

- THE HONOURABLE SRI JUSTICE GODA RAGHURAM
AND
THE HONOURABLE SRI JUSTICE NOUSHAD ALI

+ WRIT PETITION NO. W.P.Nos. 18783;20105;22744; 22803; 23774; 24272;
26168 of 2009; 288;597; 793; 1308;1317; 1493; 2039; 2040; 2480; 2849; 4039
and 5562 of 2010

FRIDAY, THE 27TH DAY OF AUGUST,
TWO THOUSAND TEN

Nalanda Educational Society rep by its Vice-President Sri
M.Prasannanjaneyulu and Others

... Petitioners

Versus

\$ Government of Andhra Pradesh rep by its Secretary to Government, School
Education Department, Secretariat, Hyderabad and others

... Respondents

! Counsel for the petitioners : Mr. P.P.Rao Senior Counsel assisted by
Mr. P.Venugopal and other counsel

^ Counsel for the respondents: Additional Advocate General assisted
by GP for Education

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>Head Note:

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1. 1. 1993(1) SCC 645

2. 2. (2002) 8 SCC 481
3. 3. (2003) 6 SCC 697
4. 4. (2004) 5 SCC 583
5. 5. (2009) 10 SCC 1
6. 6. (2005) 6 SC 537
7. 7. (1941) Ch 450
8. 8. AIR 1956 SC 285
9. 9. (1911) AC 179
10. 10. (1915) AC 120
11. 11. AIR 1968 SC 850
12. 12. (1948) 1 All.E.R. 780
13. 13. (1915) 84 L.J.Ch. 734
14. 14. (1933) Ch. 814
15. 15. (1965) 49 DLR (2D) 156
16. 16. (1981) 1 WLR 173 (HL)
17. 17. (1963) SR (NSW) 723
18. 18. (1986) 1 WLR 763 (C.A)
19. 19. (1984) 83 LGR 79
20. 20. (1888) 58 L.T. 229
21. 21. (1948) 1 All.E.R. 558
22. 22. (1970) 1 WLR 123
23. 23. (1970) 1 WLR 4
24. 24. The Times, October 7 1981
25. 25. (1977) AC 443
26. 26. (1877) 2 c.p.d. 255
27. 27. (1960) ac 336
28. 28. The Times, May 24 1988
29. 29. (1980) RTR 54
30. 30. (1969) 1 WLR 148
31. 31. (1986) 1 WLR 192
32. 32. (1970) AC 972
33. 33. (1971) 1 Q.B. 222
34. 34. AIR 1967 SC 295
35. 35. (1994) 5 SCC 346
36. 36. AIR 1963 SC 1811
37. 37. (2004) 1 SCC 712

IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD
(Special Original Jurisdiction)

FRIDAY, THE 27TH DAY OF AUGUST
TWO THOUSAND AND TEN

PRESENT
THE HON'BLE SRI JUSTICE GODA RAGHURAM
And
THE HON'BLE SRI JUSTICE NOUSHAD ALI

W.P.Nos. 18783;20105;22744; 22803; 23774; 24272; 26168 of 2009; 288;597;
793; 1308;1317; 1493; 2039; 2040; 2480; 2849; 4039 and 5562 of 2010

WRIT PETITION NO : 18783 of 2009

Between:

Nalanda Educational Society Reptd. by its Vice-President, Sri M. Prasannanjaneyulu,
S/o. Late Ramaiah, R/o. Flat No. 202, Jyothi Meadows, Kondapur Hyderabad - 500 084,
A Society Registered under the provisions of Societies Registration Act, bearing Regn.
No.503/98, Having its Regd. Office at Seethammadhara, Visakhapatnam.13

... PETITIONER

AND

- 1 Government of Andhra Pradesh Reptd. by its Secretary to Government School
Education Department, Secretariat Buildings, Hyderabad.
- 2 Commissioner & Director Directorate of School Education Government of Andhra
Pradesh, Near Telephone Bhavan,
Saifabad, Hyderabad- 4.
3. District Fee Regulatory Committee Visakhapatnam, Visakhapatnam District.

... RESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to issue a Writ, Order or direction, more particularly, one in the nature of Writ of Certiorari calling for the records relating to the G.O.Ms.No. 91, Education (SE:P.S.-I) Department, dated 06-08-2009 issued by the 1st respondent herein and quash the same as being illegal, arbitrary, violative of Article 14 of the Constitution of India and as being *ultra vires* the provisions of the Andhra Pradesh Education Act, 1982, the Andhra Pradesh Educational Institutions (Regulation of Admissions and Prohibition of Capitation Fee) Act, 1983 as well as the law laid down by the Hon'ble Apex Court in T.M.A. Pai Foundation Case; and consequently, suspend the operation of the G.O.Ms.No.91, Education (SE:P.S.-I) Department, dated 06-08-2009 issued by the 1st respondent herein, pending disposal of the above writ petition.

Counsel for the Petitioner: Mr. P.P.Rao, Mr. D.Prakash Reddy and Mr.S.Ravi
Senior Counsel assisted by Mr. P.Venugopal
Counsel for the Respondent No.1 to 3: Addl. Advocate General assisted by
GP for Education

WRIT PETITION NO : 20105 of 2009

Between:

International Educational Academy, Having its Office at 8-1-300/1 & 2, Shaikpet,
Beside Tolichowki, Hyderabad - 500008 Rep. by its Chairman, Prof. Kakarla, Patthaiah,
Aged: 84 yrs, Resident of Hyderabad.

... PETITIONER

AND

Government of A.P., Rep. by its Secretary, Department of School Education,
Secretariat, Saifabad, Hyderabad.

... RESPONDENT

Petition under Article 226 of the constitution of India praying that in the
circumstances stated in the Affidavit filed herein the High Court will be pleased to issue
an appropriate writ, direction or order especially in the nature of writ of Mandamus
declaring G.O.Ms.No. 91, Education (PE: PS-I) Department dated 6-8-2009 issued by
the Respondent as being illegal, arbitrary and *ultra vires* of the A.P. Educational
Institutions (Regulation of Admissions and Prohibition of Capitation Fee) Act, 1983 and
setting aside the same and pass

Counsel for the Petitioner: Mr. CH.Pushyam Kiran
Counsel for the Respondent: GP for School Education

WRIT PETITION NO : 22744 of 2009

Between:

1. St.Louis Educational Society. rep.by its General Secretary Mr.Tony Thangrajan
2. St.Andrews High School, rep.by its Administrator Mrs.Urmila Nair
3. Father Dhanraj, Chairman, ST,Louis Educational Society

... PETITIONERS

AND

- 1 Government of Andhra Pradesh, rep.by the Principal Secretary, to Government ,
Education Department, Government of Andhra Pradesh, Hyderabad
- 2 The Secretary, School Education Department Hyderabad
- 3 The Commissioner & Director of School Education Andhra Pradesh, Hyderabad

... RESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to issue a writ in the nature of Certiorari or any other appropriate writ or direction quashing the impugned G.Os. bearing G.O.Rt.No.376 Education Department dated 18.6.2009 the G.O.Ms.No.91 dated 6.8.2009 issued by the respondents No.1 and 2 herein and the consequential notification bearing No.8293/B5/2009 dated 7.9.2009 issued by the respondent No.2 herein viz., Secretary, School Education Department and be pleased to declare that the petitioner No.1 is free to administer and fix the schedule of tuition fees and other fees for running the petitioner No.2 school and pass

Counsel for the Petitioner: Mr.Y.Ratnakar

Counsel for the Respondents Nos 1 to 3: GP for School Education

WRIT PETITION NO : 22803 of 2009

Between:

1. Vidyananda Educational Society, 1-11-252/A-3, Jabbar Apartments, Begumpet, Hyderabad 500 016, Rep. by its General Secretary.
2. Delhi Public School, Khajaguda, Hyderabad Rep. by its Pro-Vice Chairman.
3. Delhi Public School, Sikh Village, Secunderabad Rep. by its Management Committee Member.

... PETITIONERS

AND

- 1 The Government of Andhra Pradesh, Rep. by its Principal Secretary, Education Department, Secretariat, Hyderabad.
- 2 The Commissioner & Director of School Education, Government of Andhra Pradesh, Hyderabad.
- 3 The District Collector, Ranga Reddy District, Hyderabad.

... RESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to issue an appropriate Writ, order or direction, more particularly, one in the nature of Mandamus declaring the G.O.Ms.No. 91 Education (SE.P.S.-1) Department, dated 06-08-2009, constituting the District Fee Regulatory Committees for fixation of the fee structure in unaided private educational institutions and mandating that the institution should collect only the said fee structure fixed by the said Committee is violative of Art. 19(10)(g) of the Constitution of India and amounts to an unreasonable restriction under Art. 19(1)(g) of the Constitution of India and amounts to an unreasonable restriction under Art. 19 (6) of the Constitution of India and consequently set aside the Regulations

Counsel for the Petitioner: Mr. B.Adinarayana Rao

Counsel for the Respondents Nos 1 to 3: GP for School Education

WRIT PETITION NO : 23774 of 2009

Between:

1. Princess Esin Girls' High School, Rep by its Director, Purani Haveli, Hyderabad.
2. Nizamia Hyderabad Women's Association Trust, Rep by its Trustee Mr. Syed Anis Hussain Purani Haveli, Hyderabad.

... PETITIONERS

AND

1. State of A.P. Rep by its Secretary to Government, Education Department, Secretariat, Hyderabad.
- 2 Director of School Education, Andhra Pradesh, Hyderabad.
- 3 Council for the Indian School Certificate Examinations, ICSE, New Delhi.

... RESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to issue a writ or order or direction more particularly one in the nature of Writ of Mandamus declaring the action of the respondents, more particularly, the Respondent No. 1 in issuing the notification by virtue of the Government Order in GO Ms.No. 91 dated 06-8-2009 as ultra vires and illegal in excess of exercise of its jurisdiction and whimsical, which is unconstitutional, and may

Counsel for the Petitioner: Mr. Mir Wajid Ali Kamil
Counsel for the Respondent No.1&2: GP for Education

WRIT PETITION NO : 24272 of 2009

Between:

M/s. Chirec Educational Society, Kondapur, Hyderabad, Rep by its Secretary, Smt Ratna D. Reddy, W/. Shri Vikram B. Reddy, aged about 50 years, At Premises No. 1-22, Kondapur, Near Hitech City, Botanical Garden Road, Hyderabad - 500 084

... PETITIONER

AND

Government of Andhra Pradesh Rep by its Principal Secretary, Department of School Education, Secretariat, Hyderabad.

