao and others v. State of U.P. and others***, AIR 1961 SC 1457 and ***Hope Plantations Ltd. v. Taluk Land Board, Peermade and another,*** (1999) 5 SCC 590.

15. Mr. Palit, learned counsel for OJEE submits that admission of the students in opp. party no.4-college is in violation of Section 3 and therefore, such admission is invalid as envisaged under Section 11 of the 2007 Act.

16. The case in W.P.(C) No.15532 of 2008 is that the member-colleges of OPECA have filled up the unfilled seats by taking the candidates from the JEE merit list, but not in accordance with their merit in the said list. Such candidates have prosecuted their studies in the 1st year B.Tech. course and were continuing as students in the respective colleges. In that case, the learned Single Judge of this Court held that a bare reading of the provisions of Section 9 of 2007 Act does not disclose that admission should be given in accordance with the merit list of the OJEE rather the phrase used "general category from the merit list of the OJEE". The learned Single Judge further held that even assuming that as a matter of principle, in accordance with the decision of the apex Court admissions to such technical colleges are to be made through a single window system, but in the

considered opinion of this Court provisions of Section 9 of the 2007 Act is a deviation from the said procedure of giving admission through a single window system, i.e., OJEE counseling as the procedure provided in Section 9 of the said Act is to be adopted when contingency mentioned therein arises after completion of counseling by the OJEE. The learned Single Judge further held that since the member-colleges of the petitioners' association have admitted students from the OJEE merit list as contemplated under Section 9 of the 2007 Act and there is no reason to debar such students who have already prosecuted their studies in the respective colleges for a considerable period, from continuing their studies and appearing in the University Examination. Further direction was given to the BPUT to issue Registration numbers to the said students.

17. At this juncture, it would be relevant to know what is contemplated in Sections 3, 9 and 11 of the 2007 Act.

> "Section 3. Subject to the provisions of this Act, admission of students in all private professional institutions, Government institutions and sponsored institutions to all seats including lateral entry seats, shall be made through JEE conducted by the Policy Planning Body followed by centralized counseling in order of merit, in accordance with such procedure as recommended by the said body and approved by the Government."
>
> "Section 9. (1) In every professional educational institution admissions shall be in accordance with the reservation policy of the Government notified for the purpose of this Act:
> Provided that nothing in the sub-section shall be applicable to the minority institutions.
>
> (2) in a private professional educational institution other than minority institution not exceeding fifteen per centum of the approved intake may be filled up by NRI from the merit list prepared on the basis of JEE.
> (3) Where any shortfall in filling of seats from NRI occurs, such vacant seats may be filled up from the

merit list of All India Engineering Entrance Examination or All India Medical Entrance Examination, as the case may be, conducted by Central Board of Secondary Education :
Provided that while filling up such vacant seats NRI shall be preferred.

(4) In a private professional educational institution fifteen per centum of the approved intake may be filled up strictly from the merit list of All India Engineering Entrance Examination or All India Medical Entrance Examination, as the case may be, conducted by Central Board of Secondary Education.
(5) Where the seats remain unfilled due to non-availability of candidates in the list specified in sub-sections (3) and (4) or where student out of such lists leaves after selection to such seats, the same shall be filled up by the candidates belonging to the general category from the merit list of the JEE.
(6) (a) Where seats for reserved category are left unfilled due to non-availability of candidates from a particular category in the list of JEE, such seats shall be filled up by candidates of same category from the merit list of All India engineering Entrance Examination or All India Medical Entrance Examination, as the case may be, failing which such vacant seats shall be filled up by candidate not belonging to any reserved category in accordance with the merit list of JEE.
(b) If still seats remain vacant, a second JEE may be conducted.
(7) (a) In a Minority institution, not less than fifty per centum of the approved intake shall be filled up by minority students from which the State belonging to the minority community to which the institution belongs on the basis of inter se merit in the merit list of the JEE.
(b) The remaining seats shall be for the general category out of which up to fifteen per centum may be filled up by NRI."

"Section 11. Any admission made in violation of the provisions of this Act or the rules made thereunder shall be invalid."