...RESPONDENT

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to issue an appropriate writ, direction or order especially in the nature of Writ of Mandamus declaring GO Ms.No. 91, Education (SE.PS-I) Department dated 06-8-2009 issued by the Respondent as being illegal, arbitrary and *ultra vires* and un-constitutional and nonest, being violative of Articles 14, 19, 21-A,41 and 51-A of the Constitution of India

and to set aside the same and to grant such reliefs to which the petitioner may be ultimately found entitled

Counsel for the Petitioner: Mr. Harinath Reddy.N.

Counsel for the Respondent : GP for Education

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WRIT PETITION NO : 26168 of 2009

Between:

Meridian Educational Society Rep. by its Secretary, B.S. Nellakanta,
R/o. Dr. No. 8-2-541, Road No.7, Banjara Hills, Hyderabad.

... PETITIONER

AND

1. State of Andhra Pradesh, Rep. by its Principal Secretary, Department of School Education, Secretariat, Hyderabad.
2. The Commissioner and Director, Directorate of School Education, State of A.P., Near Telephone Bhavan, Saifabad, Hyderabad.
3. The District Fee Regulatory Committee, O/o District Educational Officer, Hyderabad.
4. Central Board of Secondary Education, Rep. by its Secretary, Siksha Kendra Community Centre, Preet Vihar, New Delhi,

....RESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to issue writ of Mandamus or any other appropriate writ or order or direction the G. O.Ms. No. 91, Education (SE. PS-1) Department dated 0-08-2009 issued by first respondent as illegal, *ultra vires* the provisions of the Andhra Pradesh Education Act, 1982, the Andhra Pradesh Educational Institutions (Regulation fo Admissions and Prohibition of Capitation Fee) Act, 1983 and unconstitutional being violative of Articles 14, 19 and 21A of the Constitution of the India and Set-aside the same grant such other relief as this Hon'ble Court deems fit and proper in the Circumstances of the case.

Counsel for the Petitioner: Mr. Prabhakar Peri

Counsel for the Respondent No.1to 3: GP for School Education

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WRIT PETITION NO : 288 of 2010

Between:

1 M/s.CAL Public School, 1-50, Kapra Main Road Kapra, Keesara, Ranga Reddy
,Hyderabad-500062 rep.by its Director Sri.R.P.Seth

2 M/s.New Education Society, Registered under Societies Registration Act, 1-50, Kapra Main Road, Kapra, Keesara Ranga Reddy, Hyderabad-500062, rep.by its Secretary Sri.RP Seth

... PETITIONERS

AND

1 Government of Andhra Pradesh, rep.by its Secretary School Education, Secretariat, Hyderabad
2 The District Educational Officer, Ranga Reddy District Hyderabad
3 The Commissioner & Director of School Education Ranga Reddy District, Hyderabad
4 The Mandal Revenue Officer, Kapra Mandal, Ranga Reddy District
5 Central Board of Secondary Education, Shiksha Kendra 2 Community Centre, Preet Vihar, Vikas Marg, New Delhi-110092

.....RESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to pass order or orders, writ more particularly one in the nature of writ of mandamus declaring the application of GO.Ms.No.91 Education (SE:P.S.I) Department dated 6.8.2009 Government of AP and the proceedings of the District Educational officer under proceedings 8293/B5/2009 dated 7.9.2009 tot he petitioner school which is affiliated with Central Board of Secondary Education under proceedings No.CBSE/AFF/130122(Ex-00683-0910)/131902 dated 26.5.2008 in the matter of regulating the fees and other matters of the school as arbitrary, illegal, violative of the fundamental rights guaranteed under article 14 and 19(1)(g) of the Constitution of India., contrary to the affiliation granted by the Central Board of Secondary Education, contrary to the no objection issued by the State Government for permitting the petitioner to affiliate itself with central Board of Secondary Education without jurisdiction, contrary to the AP Act, No.5 of 1983 contrary to the Education Act and prevent the Respondents from initiating any proceedings under the said Government order No.91 dated 6.8.2009 against the petitioners perpetually or pass

Counsel for the Petitioner: Mr. Deepak Bhattacharjee

Counsel for the Respondent No.1 to 4: GP for School Education

WRIT PETITION NO : 597 of 2010

Between:

SVS Educational Academy, having its office at Bachupally, Miyapur-Medchal Highway, Hyderabad, rep by its Secretary and Correspondent, Sri V.Dhanunjaya s/o Anjaneyulu, aged 43 yeas, r/o Hyderabad.

... PETITIONER

AND

Government Of Andhra Pradesh Rep.by its Secretary, Department of School Education Secretariat, Saifabad Hyderabad

... RESPONDENT

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to issue an appropriate writ, direction or order especially in the nature of writ of Mandamus declaring G.O Ms NO 91 Education (SE:PS-I) Department dt 6-8-2009 issued by the Respondent as being illegal, arbitrary and *ultra vires* of the A.P Education Institutions (Regulation of Admissions and Prohibition of Capitation Fee) Act 1983 and setting aside the same

Counsel for the Petitioner: Mr. CH.Pushyam Kiran
Counsel for the Respondent: GP for School Education

WRIT PETITION NO : 793 of 2010

Between:

Niraj Educational Society, Ameerpet, Hyderabad, Rep. by its Life Member, B. Jivitesh Reddy S/o. B. Ramender, 39 yrs, R/o H.No. 6-3-864 Saadat Manzil, Ameerpet, Hyderabad

... PETITIONER

AND

- 1 The Government of A.P. Rep by its Principal Secretary Education Department, Secretariat Buildings Hyderabad
- 2 The Commissioner & Director of School Education, Government of A.P.Hyderabad
- 3 The District Collector Hyderabad District at Hyderabad

... RESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to issue an appropriate writ order or direction more particularly one in the nature of writ of Mandamus declaring the G.O.Ms.No. 91 Education (SE: P.S-1) Department dt. 6-8-2009 constituting the District Fee Regulatory Committees for fixation of the fee structure in unaided private educational institutions and mandating that the institution should collect only the said fee structure fixed by the Said Committee is violative of Art. 19 (1)(g) of the Constitution of India and amounts to an unreasonable restriction under Art. 19(6) of the Constitution of India and consequently set aside the said Regulations and pass

Counsel for the Petitioner: Smt.S.Renuka
Counsel for the Respondent No.1 to 3: GP for School Education

WRIT PETITION NO : 1308 of 2010

Between:

Chaitanya Memorial Education Society, H.No.4-1-690, Jambagh, Hyderabad, represented by its Honorary Secretary, J.Vikramdev Rao S/o.late J.Ramdev Rao R/o.H.No.7-1-22/12, Begumpet, Hyderabad.

... PETITIONER

AND

- 1 The Government of Andhra Pradesh, represented by its Principal Secretary, Education Department, Secretariat Buildings, Hyderabad.
- 2 The Commissioner & Director of School Education, Government of Andhra Pradesh, Hyderabad.
- 3 The District Collector, Hyderabad District at Hyderabad.

... RESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to issue an appropriate writ, order or direction, more particularly one in the nature of Mandamus declaring the G.O.Ms.No.91 Education (SE:P.S-1) Department dated 6.8.2009, constituting the District Fee Regulatory Committee for fixation of the fee structure in unaided private educational institutions and mandating that the institution should collect only the said fee structure fixed by the said Committee is violative of Art. 19 (1)(g) of the Constitution of India and amounts to an unreasonable restriction under Art. 19 (6) of the Constitution of India and consequently set aside the said Regulations.

Counsel for the Petitioner: Mr. A.Ravi Shankar

Counsel for the Respondent No.1 to 3: GP for School Education

WRIT PETITION NO : 1317 of 2010

Between:

Sunflower Educational Society, S.No. 157/4, Diamond Point, Sikh Road, Secunderabad, W/o. T.R. Raghuram, Aged 40 years, R/o. S.No. 157/4, Diamond Point, Sikh Road, Secunderabad.

... PETITIONER

AND

- 1 The Government of Andhra Pradesh, Rep. by its Principal Secretary, Education Department, Secretariat Buildings, Hyderabad.
- 2 The Commissioner & Director, of School Education, Government of Andhra Pradesh, Hyderabad.
- 3 The District Collector, Hyderabad District at Hyderabad.

... RESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to issue an appropriate Writ, order or direction, more particularly one in the nature of Mandamus declaring the G.O.Ms.No. 91 Education (SE: P.S.-1) Department dated 6-8-2009, constituting the District Fee Regulatory Committees for fixation of the fee structure in unaided private educational institutions and mandating that the institution should collect

only the said fee structure fixed b the said Committee is violative of Art. 19(1)(g) of the Constitution of India and amounts to an unreasonable restriction under Art. 19(6) of the Constitution of India and consequently set aside the said Regulations

Counsel for the Petitioner: Mr. A.Ravi Shankar
Counsel for the Respondent No.1 to 3: GP for Education

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WRIT PETITION NO : 1493 of 2010

Between:

Narayana Educational Society, Narayanguda, Hyderabad, Rep. by its Vice Chairman.

... PETITIONER

AND

- 1 The Government of Andhra Pradesh, Rep. by its Secretary,
School Education Department, Secretariat, Hyderabad.
- 2 The Commissioner and Director of School Education, Andhra Pradesh, Hyderabad.
- 3 The District Collector, Hyderabad District, at Nampally Station Road,
Hyderabad.

... RESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to Writ, Order or Direction more particularly one in the nature of a Writ of Mandamus declaring G.O.Ms.NO. 91 Education (SE.PS-1) Department, dated 06-8-2009 whereunder the District Fee Regulatory Committee for fixation of fee structure in Un-aided Private Educational Institutions and Mandating that the institution should collect only the said stipulated fee fixed by the said committee as illegal, contrary to the A.P. Education Act, 1983 and Rules made there under and violative of Article 19(1) (g) of Constitution of India and consequently restrain the Respondents herein in any way interfering with the Fee Structure in pursuance of the said G.O.

Counsel for the Petitioner: Mr.S.V.Bhatt
Counsel for the Respondent No.1 to 3: GP for School Education

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WRIT PETITION NO : 2039 of 2010

Between:

1 Vikas Educational Society, A Society Registered under the Provisions of Societies,
Having its registered office at 10-1-28, Asilmetta, Vis-3. Rep by its Vice-President,
Mr.M. Prasannanjaneyulu, S/o. Late Ramaiah, Aged about 43 yers, Occ:Edu R/o. Flat
No. 202, Jyothi Meadows, Kondapur, Hyderabad - 500 084

2 OAKRIDGE International School, Sy.No. 6 and 13, Khajaguda, Nanakramguda Road, Serilingampalli Mandal, Ranga Reddy District, Rep by its Vice President, Mr. M. Prasannanjaneyulu

... PETITIONERS

AND

1 The Government of A.P. Rep by its Principal Secretary Education Department, Secretariat Buildings Hyderabad
2 Commissioner & Director Directorate of School Education, Govt. of A.P. Saifabad, Hyderabad-4
3 District Fee Regulatory Committee, Ranga Reddy District, Collectorate Office, Ranga Reddy District.

... RESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to issue an appropriate writ order or direction more particularly one in the nature of writ of Mandamus declaring the G.O.Ms.No. 91 Education (SE: P.S-1) Department dt. 6-8-2009 issued by the 1st respondent as being illegal arbitrary and *ultra vires* of the A.P. Educational Institutions (Regulation of Admissions and Prohibition of Capitation Fee) Act, 1983 and consequently set aside the

Counsel for the Petitioner: Mr. Challa Gunaranjan
Counsel for the Respondents Nos.1 to 3: GP for Education

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WRIT PETITION NO : 2040 of 2010

Between:

1 OAKRIDGE EDUCATIONAL SOCIETY, A Society registered under the provisions of A.P.Societies Registrations Act 2001 bearing Regd.No.206 of 2008, Having its registered office at 10-1-28, Asilmetta, Visakhapatnam-3, represented by its Vice-President Mr.M.Prasannanjaneyulu, S./o.Late Ramaiah aged about 43 years, Occ: Education, Resident of Hyderabad.
2 OAKRIDGE INTERNATIONAL SCHOOL, Bowrampet Outbullapur Mandal, Ranga Reddy District, rep.by its Vice President Mr.M.Prasannanjaneyulu
3 WEST WOOD INTERNATIONAL SCHOOL, Lawson`s Bay Colony, Visakhapatnam-17, Rep.by its Vice president, Mr.M.Prasannanjaneyulu

... PETITIONERS

AND

1 Government of Andhra Pradesh, rep. by its Secretary to Government, School Education Dept., Secretariat, Hyderabad
2 The Commissioner & Director , Directorate of School Education, Govt of A.P., Saifabad, Hyderabad-4

3 The District Fee Regulatory Committee, Ranga Reddy District, Collectorate office,
Ranga Reddy District

4 The District Fee Regulator Committee, Visakhapatnam District, Collectorate office,
Visakhapatnam District

... ESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to issue an appropriate writ direction or order especially one in the nature of writ of mandamus declaring G.O.Ms.No.91, Education (SE.PS-I) Department dated 6.8.2009 issued by the 1st respondent as being illegal, arbitrary, and *ultra vires* of the AP Educational Institutions (Regulation of Admissions and Prohibition of Capitation Fee) Act,1983 and consequently set aside the same and pass

Counsel for the Petitioner: Mr. Challa Gunaranjan

Counsel for the Respondents No.1 to 4: GP for Education

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WRIT PETITION NO : 2480 of 2010

Between:

Hyderabad Education Academy, a Society Registered under the Societies Registratrion Act with Registration No. 2515/9 having its registered office at Masab Tank Hyderagad
Per correspondent Salman Karim Babu Khan

... PETITIONER

AND

- 1 Union of India, Rep. by its Secretary, Ministry of Human Resources Department,
(Education), New Delhi.
- 2 Government of Andhra Pradesh, Rep. by its Secretary,
Education (SE.PS-I)Department, State Secretariat Buildings, Saifabad, Hyderabad.
- 3 Government of Andhra Pradesh, Rep. by its Principal Secretary,
School Education Department, Secretariat Buildings, Hyderabad.
- 4 District Collector, Hyderabad District, Government of A.P. Hyderabad.

... RESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to issue a writ order or direction more particularly in the nature of a Writ of Mandamus declaring the action of the Respondent No. 2 in issuing the GO Ms.No. 91 dated 06-8-2009 and all consequential proceedings as *ultra vires* and illegal, in excess of jurisdiction, arbitrary proceedings as *ultra vires* and illegal, in excess of jurisdiction, arbitrary and unconstitutional

Counsel for the Petitioner: Mr. S.R.Mahajir

Counsel for the Respondent No1.: Mr.Ponnam Ashok Goud(Asst Solicitor Gen)
Counsel for the Respondent No2 to 4.: G.P. for School Education

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WRIT PETITION NO : 2849 of 2010

Between:

Sree KTM Trust, having its office at H.No. 1-2-288/23/1, Domalguda, Hyderabad
Rep its Trustee, K.T. Mahi, s/o. Late K. Mahipathi Rao, about 44 years, Occ :
Educationist, R/o. H.No. 17/C, M.L.A. Colony, Road No. 12, Banjara Hills, Hyderabad.

... PETITIONER

AND

- 1 Government of Andhra Pradesh Reptd. by its Principal Secretary,
Education Department, Secretariat Buildings, Hyderabad.
- 2 The Commissioner & Director of School Education,
Government of Andhra Pradesh, Hyderabad.
- 3 The District Collector and Chairman, District Fee Regulatory Committee,
Ranga Reddy District at Lakdikapool, Hyderabad.

... RESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to issue an appropriate writ, Order or direction, more particularly, one in the nature of Writ of Mandamus declaring the G.O.Ms.No. 91, Education (SE:P.S.-I) Department, dated 06-08-2009 constituting the District Fee Regulatory Committees for fixation of the fee structure in unaided private educational institution should collect only the said fee structure fixed by the said committee is violative of Art. 19 (1) (g) of the constitution of India and amounts to an unreasonable restriction under Art. 19 (6) of the constitution of India and consequently set aside the said Regulations

Counsel for the Petitioner: MR. A.Ravi Shankar
Counsel for the Respondents Nos.1 to 3: GP for School Education

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WRIT PETITION NO : 4039 of 2010

Between:

Nasr Education Society, 6-2-905, " Khushnuma" Khairatabad, Hyderabad-500004, rep.by
its Secretary Begum Anees Khan, W/o.Late Nawab Muzaffar Hussain Khan aged 70years

... PETITIONER

AND

- 1 The Government of Andhra Pradesh, rep.by its Principal Secretary, Education
Department, Secretariat Buildings, Hyderabad
- 2 The Commissioner & Director, Of School Education Government of AP., Hyderabad
- 3 The District Collector, Hyderabad District at Hyderabad

.....RESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to issue a writ order or direction one more particularly in the nature of a writ of mandamus declaring the G.O.Ms.No.91 Education (SE:P.S.-1) Department dated 6.8.2009 constituting the District Fee Regulatory Committees for fixation of the fee structure in unaided private educational institutions and mandating that the institution should collect only the said fee structure fixed by the said Committee is violative of Art.19(1)(g) of the Constitution of India and amounts to an unreasonable restriction under Art.19(6) of the Constitution of India and consequently set aside the said Regulations

Counsel for the Petitioner: Mr. S. Niranjan Reddy
Counsel for the Respondent No.1 to 3: GP for School Education

WRIT PETITION NO : 5562 of 2010

Between:

Hyderabad Public School Society, a Society registered under the Societies Registration Act, with Registration No. having its registered office at Masab Tank, Hyderabad and represented by its Secretary M.A.Faiz Khan

... PETITIONER

AND

- 1 Government of Andhra Pradesh, rep.by its Principal Secretary, Education (SE.PS-I)
Department, State Secretariat Buildings, Saifabad Hyderabad
- 2 The Commissioner and Directorate of School Education Saifabad, Hyderabad
- 3 The District Fee Regulatory Committee, office of District Education Officer

... RESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to issue an appropriate writ order or direction more particularly one in the nature of mandamus declaring the action of the Respondent No.1 in issuing the G.O.ms.No.91 dated 6.8.2009 as *ultra vires* and illegal, in excess of jurisdiction arbitrary, and unconstitutional and pass

Counsel for the Petitioner: Mr. L.Ravichander
Counsel for the Respondent No.1 to 3: GP for School Education

THE HON'BLE SRI JUSTICE GODA RAGHURAM
AND
THE HON'BLE SRI JUSTICE NOUSHAD ALI

W.P.Nos. 18783;20105;22744; 22803; 23774; 24272; 26168 of 2009; 288;597;
793; 1308;1317; 1493; 2039; 2040; 2480; 2849; 4039 and 5562 of 2010

ORDER: (Per Hon'ble Sri Justice G. Raghuram)

The common issue presented in the several writ petitions, (though the pleadings are differently structured), is the validity of order of the State Government in (1) G.O.Rt.No.376 Education (SE: PS-1) Department dated 18-06-2009 and in (2) G.O.Ms.No. 91 Education (SE: P.S.—1) Department dated 06-08-2009. In some writ petitions, an additional relief is sought viz., invalidation of the order of the Secretary, School Education in proceedings No. 8293/B5/2009 dated 07-09-2009 (W.P.Nos. 22744 of 2009 and 288 of 2010). The principal attack is however against G.O.Ms.No.91, Education dated 06.08.2009.

The impugned orders {G.O.Rt.No.376 Education (SE: PS-1) Department dated 18-06-2009 and G.O.Ms.No. 91 Education (SE: P.S.—1) Department dated 06-08-2009} read as under:

Regulation of fee structure for the pupils admitted/studying in the private schools, corporate schools, CBSE and ICSE schools in the State – Orders issued.

EDUCATION (SE: PS-I) DEPARTMENT

G.O.Rt.No. 376

Date: 18-06-2009

Read the following:

From the Collector & District Magistrate D.O.Lr.No. Special/A.Sec./2009 dated 13-05-2009.