18. A plain reading of Section 3 makes it clear that admission of students in all private professional educational institutions, Government

institutions and sponsored institutions to all the seats including lateral entry seats shall be made through JEE. The expression of "all seats" appearing in Section 3 includes admission of students under Section 9 of the 2007Act. Admittedly in the present case, admission of the petitioner-students in opp. party no.4-institution has not been done through OJEE conducted by the PPB followed by Central Counseling in order of merit and approved by the Government. Thus, admission of the petitioner-students in opp. party no.4-college has been made in violation of the provisions of Section 3 of the 2007 Act. Therefore, the contention of Mr. Routray that admission of the petitioner-students in opp. party no.4-college is in accordance with the provisions of this Act, i.e., under Section 9 of the 2007 Act, is not correct. Once the admission of the petitioner-students in opp. party No.4-College is held to be in violation of Section 3 of the 2007Act, Section 11 of the 2007 Act comes into operation which envisages "any admission made in violation of the provisions of the Act and the Rules made thereunder shall be invalid."

19. Section 9 of 2007 Act provides for reservation of seats in a particular manner. Section 9 cannot be read in isolation. Provisions of Section 9 are subject to Section 3 of 2007 Act. Any attempt to read Section 9 in isolation would completely defeat/frustrate the object, reason and purpose of 2007 Act. Section 3 of 2007 Act makes it mandatory that all admission shall be made through JEE conducted by the PPB followed by centralized counseling in order of merit. Section 3 of 2007 Act envisages for admission of all students through OJEE in order of merit and in a transparent manner. Thus, all admission including the admission for seats reserved under Section 9 of 2007 Act are to be done either directly by the OJEE or under its direct

supervision and any admission made to any Private Professional Institution, Government Institution and Sponsored Institution in violation of Section 3 of the 2007 Act, i.e., not through OJEE is invalid.

20. Law is well-settled that the statute must be read as a whole. No part of a statute can be construed in isolation. The Hon'ble Supreme Court in the case of ***Mor Modern Cooperative Transport Society Ltd. vs. Financial Commissioner and Secretary to Government of Haryana and another,*** *(2002) 6 SCC 269,* held as under:

> "14**.** .....It is trite to say that the intention of the legislature must be found by reading the statute as a whole. The court must ascertain the intention of the legislature by directing its attention not merely to the clauses to be construed but to the entire statute; it must compare the clause with the other parts of the law, and the setting in which the clause to be interpreted occurs. The rule is of general application as even the plainest terms may be controlled by the context. The expressions used in a statute should ordinarily be understood in a sense in which they best harmonize with the object of the statute, and which effectuate the object of the legislature...."

21. It may be relevant to refer here the decision of the Hon'ble Supreme Court in the case of ***Reserve Bank of India vs. Peerless General Finance and Investment Co. Ltd.*** *(supra),* wherein it has been held as under:

> "**33.** Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then

> section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place. It is by looking at the definition as a whole in the setting of the entire Act and by reference to what preceded the enactment and the reasons for it that the Court construed the expression "Prize Chit" in *Srinivasa* and we find no reason to depart from the Court's construction."

22. At this juncture, it will be beneficial to refer to the Preamble of 2007 Act:

> "Preamble of 2007 Act specifically provides that "Whereas the Hon'ble Supreme Court of India in its judgment in P.A. Inamdar and others vs. State of Maharastra reported in AIR 2005 SC 3226 has held that having regard to the larger interest and welfare of the student community to promote merit, achieve excellence and curb malpractices, it would be permissible to regulate admission by providing a centralized and single window procedure which, to a large extent, can secure grant of merit based admission on a transparent basis.
>
> "And whereas, it is further held that no capitation fee can be charged directly or indirectly or in any form and if charging of capitation fee and profiteering is to be checked, the method of admission is to be regulated so that the admissions are based on merit and transparency and the students are not exploited."
>
> "And whereas, the Hon'ble Supreme Court in P.A. Inamdar Case has observed that it is for the Central Government or for the State Governments, in absence of a Central legislation, to come out with a detailed thought out legislation on the subject, which is long awaited."

> The aforesaid preamble of the 2007 Act clearly indicates the object and purpose of enacting the said legislation by the State Legislatures. Therefore, while applying/interpreting the provisions of the 2007 Act, the intention behind having such an Act has to be kept in mind."