ORDER:

1. 1. The Collector, Hyderabad has brought to the notice of Government that the Private schools are at liberty in fixing the school fee which has resulted in huge escalation of school fee and donations especially in this academic year by certain private schools. Since, there is no ceiling for fee, certain private schools are collecting huge school fee and other miscellaneous fee and taking huge amount by way of donations for admissions. Due to this, the parents are facing lot of difficulty in admitting their children in private schools. He has also stated that there is an urgent need for fixing a ceiling on collection of all fee by the private schools as the trend of enhancement which has started especially this year would result in sky rocketing of the fee in next few years resulting in untold hardship for parents and school student with no option as it lose to impossible shift children from one school to another especially in the middle of the year. He has finally requested the Government to issue necessary orders for streamlining the collection of school fee in all private schools.
2. 2. Government have also received number of representations from the parents of the pupil on the collection of exorbitant fee by the private schools in the State and requested for regulation of the fee structure in the private schools.
3. 3. Government have examined the matter and direct that a committee with the following members be constituted with immediate effect to go into the regulation of fee structure in the private schools, corporate schools, CBSE schools, ICSE Schools functioning in the State by categorizing the schools with reference to the amenities provided to the students by the school management and taking into their location in the State.
 1. 1. Sri Naveen Mittal, IA.S., Collector & District Magistrate, Hyderabad.
 2. 2. Sri Lav, Agarwal, I.A.S., Commissioner, Intermediate Education.
 3. 3. The nominee of the Commissioner & Director of School Education, A.P., Hyderabad.
 4. 4. Sri Ramana Murthy Raju, Additional Secretary, Law Department.
 5. 5. Sri Narayana Reddy, Principal & Correspondent, Warangal, St. Peters
4. 4. The committee shall give its report along with recommendations on regulation of fee structure along with penal provisions for violation in collection of the fee ordered by the Government in this regard within three days from the date of receipt of the orders. The committee may also make any of the recommendations on the subject to Government for its consideration.
5. 5. The Commissioner & Director of School Education is requested to take action and assist the committee in submission of its report.

(BY ORDER AND IN THE NAME OF THE GOVERNOR OF ANDHRA PRADESH)

K.R. KISHORE
PRINCIPAL SECRETARY TO GOVERNMENT.

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**GOVERNMENT OF ANDHRA PRADESH
ABSTRACT**

School Education Department – The Andhra Pradesh Educational Institutions (Regulation of Admissions and Prohibition of Capitation Fee) Act, 1983 – Recommendation of the Committee for regulation of Fee Structure in Private unaided Schools – Notification – Orders – Issued.

EDUCATION (SE: P.S.I) DEPARTMENT

G.O.Ms.No. 91

Dated: 06-08-2009

Read the following:

1. 1. G.O.Ms.No. 1, Education Department dated 01-01-1994.
2. 2. G.O.Rt.No. 376, Education Department dated 18-06-2009.

ORDER:

It was brought to the notice of Government that certain private educational institutions are exploiting the parents by hiking fee indiscriminately and some of them also luring them with attractive names such as IIT Olympiad/Concept/e-Techno/e-shastra etc and collecting exorbitant fees. In this situation, it is felt by the Government that there is every need to regulate the collection of fee by Private unaided Schools.

2. 2. However, the intention of Government is only to prevent and curb such exploitation by the school managements, without interfering on their independent functioning. It is not the intention of the Government to impose an irrational fee structure and endanger the viability of the schools to provide quality education.
3. 3. In the circumstances stated above, Government have constituted a Committee in the G.O. 2nd read above, to look into the fee structure in the Private Schools with the following members;
 1. 1. Commissioner, Intermediate Education
 2. 2. The District Collector, Hyderabad.
 3. 3. Additional Secretary, Law Department.
 4. 4. Joint Director, o/o Director of School Education.
 5. 5. Sri Narayana Reddy, principal & Correspondent, Warangal.

4. 4. The Committee conducted meeting with stake holders, studied judgments of various High Courts, Supreme Court and created a separate cell to obtain representations from the people and finalized its recommendations. The Committee submitted its report to Government on 3-7-2009.
5. 5. The Committee in its report stated that the Hon'ble Supreme Court in several judgments held that there could be no rigid fee structure for all schools alike and each institution should have the freedom to fix its own fee structure after taking into account the need to generate funds for administration of the institution and provide facilities to the students and however there can be no profiteering and commercialization.
6. 6. Government have examined the recommendations of the committee appointed in the G.O. 2nd read above and issues following orders for compliance by Private Unaided Schools.
7. 7. The following notification shall be published in A.P. Gazettee:

NOTIFICATION

In exercise of the powers conferred by Section 7 of the Andhra Pradesh Educational Institutions (Regulation of Admissions and Prohibition of Capitation Fee) Act, 1983 (A.P. Act No. 5 of 1983) the government of Andhara Pradesh hereby regulate the fee in private unaided schools in the State as follows:

Private unaided schools may levy and collect the following fees:

1) FEES:

- (a) (a) One time fees:
 - (i) (i) Application fee not exceeding Rs.100/-
 - (ii) (ii) Registration fee not exceeding Rs.500/-
 - (iii) (iii) Refundable non-interest bearing Caution Deposit not exceeding Rs.5,000/- and the same shall also be submitted to DFRC with due justification for approval.
 - (iv) (iv) No other fee by any name, whatsoever, shall be charged as a onetime measure.
- (b) (b) **TUTION FEES:**
 - (i) (i) Tuition fee shall be fixed basing on the salaries paid to the teachers and staff, retirement benefits, running expenditure, infrastructure and facilities available including any Special fee, for any specific purpose and Development fee.
 - (ii) (ii) The tuition fee shall be collected in not less than 3 installments.
 - (iii) (iii) Any activity which is not directly linked to education, if provided, shall be optional to the student and shall not be built as part of the tuition fee.
- (c) (c) **USER CHARGES:**
 - (i) (i) The school shall necessarily notify a minimum of 3 shops in the town where books/note books/stationery are available. Sale of books/note books/ Stationery at School Counter, if any, **shall be made at a Discount.**
 - (ii) (ii) It shall not be compulsory to purchase uniforms from the designated shops or Sales Counter of the school. The students shall have option to purchase the Uniform from the outsides outlets of his choice as per the specifications prescribed by the School.

- (iii) (iii) The transportation fee shall be fixed with a slab of 5 KMs.
- (iv) (iv) Private Schools are advised not to run schools beyond stipulated time. In case extra classes are held, it should be optional for children to attend extra classes and no extra fee shall be charged for this.
- (v) (v) Private Schools are advised against issuing advertisements about their results in News papers. In case they do so, the cost of advertisement shall not be included in the fee structure.
- (vi) (vi) Interim Measure of fee for the academic year 2009-10:- Until District Fee Regulatory Committee (DFRC) approves fee for the school for the academic year of 2009-10, the School shall charge fee as was charged during 2008-09 academic year.

2. SEPARATE ACCOUNT:

- (i) (i) Separate Account shall be maintained for collection of different type of fees and each item of expenditure.
- (ii) (ii) The schools which have more than one branch under the same management shall maintain accounts in respect of branch for each item of expenditure separately.

3. PRIVATE UNAIDED SCHOOLS NOT TO CHARGE FEE MORE THAN THE FEE FIXED BY THE DFRC:

- (i) (i) DFRC shall approve the fee for each private unaided school within its jurisdiction.
- (ii) (ii) If schools collect fee more than the fee approved by the DFRC, it shall be treated as capitation fee and Management shall be liable for action under the provisions of Andhra Pradesh Educational Institutions (Regulation of admissions and Prohibition of Capitation Fee) Act, 1983. The recognition granted to the school and NOC issued shall be withdrawn after giving due notice.

4. FEE REGULATORY COMMITTEE:

The District Fee Regulatory Committee (DFRC) comprising of (a) the District Collector or his nominee not below the rank of Joint Collector, (b) The District Educational Office concerned and (c) the District Audit Officer/Auditor of Pay & Accounts Officer shall be constituted for approving fee structure for all private unaided schools in the respective District.

5. GOVERNING BODY:

- (i) (i) The Governing Body of school shall submit audited statements along with proposed fee structure to District Fee Regulatory Committee before the 30th of September and the District Fee Regulatory Committee shall accord approval after giving opportunity of being heard to management of private unaided school and the representation of parents, before the 31st December in respect of the fee structure for the next academic year.
- (ii) (ii) The Governing Body of the school shall be constituted as per G.O.Ms.No. 1, Education Department dated 1.1.1994.

6. VALIDITY OF THE FEE STRUCTURE:-

The fee structure approved by District Fee Regulatory Committee shall be valid for a period of 3 academic years but Management may increase fee every year based on the increase in Consumer Price Index. However, District Fee Regulatory Committee also reserves the right to review its decision on reasonable grounds *suo motu* or on representation from the parents or management of the school.

7. 7. APPELLATE AUTHORITY:

An appeal against the decision of District Fee Regulatory Committee shall lie to the Commissioner and Director of School Education.

8. 8. GENERAL

- (i) (i) Private Management shall not put names of schools such as IIT Olympiad/Concept-Techno/e-shastra.
- (ii) (ii) The Committee constituted in G.O.Rt.No.376, Education (SE:P.S.I) Department dated 18-06-2009 shall submit detailed guidelines for the guidance of the District Fee Regulatory Committee, and formats for submission of statement by Management to District Fee Regulatory Committee.

SURESH CHANDA,
Secretary to Government

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Heard Sri P.P. Rao, Sri D. Prakash Reddy and Sri S. Ravi, learned senior advocates; Sri Y. Ratnakar, Sri B. Adinarayana Rao, Sri P. Venugopal, Sri L. Ravichander, Sri S.V. Bhatt, Sri A. Ravishanker, Sri Harinath Reddy, Sri Prabhaker Peri, Sri Ch. Pushyam Kiran, Sri Deepak Bhattacharjee, Sri Mir Wazid Ali, Smt. S. Renuka learned counsel, for the petitioners; Sri A. Sudershan Reddy, the learned Additional Advocate General for the State of Andhra Pradesh and other official respondents under the control of the State Government, in the several writ petitions; Sri Ponnam Ashok Goud, learned Assistant Solicitor General for India; Sri C.V. Mohan Reddy, learned senior Advocate for the H.S. Parents Association (impleaded as respondent in several of the writ petitions), the learned Government Pleader for School Education and Sri D.V. Siva Prasad, learned counsel for the respondents.

The challenges in the several writ petitions are common, though additional grounds of challenge are presented by some of the writ petitioners, administrating schools affiliated to the Central Board of School Education (CBSE) and the Indian Certificate of Secondary Education (ICSE). Since the basic challenge is to the validity of a notification issued by the State Government, in purported exercise of powers *qua* the Andhra Pradesh Educational Institutions (Regulation of Admissions and Prohibition of Capitation Fee) Act, 1983 (A.P. Act No. 5 of 1983) (hereinafter the Capitation Fees Act), we set out and consider the several grounds of challenge.

Grounds of challenge:

(A) (i) The Capitation Fees Act and the Rules made thereunder are not intended to apply to schools affiliated to the CBSE or ICSE. Where the State grants on application (as a usual procedure), a 'no objection certificate' to facilitate affiliation of a school to the CBSE or ICSE, the school so affiliated is required to comply with and conform to all the terms and conditions of its affiliation, the affiliation bye-laws or other stipulated norms of the CBSE or ICSE, as the case may be. Such compliance with the affiliation and other stipulated norms is also mandatory *qua* instructions of the affiliating authority. In the context of such affiliation, the obligation of a school to conform to a State Regulation ceases.

(ii) 'Education' is a legislative field enumerated in the Concurrent List (Entry-25 List-III) in the Seventh Schedule of the Constitution. A school affiliated to a Central authority, for instance a body such as the CBSE,

controlled by the Ministry of Human Resources Development, Government of India, is outside the purview of State Regulation.

(B) Even if a State legislation and/or the Rules made thereunder apply validly to schools affiliated to the CBSE or ICSE as well, the impugned orders, in particular the orders in G.O.Ms.No. 91 are inoperative being inconsistent with the provisions of Section 7 of the Capitation Fees Act and Rule 18 of the Andhra Pradesh Educational Institutions (Establishment, Recognition, Administration and Control of Schools under Private Managements) Rules, 1993 issued in G.O.Ms.No.1, Education (P.S.2) Department dated 01-01-1994 (the 1993 Rules); the 1993 Rules having been issued in exercise of powers under the provisions of the Andhra Pradesh Education Act, 1982 (the 1982 Act). Section 7 of the Capitation Fee Acts enables the State to regulate tuition and other fees by notifying such regulation, by publishing the same in the Gazette. G.O.Ms.No. 91 empowers the District Fee Regulatory Committee (DFRC) to regulate fees without the State Government itself notifying the fee as mandated. Such a process tantamounts to abdication of the statutory power of the State in favour of the DFRC. The impugned order thus suffers the vice of excessive delegation. Rule 18 (1) of the 1993 Rules declares that every unaided school shall have its own fee structure, to determine the fee to be collected from the students of various courses/classes and sub-rule (2) of this Rule empowers the governing body of the school to prescribe the fee structure, taking into account the factors enumerated in clauses (a) to (i). Since the impugned order (G.O.Ms.No. 91), which subjects the fee stipulated by the governing body of the school to

the approval of the DFRC, being an administrative order issued in exercise of powers under Section 7 of the Capitation Fee Act, the same cannot override or prevail over the provisions of Rule 18 of the 1993 Rules.

(C) G.O.Ms.No. 91 does not provide for notification of the fee approved by the DFRC (in respect of each school), contrary to the provisions of the Capitation Fees Act.

(D) Neither the provisions of the Capitation Fees Act nor of the 1993 Rules envisage or permit the constitution of a DFRC and the transfer to such a body, the power to regulate/prescribe fees. The composition of the DFRC is contrary to the directions of the Supreme Court in *Islamic Academy of Education v. State of Karnataka* [2003 (6) SCC 697]. In *Islamic Academy of Education* the Apex Court directed that the determination of fee must be by an independent committee headed by a retired judge of a High Court nominated by the Chief Justice of the High Court and must include a Chartered Accountant as a member in addition to representatives of the concerned authorities (in the present case such as the CBSE and ICSE etc.). The DFRC, under the terms of the impugned orders, comprises subordinate officers of the Government, with a solitary exception.

(E) (i) Paragraph-1 (c)(vi) of G.O.Ms.No. 91 compels a school to charge the same fee as was charged during 2008-09, till the fee for the subsequent year i.e., 2009-10 is approved (by the DFRC). Such freezing of the fees is inconsistent with the provisions of Section 7(2) of the Capitation Fees Act. (ii) Paragraph-1(a); (b)(iii); (c)(v) and (vi) of G.O.Ms.No. 91 are *ultra vires* the

provisions of Article 19(1)(g) and are not saved by any law made within the contours of Article 19(6) of the Constitution. Para-1(b)(iii) enjoins that any activity not directly linked to education, if provided, shall be optional to the student and shall not be billed as part of the tuition fee. Such provision is vague and circumscribes the academic, managerial and occupational autonomy of the management and is a restriction/regulation totally irrelevant to regulation of Capitation Fees. Paragraph-1 (c)(v) enjoins that if extra classes are held, it should be optional to the children to attend such classes and no extra fee should be charged for this purpose. Such a provision is contrary to the public interest and the interests of academically backward children, who require extra coaching to keep pace with the contemporary standards of academic achievements.

(F) (i) The provisions of Paras 3 and 4 of G.O.Ms.No. 91 are inconsistent with the provisions of the Capitation Fees Act. Section 7 (1) of this Act enables the Government (by notification in the Gazette), to regulate tuition fee or any other fee that may be levied and collected by any educational institution in respect of each class of students and sub-section (2) enjoins that no educational institution shall collect any fee in excess of the fee notified under sub-section (1). Paragraph-3 of G.O.Ms.No. 91 enjoins that the DFRC shall approve the fee for each private unaided school within its jurisdiction and that if any school collects a fee in excess of the approved fee, it shall be treated as 'capitation fees' and the management liable for action under the provisions of

the Capitation Fees Act and the 'NOC' issued withdrawn after due notice. This provision of G.O.Ms.No. 91 is thus inconsistent with the Capitation Fees Act.

(ii) Paragraph-4 of G.O.Ms.No. 91 stipulates that the DFRC, comprising the District Collector or his nominee, not below the rank of Joint Collector; the District Educational Officer concerned; and the District Audit Officer/Auditor or Pay & Accounts Officer shall be constituted for approving fee structure for all private unaided schools in the District. The provisions of paragraph-4 of G.O.Ms.No. 91, to the extent the DFRC is required to accord approval to the fee structure of a school, after giving opportunity of being heard to representations of the parents as well, is subversive of the managerial autonomy of private educational institutions as judicially delineated.

(G) The provisions of paragraph-6 of G.O.Ms.No. 91 (freezing the fee structure approved by the DFRC for a period of three academic years and enabling the management to increase the fee every year based on the increase in the Consumer Price Index (CPI) and further empowering the DFRC to review its decision (on the fee structure) *suo motu* or on representation from the parents or the management of the school), are unsustainable. The CPI is neither *per se* nor in all circumstances an accurate index for determination of an appropriate fee structure for a school (for the academic year in question). Random and dynamic circumstances that may necessitate increase in the wages of the teaching and non-teaching staff, additional capital requirements, if any, for maintenance or infrastructure development and expansion may not be commensurate with or be adequately indexed by reference to the CPI of the

particular year. There are no guidelines as to what constitute reasonable grounds for *suo motu* exercise of the review power of the DFRC, in respect of the fee structure.

(H) The provisions of paragraph 8 (ii) are vague and unsustainable. There are no parameters indicated for evolving detailed guidelines, by the committee constituted under G.O.Rt.No. 376, which would govern/guide the DFRC in granting approval for the fee structure for each school.

The Defense:

On behalf of the respondents and in defense of the impugned orders it is contended:

(a) that the provisions of paragraph 1(c)(vi) (of G.O.Ms.No. 91), directing schools to charge the same fee during the academic year 2009-10 as was charged during the academic year 2008-09, is an interim measure i.e., till the DFRC approves the fee for the academic year 2009-10 and is thus neither arbitrary, irrational nor otherwise illegal.

(b) In view of the abnormal increase in the fee charged by many schools during the academic year 2009-10 (ranging from 20 to 80% of the fee charged during the preceding academic year, 2008-09), the State responding to complaints by students and parents issued the impugned orders, in the public interest. As provisions of the Capitation Fees Act prohibit collection of 'capitation fee' by any educational institution, including schools, the provisions of the impugned orders are legitimate and valid.

(c) The Navin Mittal Committee submitted a report which identified various malpractices including the exorbitant fee being collected by private schools and made recommendations. Pursuant to the recommendations, the State issued G.O.Ms.No. 91. These orders are in conformity with the provisions of the Capitation Fees Act.

(d) G.O.Ms.No. 91 is an order notified by the State in exercise of its powers under Section 7 (1) of the Capitation Fees Act. This order was published in the Andhra Pradesh Gazette, dated 10-09-2009 and is thus a notification issued under the provisions of the said Act. The several decisions of the Supreme Court, while preserving academic and managerial autonomy of private unaided educational institutions, have clearly recognized that the State's legitimate role interest and authority to regulate to prevent commercial exploitation of education and to initiate measures and issue orders for prohibiting collection of 'capitation fee'. The provisions of G.O.Ms.No. 91 are in furtherance of a legitimate governmental interest and consistent with the law declared and the provisions of the Capitation Fees Act.

(e) The contention that the provisions of G.O.Ms.No. 91 are inapplicable to schools affiliated to the CBSE or other authorities like the ICSE, is misconceived. The bye-laws for affiliation to the CBSE or other authorities are not pursuant to any statutory provisions nor have a statutory flavor. Further, guideline No. 11 in the norms of affiliation (of CBSE) which relates to fee to be charged by a school, clearly postulates that the fee chargeable should be in

accordance with the law of the State Government or a Union Territory. The CBSE being a non-statutory body and functioning under no legislation of the Union Government on the subject of education, the State is not denuded of its legislative or executive power to regulate the fee structure of schools, to curb collection of Capitation Fee.

(f) Even in respect of schools affiliated to the CBSE or ICSE (pursuant to an 'NOC', issued by the State Government or an authority under the control of the State Government), the State is not denuded of its legislative or executive power to regulate fee, to ensure that 'capitation fee' is not collected. The provisions of G.O.Ms.No. 91 are thus valid and legal. Issue of 'NOC' to schools would not erode the legislative or executive power of the State in this area.