23. The source of 2007 Act is the judgments of the Hon'ble Supreme Court of India in the cases of *P.A. Inamdar and others vs. State of Maharashtra and others, AIR 2005 SC 3226 and Islamic Academy of Education and others vs. State of Karnataka and others, AIR 2003 SC 3724*. The Constitution Bench in both the above mentioned cases laid emphasis on merit based, transparent admission procedure to be regulated by the State through a centralized and single window mechanism.

Thus, the provisions of Section 9 of 2007 Act dealing with reservation of seats and admission against unfilled seats are subject to the provisions of Section 3 of the said 2007 Act.

24. The order/judgment dated 31.3.2009 passed in W.P.(c) No. 15532 of 2008 and Misc. Case No.14595 of 2008 on which strong reliance has been placed by Mr. Routray does not reveal that Section 3 and Section 11 of the 2007 Act were brought to the notice of the learned Single Judge while considering the admission of the students under Section 9 of 2007 Act. Therefore, the judgment cannot be treated as a precedent and principle of per incuriam applies.

25. The concept of "*per incuriam*" is those decisions given in ignorance or forgetfulness of some inconsistent statutory provisions or of some authority binding on the Court concerned, i.e., previous decisions of the Court, i.e., its own Court or by a Court of co-ordinate or higher

jurisdiction or in ignorance of a term of a statute or by a rule having the force in law. "Incuria" literally means "carelessness". In practice, per incuriam is taken to mean per ignorantium.

26. The Hon'ble Supreme Court in the case of ***Sunia Devi vs. State of Bihar and another ,*** (2005) 1 SCC 608: AIR 2005 SC 498 has held as under :

> "19. "Incuria" literally means "carelessness". In practice per incuram is taken to mean per ignoratium. English courts have developed this principle in relaxation of the rule of stare decisis. The "quotable in law", as held in Young v. Bristol Aeroplane Co. Ltd.7 is avoided and ignored if it is rendered "in ignoratium of a statute or other binding authority". Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law. The above position was highlighted in State of U.P. v. Synthetics and Chemicals Ltd.8. To perpetuate an error is no heroism. To rectify it is the compulsion of the judicial conscience."

27. Further, in view of the judgments of the Hon'ble Supreme Court in the cases of ***ASHA v. Pt.B.D. Sharma University of Health and Science and others***, AIR 2012 SC 3396, *Gurdeep Singh (supra) and A.P.Christian Medical Educational Society (supra),* the order of this Court dated 31.3.2009 passed in W.P.(c) No.15532 of 2008 cannot be followed as precedent.

28. In the case of ***ASHA*** (supra), the Hon'ble Supreme Court held as under:

> "36. (a) The rule of merit for preference of course and colleges admits no exception. It is an absolute rule and all stakeholders and concerned authorities are required to follow this rule strictly and with demur.
>
> xx xx xx

> Where the admissions given by the concerned authorities are found by the courts to be legally unsustainable and where there is no reason to permit the students to continue with the course, mere fact that such students have to be in a year or so into the academic course is not by itself a ground to permit them to continue with the course."
>
> "37. With all humility, we reiterate the request that we have made to all the High Courts in Priya Gupta's case, (2012 AIR SCW 3354) (supra) that the courts should avoid giving interim orders where admissions are the matter of dispute before the Court. Even in case where the candidates are permitted to continue with the courses, they should normally be not permitted to take further examinations of the professional courses. The students who pursue the course under the orders of the Court would not be entitled to claim any equity at the final decision of the case nor should it weigh with the courts of competent jurisdiction."