(g) There is no conflict between the provisions of the 1993 Rules and the provisions of G.O.Ms.No.91. The provisions of G.O.Ms.No. 91 do not tantamount to abdication of the obligation of the State enjoined by the provisions of Section 7 of the Capitation Fees Act. It is legitimate for the Government to constitute a committee either to frame guidelines or to consider proposals of the school for approval of the fee structure. Approval of the fee structure by the DFRC does not violate the provisions of Section 7. Alternatively, approval by the DFRC of the fee structure of a school is recommendatory and the fee structure for each school or classes of schools would eventually be issued by the State Government by notification, as enjoined by and to conform to the provisions of Section 7 of the Capitation Fees Act.

(h) The learned Additional Advocate General also urged that the contention that G.O.Ms.No. 91 is not law within the meaning of Article 19 (6) of the Constitution, is unfounded. G.O.Ms.No. 91 was notified and published in the Andhra Pradesh Gazette (dated 10-09-2009); and this notification specifically asserts that it is issued in exercise of powers conferred by Section 7 of the Capitation Fees Act. G.O.Ms.No. 91 is thus law within the meaning of Article 13 (3) (a) of the Constitution and the contention of the petitioners that it is in the nature of administrative instructions, is misconceived.

(i) G.O.Ms.No. 91 does not abrogate the academic or managerial autonomy of the petitioners. It is a regulatory measure intended to curb the scourge of capitation fees.

(j) The contention that the involvement of parents' representatives in the process of determination of fee by the DFRC is violative of the petitioners' fundamental rights, is misconceived. The provisions of the 1993 Rules and of the regulatory measures enumerated in G.O.Ms.No. 91 operate in tandem. The raft of these regulatory measures incorporate a protocol for the involvement/association of representatives of parents in the fee determination/approval process. It is a salutary consultative process, since parents are significant stakeholders in the matter of fee determination.

The basis for the regulatory framework in G.O.Ms.No. 91 is the report of the Navin Mittal Committee.

The Navin Mittal Committee report (relevant portions of which would be analyzed in this judgment), is set out as Annexure to this judgment, for the record.

The Contours of Education as a concept and a broad evolutionary history of schools system:

Etymologically, the word education is derived from *educare* (Latin) "bring up", which is related to *educere* "bring out", "bring forth what is within", "bring out potential" and *ducere*, "to lead". [vide www.etymological.com/educate]

Learning in human species is also the transmission of the values and accumulated knowledge of a society. In ancient and extending to an extent into developing cultures, there was often little formal education. The young learnt from their environment and activities. They imbibed those intuitive skills and knowledge requisite for survival and propagation of species by observation, trial and error and repetition. The adults in the habitat acted as teachers. In more complex and developed societies and cultures, where there is greater knowledge to be passed on, a more selective and efficient means of transmission - the school and the teacher - becomes necessary and evolved as an adjunct of social organisation. The content of formal education, its values and variation, its duration and who receives it, at what levels and in what structure and hierarchical formats have and do vary from culture to culture and age to age, as has the philosophy of education transformed and evolved.

As the post-Medieval world graduated from the hunter-gatherer through the pastoral, the industrial and post industrial economy and civilization, the other

forms and methodologies of social governance (tribal chieftains, nobles, oligarchies, monarchies or dictatorships) gave way increasingly to democracies; tribal accretions coalesced into hamlet diversities and eventually into Cities, States and Nations. Alongside this socio-economic-political societal transformation, there occurred a transformation in the formal or non-formal matrices of transmission of the values and accumulated knowledge of the accreting societies. A knowledge society was evolving together with complementary organisations.

In Medieval Western Europe, education was typically a charge of the Church; the Monastic schools and Universities were the chief centers and virtually all students took the orders. Lay education consisted of apprentice training for a small group of the common people, or education in the usages of chivalry for the more privileged. In other cultures Gurukulas, Madarsas or like ecclesiastical institutions were the centers of learning. The forms of education were often insular, doctrinal and segregated, available selectively or to the privileged. In the West and with the Renaissance, education of boys and some girls in classics and mathematics became widespread. Post Reformation, both Protestants and Roman Catholic groups began offering formal education to more people and there was an increase in the number of private and public schools, though the basis remained the classical-mathematics curriculum. Around that time, the world over too and driven by the demands of the Industrial Revolution that had arrived, the hitherto insular, structured, rationed or doctrinal centers of education crumbled and some measure of

standardization and secularisation of education, incorporating variegated dimensions of knowledge became necessary. Corresponding models of education and educational institutions started evolving. The classical State around this time also evolved functionally from the mere performance of minimal sovereign functions - of maintenance of external security and internal tranquility of the realm, metamorphosing into the affirmative State regulating ever increasing areas of societal concerns. A regime of regulation of education by the State had arrived.

With the development of scientific enquiry from mid 18th Century, new methods and materials, accelerating evolution of scientific thought -- fundamental and radical discoveries in the fields of humanities and sciences and concomitant technologies and philosophical shifts transformed society's perceptions about the bases of education. Elementary, secondary schools and institutions of higher learning were established and as larger proportions of the population adapted to formal education, curriculae became differentiated, refined and advanced.

The 19th Century was a time of rapid economic growth and urbanization, an era of institution building and education was shaped by these developments. Schools became institutions of reform intended to help redress pressing social problems. State and City systems of schooling came into being, although local prerogatives continued to dictate most educational practices. It was a time when schools and education gradually assumed greater importance, and came to reflect the prevailing social divisions and patterns of inequalities.

Education in the countryside evolved slowly, but schools developed rapidly in the cities. Education was linked to sections of development and destitution, crime and social conflict. While the urban schools adopted a measure of standardization of curriculae and reflected prevailing norms of strict discipline and order, schools in the countryside were manned by itinerant masters with little formal training and flexible discipline and attendance. It was this dichotomy and the rural-urban divide in the format of education permeating most of the Western World that was imported and took roots in the Indian soil under the British.

Education reform appeared in many guises in the opening decades of the 20th Century. There was reform in the format of education by infusions from other disciplines like experiential psychology which led to the genesis of special schools calibrated to differential levels of physical or mental ability amongst the children. This period also saw the emergence of new, centralized and efficient city school systems as part of sweeping reform campaigns in local body governance with increasing enrolment and demand for continuing and higher education. Horizontal stratifications of education levels and complementary curriculae evolved - for primary, secondary, post-secondary and baccalaureate and higher levels of education alongside of variety of professional programmes. This expansion brought in its wake the bureaucratization of education as a whole. This global shift in the pattern of education absorbed education in India as well into a dynamic vortex of change - academic and structural.

A right to education evolved and came to be recognized in several jurisdictions. Since 1952, Art.2 of the first Protocol to the European Convention on Human Rights obliges all signatory parties to guarantee the right to education. At the international level, the United Nations' International Covenant on Economic, Social and Cultural Rights of 1966 guarantees this right under its Article 13.

Education in the widest sense of the expression is any act or experience that has formative effect on the mind, character or physical ability of an individual. In its technical sense, *education* is the process by which the society normally and deliberately transmits its accumulated knowledge, skills and values from one generation to another. In its very nature *education* cannot be caged and cabined in an inflexible mould. Education may incorporate a variety of teaching matrices, techniques and formats; traditional or non-traditional, formal or non-formal; may include reading, writing or even exclusively the oral tradition; it may draw on many subjects and diverse areas of human excellencies and intellectual developments including mathematics, science, history, technology, games and sports, vocational skills, sculpture, painting, music, dance, educational adjuncts for physical development and excellence; including horse riding, mountaineering, swimming or other sports.

The broad contours of structured education in modern society may be comprehended within a three fold classification as: (i) systems of formal education, (ii) the process and (ii) the technology. Systems of formal education would include pre-school, primary, secondary, higher, adult,

alternative and/or indigenous education. The process of education would comprise (a) curriculae, (b) learning modalities and (c) teaching methodology. The technology of education includes education values as well as economics, history, philosophy, psychology and sociology of education; the study of education in the developed and developing and underdeveloped regions of the world and the effect of internationalization and globalization on education management in a specific society.

Primary or elementary education usually comprise the first 5 to 7 years of formal, structured education or 6 to 8 years of schooling starting at the age of 3 to 6 (varying from country to country or within a country as well). Globally, around 70% of primary-age children are enrolled in primary education and this proportion is rising (vide UNESCO, Education for All Monitoring Report 2008 - study of Net Enrollment Rate in primary education). Under the Education for All programme driven by the UNESCO, most countries have committed to achieving universal enrollment in primary education by 2015 and in many countries it is compulsory for children to receive primary education.

The division between primary and secondary education is however blurred and arbitrary, but generally occurs at about 10 to 12 years of age. Some systems have separate middle schools providing for transition from primary to secondary education, taking place around the age of 14 years. Schools which provide primary education are generally referred to as Primary Schools. Primary Schools may again be classified into infant and primary schools or pre-schools and schools. Under the Andhra Pradesh Education Act,

1982 'general education', 'pre-primary education', 'primary education', 'special education' and 'technical education' are defined in Section 2-(19), (32a), (34), (38) and (44).

In most contemporary systems of education across the world, secondary education comprises the formal education that occurs during adolescence, characterized by transition from the typically compulsory, comprehensive primary education for minors, to the optional, selective tertiary, post-secondary or higher education. Depending on the particular educational system, schools for this period or a part of it, may be called high schools, gymnasiums, lyceums, middle schools, colleges, or vocational schools. The purpose of secondary education could be to give common knowledge preparatory to higher education or even direct professional training.

With the onset and development of industrial civilization and the transition from the pastoral to the industrial civilization and the concomitant rise in big businesses, technological advancement and industrialization, the consequent requirement of skilled work force transformed the hitherto static pedagogy of secondary schools to a focus on imparting practical job skills, that would better prepare students for white or skilled blue collar work in factories and industries. The curriculae also underwent paradigm shifts.

The next tier of the education matrix is higher education also called the tertiary, third stage, or post secondary education, which is globally a non-compulsory level of education and normally follows on the completion of a school providing secondary education. Tertiary education normally comprises

under-graduate and post-graduate education, vocational education or professional education or training. Colleges and Universities are the primary institutions that provide tertiary education and are collectively referred to as tertiary educational institutions.