29. In the case of ***Gurdeep Singh*** *(supra),* the Hon'ble Supreme Court held as under:

> "9**.** What remains to be considered is whether the selection of Respondent 6 should be quashed. We are afraid, unduly lenient view of the courts on the basis of human consideration in regard to such excesses on the part of the authorities, has served to create an impression that even where an advantage is secured by stratagem and trickery, it could be rationalised in courts of law. Courts do and should take human and sympathetic view of matters. That is the very essence of justice. But considerations of judicial policy also dictate that a tendency of this kind where advantage gained by illegal means is permitted to be retained will jeopardise the purity of selection process itself; engender cynical disrespect towards the judicial process and in the last analysis embolden errant authorities and candidates into a sense of complacency and impunity that gains achieved by such wrongs could be retained by an appeal to the sympathy of the court. Such instances reduce the jurisdiction and discretion of courts into private benevolence. This tendency should be stopped. The selection of Respondent 6 in the sports category

> was, on the material placed before us, thoroughly unjustified. He was not eligible in the sports category. He would not be entitled on the basis of his marks, to a seat in general merit category. Attribution of eligibility long after the selection process was over, in our opinion, is misuse of power. While we have sympathy for the predicament of Respondent 6, it should not lose sight of the fact that the situation is the result of his own making. We think in order to uphold the purity of academic processes, we should quash the selection and admission of Respondent 6. We do so, though, however, reluctantly."

30. In the case of ***A.P.Christian Medical Educational Society*** *(supra),* the Hon'ble Supreme Court held as under:

> "**10.** Shri K.K. Venugopal, learned counsel for the students who have been admitted into the MBBS course of this institution, pleaded that the interests of the students should not be sacrificed because of the conduct or folly of the management and that they should be permitted to appear at the University examination notwithstanding the circumstance that permission and affiliation had not been granted to the institution. He invited our attention to the circumstance that students of the medical college established by the Daru-Salam Educational Trust were permitted to appear at the examination notwithstanding the fact that affiliation had not by then been granted by the University. Shri Venugopal suggested that we might issue appropriate directions to the University to protect the interest of the students. We do not think that we can possibly accede to the request made by Shri Venugopal on behalf of the students. Any direction of the nature sought by Shri Venugopal would be in clear transgression of the provisions of the University Act and the regulations of the University. We cannot by our fiat direct the University to disobey the statute to which it owes its existence and the regulations made by the University itself. We cannot imagine anything more destructive of the rule of law than a direction by the court to disobey the laws. The case of the medical college started by the Daru-Salam Trust appears to stand on a different footing as we find from the record placed before us that permission had been granted by the State

> Government to the Trust to start the medical college and on that account, the University had granted provisional affiliation. We also find that the Medical Council of India took strong and serious exception to the grant of provisional affiliation whereupon the University withdrew the affiliation granted to the college. We are unable to treat what the University did in the case of the Daru-Salam Medical College as a precedent in the present case to direct the University to do something which it is forbidden from doing by the University Act and the regulations of the University. We regret that the students who have been admitted into the college have not only lost the money which they must have spent to gain admission into the college, but have also lost one or two years of precious time virtually jeopardising their future careers. But that is a situation which they have brought upon themselves as they sought and obtained admission in the college despite the warnings issued by the University from time to time. We are happy to note  that the University acted watchfully and wakefully, issuing timely warnings to those seeking admission to the institution. We are sure many must have taken heed of the warnings issued by the University and refrained from seeking admission to the institution. If some did not heed the warnings issued by the University, they are themselves to blame. Even so if they can be compensated in some manner, there is no reason why that may not be done. We are told that the assets of the institutions, which have sprung out of the funds collected from the students, have been frozen. It is up to the State Government to devise suitable ways, legislative and administrative, to compensate the students at least monetarily. The appeal filed by the society is dismissed with costs which we quantify at Rs 10,000. The writ petition filed by the students is dismissed but, in the circumstances, without costs."

31. For the reasons stated above, the decision of the Hon'ble Supreme Court in the cases of ***Daryao and others*** (supra) and ***Hope Plantations Ltd.*** (supra) relied upon by Mr.Routray are not relevant and of no help to the petitioners.

32. The matter can be looked at from a different angle. It is not disputed that the petitioners are the rank holders of AIEEE and OJEE. AIEEE and OJEE allot rank number to the participants according to their merit. According to their merit, participants are entitled to a particular subject and the college and in the process a meritorious student gets a better subject and better college in comparison to a less meritorious student. Therefore, if admission will be given to the students holding AIEEE and OJEE at the college level against the non-reporting vacant seats in B. Tech. Engineering course in the opp. party no.4-College without counseling among all the left out OJEE and AIEEE rank holder students, more meritorious students than the petitioners may be deprived of getting admission against B.Tech. course in opp. party no.4-institution. Merely because the petitioners had taken admission pursuant to decision of PPB dated 1.12.2012 and pursuant to OJEE advertisement dated 3.12.2012 issued for holding a special counseling for such vacant non-reporting seats and that the petitioners are continuing their studies against the approved AICTE in-take seats available in Opp. party no.4-institution will not improve their case. Admission can only be given on the basis of merit in the entrance test through OJEE counseling. In the present case, it is nobody's case that there was no student who is ranked higher than the petitioners in AIEEE and OJEE.

However, in course of hearing, a submission was made on behalf of the petitioners that the petitioners have secured higher rank than some students admitted in opposite party No.4-College through OJEE-2012. Being asked by this Court as to why the petitioners could not be selected in

OJEE counseling for taking admission in opposite party No.4-College, if students securing lower rank could take admission in the said College, no answer was given on behalf of the petitioners to that query. In any event, since the petitioners have not taken admission through OJEE counseling as required under Section 3 of 2007 Act, their admission cannot be said to be valid. The petitioners had been given admission by the opp. party no.4-institution in violation of conditions stipulated in Section 3 of 2007 Act. If the admission of the petitioners is protected/regularized, then the same would give rise to rank violation, compromising merit, exploitation of the students by the Colleges. In the process, other candidates having higher rank would be deprived of admission in B.Tech course in opp. party no.4-college. There may be a number of candidates above the petitioners in order of merit.

33. Question No.(iv) is whether petitioners are entitled to get any relief on the basis office order dated 15.03.2007 issued by the State Government through its concerned Department.

Placing reliance upon the office order dated 15th March, 2007 issued by the State Government through its concerned Department Mr.Routray submitted that admission of petitioner-students to opposite party No.4-College should be regularized. Undisputedly, petitioners have not taken admission in opposite party No.4-College through OJEE as required under Section 3 of 2007 Act. Therefore, their admission cannot be regularized on the basis of office order dated 15th March, 2007.

Law is well-settled that executive instructions cannot prevail over the statutory provisions. The Hon'ble Supreme Court in the case of

State of Haryana vs. Mahender Singh and others, *(2007) 13 SCC 606,* held as under:

> "**39.** It is now well settled that any guidelines which do not have any statutory flavour are merely advisory in nature. They cannot have the force of a statute. They are subservient to the legislative Act and the statutory rules. (See *Maharao Sahib Shri Bhim Singhji* v. *Union of India*[7], *J.R. Raghupathy* v. *State of A.P.* and *Narendra Kumar Maheshwari* v. *Union of India*.)"

34. In view of the above, petitioners are not entitled to the relief claimed on the basis of office order dated 15th March, 2007 issued by the Government through its concerned Department.

35. To deal with question No.(v), it is to be examined whether the reasons assigned by the Secretary in its order dated 23 May, 2013 for not regularizing the admission of the petitioners are valid and cogent. In the order dated 23 May, 2013 the following reasons have been given for not regularizing the admission of the petitioners in opposite party No.4-College.

> "Continuance of the students in different institutions as submitted by OPECA is illegal, ab initio and such provisions of admission committed at the institutional level is neither backed by any order/judgment of the High Court nor any order of the State Government and is also not in consonance with the provisions of the aforesaid 2007 Act. Therefore, non-approval of the government recommendation under para 2.4.1. of PPB through its meeting held on 01.12.2012 is just and appropriate."

36. For the reasons stated above, I don't find any illegality or infirmity in the order dated 23 May 2013 passed by the Secretary warranting interference of this Court.

37. In view of the above, this Court is of the considered view that petitioners' admission to B.Tech. course in opp. Party o.4-college for 2012-13 academic year against non-reporting vacant seats is illegal and cannot be regularized. Consequentially no direction can be given to BPUT to issue University Registration numbers to the petitioners.

38. In the result, the writ petitions are dismissed.

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B.N.Mahapatra,J.

Orissa High Court, Cuttack
The 2th December, 2013/ss/ssd/skj