Alternative education also known as non-traditional education is a broad term referring to all forms of education outside of the traditional education and for all age groups and levels of education. This form of education may include those specially designed for student's special needs ranging from teenage pregnancy to intellectual disability or physical challenge. This also includes forms of education designed for a general audience and/or employing alternative educational philosophies or methodologies. Indigenous education is also comprised within the matrix of alternative education and as an educational methodology involves indigenous ways of knowing, learning, instructing, teaching and training. This method is considered by many critical post-modern scholars as important for ensuring that students and teachers, (whether indigenous or otherwise) are able to benefit from education in a culturally sensitive manner that draws upon, utilizes, promotes and enhances awareness of indigenous traditions. In this methodology the provisions, perspectives, concepts, curriculae, course material, text books and course books vary either wholly or in part [see also: *Learning in Adulthood: A Comprehensive Guide, 2007* - Sharan Merriam, Rosemary, Cafarella and Lisa Baumgartner; and *supporting Aboriginal Students Success: Self-esteem and*

identity, A Living Teachings Approach - seminar presentation by Dr. Pamela Toulouse - <http://www.edu.gov.on.ca/eng/research/Toulouse.pdf>].

The general architecture *qua* the relevant statutory provisions:

While initially Article 45 in Part IV of the Constitution exhorted the State to endeavor to promote free and compulsory education for all children until they complete the age of 14 years, within a period of ten (10) years from the commencement of the Constitution as a principle fundamental in the governance of the country and as the duty of the State to apply this principle in making laws (vide Art.37); by the Constitution (Eighty-sixth Amendment) Act 2002, Article 21A was introduced in Chapter III relating to Fundamental Rights. By this provision the State is required to provide free and compulsory education to all children of the age of 6 to 14 years in such manner as the State may, by law, determine. To comply with the mandate of Article 21A Parliament enacted the Right of Children to Free and Compulsory Education Act, 2009. Provision of primary and part of secondary education to all children of the age of 6 to 14 years is now a constitutional directive to the State operationalised by the Legislative mandate of the 2009 Act.

Post Independence, India witnessed a gradual transformation, from an initial stage of the State being the principal provider of educational infrastructure and regulator of formal education to being a supporter (grants-in-aid) and to now being largely a mere regulator, contouring and determining academic and faculty standards and infrastructural norms. The State is steadily and inexorably withdrawing from the funding of educational

infrastructure at all levels and is content to merely regulate. Education is now exponentially and largely a free market commodity. With accelerating privatization and an ever increasing demand for education, alongside well meaning philanthropists committed to altruistic support to education, came the carpetbaggers. The scourge of commercialization of education looms large; education is now big business and is occasionally or often pursued with a cynical and ruthless disregard for the raft of intermeshing values that must substrate a rational, benign and sustainable medium for accretion, dissemination and transmission of the wealth of accumulated human knowledge, within a generation or across generations. The Indian State has now a new and emergent item on its governance agenda - containing the rampaging sociopathy of the commercialization of education.

An early initiative towards curbing the menace of commercialization of education (the charging of Capitation Fee) is the legislation in Andhra Pradesh -
- The Capitation Fees Act.

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Relevant provisions of the Capitation Fees Act:

The Andhra Pradesh Educational Institutions (Regulation of Admissions and Prohibition of Capitation Fee) Act, 1983 generally provides for regulation of admissions into educational institutions and for prohibition of collection of capitation fee in the State. Section 2 (b) defines *Capitation fee* as any

amount collected in excess of the fee prescribed under Section 7 (prescribed by Rules made by the Government under the Act).

Section 7 reads:

7. Regulation of fees: (1) It shall be competent for the Government by notification, to regulate the tuition fee or any other fee that may be levied and collected by any educational institution in respect of each class of students.

(2) No educational institution shall collect any fee in excess of the fee notified under sub-section (1).

(3) Every educational institution shall issue an official receipt for the fee collected by it.

Sections 9 and 10 enumerate penalties for contravention of the provisions of the Act or the Rules made thereunder and offences by the companies. Section 11 enacts a power to enter and inspect an educational institution for the purpose of ascertaining whether there is or has been any contravention of the provisions of the Capitation Fee Act. Section 15 enumerates a broad power to make rules for carrying out all or any of the purposes of the Act.

Andhra Pradesh Education Act 1982 ('the 1982 Act'):

Prior to this enactment, the administration of educational institutions in the State was governed by executive rules and codes and a few enactments [The Andhra Pradesh (Andhra Area Elementary Education) Act 1920; The Andhra Pradesh (Andhra Area) Aided Institutions (Prohibition of Transfer of Property) Act 1948; The Andhra Pradesh Educational Institutions

(Requisitioning and Acquisition) Act 1956; The Andhra Pradesh Primary Education Act 1961; and The Andhra Pradesh Recognised Private Educational Institutions (Control) Act 1975]. In view of the quantum growth and spread of secondary and higher levels of education (quadrupled over the first three plan years) and in response to the need for more comprehensive, structured and effective measures for the administration of education, the 1982 Act was enacted.

The Act applies to all educational and tutorial institutions in the State except the four categories of institutions enumerated in Sec. 1(3). Section 19 classifies educational institutions regulated under this Act into State institutions viz., educational institutions established or maintained and administered by the Government; local authority institutions i.e., educational institutions established or maintained and administered by a local authority; and private institutions i.e., educational institutions established or maintained and administered by any body of persons registered in the manner prescribed. Section 20 enacts measures for grant of permission for establishment of educational institutions and sub-section (4) thereof enjoins that no educational institution shall be established [on and from the commencement of the Andhra Pradesh Education (Amendment) Act 1987], except in accordance with the provisions of the Act; that any person who contravenes the provisions of this Section or who after the permission granted to him thereunder is cancelled, continues to run such institution, shall be punished with imprisonment and a fine as stipulated; and that a court convicting a person under this provision

shall also order closure of the institution with respect to which the offence is committed.

Chapter XIV of the Act enacts provisions regulating payment of salaries and allowances to and disciplinary action against employees of private institutions. Sec. 84(1) in this Chapter enjoins that pay and allowances of any employee in a private institution shall be paid on or before such day of every month, in such manner and by or through such authority, officer or person as may be prescribed. Sec.84A enables imprisonment or fine for contravention of any of the provisions of this Chapter.

Section 99 enacts a broad power in the Government to notify rules, to carry out all or any of the purposes of the Act. Section 99(1)(b) in the several clauses enumerated thereunder spells out the areas in respect of which rules may be made; including in the matter of regulating the rates of fees; the levy and collection of fees in educational institutions (xiii); the manner in which accounts, registers, records or other documents shall be maintained in the educational institutions and the authority responsible for such maintenance (xiv); the submission of reports, statements and accounts by Managers or owners of properties of educational or tutorial institutions (xv); the mode of keeping and auditing of accounts of such institutions (xvii); the preparation and sanction of building plans and estimates of the educational institutions and the requirements to be fulfilled by the building for the educational institutions maintained by the local authority and private institutions (xxii); the conditions subject to which donations or contributions from the public may be accepted

by the educational institutions and the naming of institutions (xxix); and the scale of fee or charges and the manner of fixing fee and charges payable in respect of any certificate, permission, marks lists or other documents for which such fee may be collected (xxxii).

The Andhra Pradesh Educational Institutions (Parents - Teachers Association) Rules 1987 ('the 1987 Rules'):

These Rules, issued in G.O. Ms. No. 246 Education Department dated 17.10.1987 were made in exercise of the obligation u/Sec. 30 of the 1982 Act and in exercise of rule making power thereunder. Sec.30 enjoins that there shall be a parent-teacher association ('the association') for every educational institution other than an adult educational centre and that the composition and function of such association shall be in accordance with prescribed Rules.

The objectives of the association are (a) to provide a significant role in the functioning of the institution vis-à-vis students' amenities, welfare and other similar objectives; (b) to enable involvement in educational standards and discipline maintenance programmes; (c) to make suggestions regarding the policies and patterns of education and to establish a rapport between an educational agency and the parents; (d) to enable the parents to be involved in programmes formulated by the University Grant Commission (UGC), to effectuate implementation of such programmes, and to interface in several ways with the educational institutions (Rule-3).

While Rules 4 to 7 set out the norms for membership and subscription; composition of the association; executive council of the association and its functioning and the procedure for election of the office bearers of the

association; Rule-8 has provisions for functioning of the association including the tenure, provisions for meetings of the association; specifies the officers of the association and their functions. Rule-9 sets out provisions relating to utilization of funds, maintenance of accounts and other house keeping provisions. Though Rule-5 and Rule-6 read conjointly provide that the President and the Vice President shall be a parent while the Secretary-cum-Treasurer shall be the Head of the educational institution, *per se* under the raft of the 1987 Rules the association has neither an intrusive nor a determinant role in academic or administrative affairs of an educational institution but is intended to perform a complementary, participatory or a facilitative role to further academic and other standards of an institution.

The Andhra Pradesh Educational Institutions (Establishment, Recognition, Administration and Control of Schools under Private Management) Rules 1993 ('the 1993 Rules):

The Rules in G.O. Ms. No. 1 Education Department dated 01.01.1994 were issued in supersession of earlier rules [issued in G.O.Ms.No. 524 Education Department dated 20.12.1988; The Andhra Pradesh Private Institutions Employees (Disciplinary Control) Rules 1983 issued in G.O.Ms.No. 467 Education Department dated 3.11.1983 and the Andhra Pradesh Minority Education Institutions (Establishment, Recognition and Regulation) Rules 1988 issued in G.O.Ms. 526 Education Department dated 21.12.1988]. The 1993 Rules regulate grants of permission for establishment of schools, upgradation of existing schools, grant of recognition and administration of schools and to

regulate disciplinary control of employees under private managements including minority educational institutions.

Rule 1(2) enjoins that the rules apply to all categories of schools functioning under private management including minority educational institutions categorized as Pre-Primary, Primary, Upper-Primary, Secondary, Oriental schools, Hindi Pathshalas, Sanskrit Pathshalas, Hindi Vidyalayas and special schools. Rules 4 to 9 set out provisions: (a) enumerating criteria for establishment of schools; (b) requirements for establishment of a new school or for upgradation of an existing school; (c) modalities for applying for permission for establishment of new schools or for upgradation of existing schools; (d) provisions relating to scrutiny and grant of permission on an application for establishment or upgradation; (e) provisions relating to validity and tenure of the permission granted; and (f) the procedure for grant of recognition, the tenure of recognition and the procedure and terms for renewal of recognition.

Rule 10 sets out general conditions governing permission or recognition and specifies that these shall be in addition to specific conditions that may be prescribed in individual cases. Sub-rule (3) provides that a school (permitted or recognized) shall follow the syllabus and text books prescribed by the Government, but clarifies that this requirement is inapplicable to schools affiliated to Boards of Examinations other than the State Board, in which event such schools should follow the requirement of the concerned Board. Rule-11 provides for withdrawal of permission or recognition for violation of these rules after complying with principles of natural justice. Rule-12 sets out provisions

to regulate appointment of staff including for educational institutions receiving grants-in-aid from the Government. Rule-13 spells out the composition of the staff selection committee for filling up aided posts otherwise than by promotion. Rule-14 spells out norms and conditions including as to the age of children for admission to specified categories of schools.

Rule 15 enjoins that every school, aided or otherwise, shall constitute a governing body to discharge the functions specified in Rule-15. The composition of the governing body includes the President and Vice-President of the Parent-Teachers' Association. The quorum for meetings of the governing body and the schedule and periodicity for governing body meetings are also provided in this rule.

Rules 16 to 18 delineate the functions of the governing body; the criteria and procedures for fixing salary structure for the staff; and the criteria for fixing fee structure and allocation of revenue earned as fee. While the functions of the governing body include fixing the salary structure for the staff consistent with the financial position of the institution and determining the fee to be collected from the students of various classes, keeping in view the several expenditures involved in the maintenance of the institution (Rule-16); the criteria and procedures for fixing salary structure for the staff are specified in Rule 17 which enjoins that managements of unaided schools may collect fees at the rate prescribed by the governing body as per the criteria provided in Rule-18. Under this Rule the governing body is also empowered to fix the salary structure of the staff consistent with the revenue position of the

institution and other requirements spelt out in Rule 18(4). Further, this Rule stipulates that approximately 50% of the total revenue collection as fee shall be earmarked for payment of regular salaries to the staff and 15% for providing other benefits like Teachers' Provident Fund, Group Insurance etc.

Rule 18 preserves the liberty of every unaided schools or an upgraded aided school (without aid for higher classes) to have its own fee structure and enables its governing body to prescribe the fee structure taking into account the factors set out in Clauses (a) to (i) of sub-rule (2). Sub-rule (4) stipulates how the fee collected should be allocated to meet the requirements specified therein including income for the management (5%); for maintenance of the institution including general establishment charges for purchase of library books etc, (15%); for developmental activities for starting additional courses, classes, sections, upgradation of the institution, additional accommodation, acquisition of equipment and furniture, purchase of land for institutional use etc, (15%); for payment of salaries to the staff (50%); and towards management's contribution towards staff benefits like gratuity, teachers' provident fund, group insurance scheme etc, (15%). Sub-rule (5) enjoins the educational agency to maintain separate accounts in one or more banks for the amounts allocated for the several purposes spelt out in sub-rule (4) and prohibits amounts allocated for specific purposes from being diverted for any other; and that the account shall be operated jointly in the name of the Secretary, Correspondent or Manager of the institution and the Headmaster or Principal of the institution.

Rules 19 and 20 incorporate prescriptions relating to disciplinary control and for submission of an annual administration report by an educational agency. Rule-21 enables the Government to relax the provisions of the Rules for reasons of undue hardship to any educational agency or in public interest.

The 1982 Act, the Capitation Fees Act, the 1981 and the 1993 Rules are regulatory instruments which were enacted or promulgated prior to the several judicial pronouncements identifying and declaring the rights and the contours of autonomy (academic and managerial) of private unaided educational institutions, minority or otherwise. The extent of and limits to the regulatory role of the State in respect of such institutions, in the context of the balance between the extent of institutional autonomy and liberty and the permissible contours of the State's regulatory role, is the legal architecture that governs analysis of the issues presented in these writ petitions. It is therefore necessary to consider the relevant precedents in this area. Before proceeding to consider the *dicta curial*, we identify the several issues that arise for adjudication.

Issues:

A) (i) Whether private unaided educational institutions affiliated to Boards of Examinations other than the State Board (whether CBSE; ICSE or others) (hereinafter non-State Boards), are immune to regulation by the State (State of Andhra Pradesh) (whether under the provisions of the 1982 Act, the Capitation Fees Act the executive power of the State or the Rules or Regulations issued in exercise of statutory powers).

(ii) Whether "NOC" granted by a State agency is a promise of immunity (by the State) from prescription of fees and other regulation by the State.

(iii) Even if permissible, whether State regulation must steer clear of and not subvert the norms and regulations prescribed by non-State Boards.

B) (i) Whether the Capitation Fees Act is not intended to apply to educational institutions governed by norms and regulations of non-State Boards.

(ii) Whether G.O.Ms.No. 91 dated 06-08-2009 is not a regulation referable to Section 7 of the Capitation Fees act, but a mere executive order by the State and thus violative of the provisions of this Act.

(iii) Whether the power conferred on the DFRC vide paragraph No.3 of G.O.Ms.No. 91 (to approve fee for each private unaided school within its jurisdiction) and the declaration that any fee collected in excess of such approved fee shall be treated as Capitation fee; the management liable for action under the provisions of the Capitation Fees Act; and the recognition granted and the 'NOC' issued to such school shall be withdrawn, are inconsistent with the provisions of Section 7 of the Capitation Fees Act, for abdication or impermissible delegation by the State of its functions enjoined by the provisions of Section 7 of this Act.

(iv) Whether constitution of the DFRC and the entrustment to this body, the power of approving fee structure (for private unaided schools in the respective Districts), under Para-4 of G.O.Ms.No.91, is invalid for abdication or

impermissible delegation of the power of the State *qua* Sec.7 of the Capitation Fees Act.

(v) Whether Para-5 (ii) of G.O.Ms.No.91 (mandating that the Governing Body of the school shall be constituted as per G.O.Ms.No.1 Education Department dated 01.01.1994), is invalid for being impermissibly intrusive and in derogation of the operational autonomy of private unaided schools.

(vi) Whether the provisions of Para-6 of G.O.Ms.No.91, to the extent they curtail the liberty to increase the fee every year, by the prescription of a condition that such increase shall be relatable to the increase in the consumer price index and the further power conferred on the DFRC to review its decision (as to fee structure) on reasonable grounds, "*suo motu* or on representation from the parents or the management of the school" without prescribing guidelines annotating "reasonable grounds", is invalid for impermissible transgression of the operational autonomy of private unaided schools and for travelling beyond the scope of the provisions of the Capitation Fees Act; and

(vii) Whether Para-8(ii) of G.O.Ms.No.91 enabling the committee constituted in G.O.Rt.No.376 Education Department dated 18.06.2009 to submit *detailed guidelines for the guidance of the DFRC and formats for statement by management to DFRC*, is invalid for not associating the principal stake holders i.e., the Managements of private unaided schools, in the process of formulation guidelines.

C) (i) Whether the prescription of fees in paragraph No.1 (a) and other sub-paragraphs of paragraph No.1 of G.O.Ms.No. 91 are beyond the regulatory

power of the State, when the provisions of Section 7 of the Capitation Fees Act are construed in accordance with the operational autonomy of private unaided educational institutions (as identified and declared by extant and binding precedential authority).

(ii) Whether the prescription in Para-1(c)(vi) of G.O.Ms.No.91 (that until the DFRC approves the fee for schools for the academic year 2009-10, the schools shall charge the same fee as was charged during the preceding academic year 2008-09), is invalid for being inconsistent with the provisions of Sec.7 of the Capitation Fees Act, for violating the operational autonomy of private unaided schools and for being irrational.

D) Whether no relief can be granted in the several writ petitions, since the challenge is primarily premised on the right to operational autonomy qua the rights guaranteed under Article 19(1)(g) of the Constitution and those rights could be claimed only by a citizen and not an educational society or educational institution (not being a natural person or a citizen).

Analysis of the Issues:

Issue (A): The several sub-issues comprising issue (A) involve overlapping analysis and are hence considered in conjunction.

Sri P.P.Rao, the learned Senior Counsel who led the arguments on behalf of the petitioners, initially implicated that the impugned State regulation is invalid on account of the incompetence of the State to regulate schools affiliated to a non-State Board such as the CBSE, since the CBSE Regulations amount to a federal regulation and "Education" being a legislative field

enumerated in the Concurrent List (Entry 25, List III of the Seventh Schedule), a State regulation may not transgress an area occupied by the norms and regulations prescribed by a federal board. During the course of arguments however Sri Rao with his usual fairness submitted that it is not the case of the petitioners that the State is incompetent to regulate, on account of the discipline of Articles 246 and 254 read with Entry 25 of List III of the Seventh Schedule, in respect of schools affiliated to non-State bodies like the CBSE.

Sri Rao contended that several private unaided schools are affiliated to non-State Boards like CBSE and ICSE, after NOC is granted by a State agency. Since on such affiliation to a non-State Board the affiliating school must conform to the raft of norms and regulations prescribed by such Board, the State may not prescribe additional regulations or otherwise regulate the activities of such schools as that would impair the efficacy of the norms and regulations of a non-State Board and would arbitrarily constrain a school to conform to actual or potentially inconsistent regulations, one by the affiliating non-State Board and the other by the State. This generic contention of Sri Rao was adopted and echoed by other learned Counsel appearing for the petitioners.

From the pleadings in Para-11 of W.P.No. 24272/09 (CHIREC Educational Society) it appears that the CBSE had its genesis as the U.P. Board of High School and Intermediate Education in 1921 with jurisdiction over Rajputana, Central India and Gwalior. In 1929 the Government of India set up the Board of High School and Intermediate Education, Rajputana with jurisdiction including

Ajmer, Mewara, Central India and Gwalior. In 1952 the constitution of the Board was amended and its jurisdiction expanded to Part-C and Part-D territories and the Board given its present name "Central Board of Secondary Education". The Board in its present form was reconstituted in 1962. The main objectives of this Board are to serve educational institutions more effectively and to be responsive to the educational needs of those students whose parents are employed in the Central Government and have frequently transferable jobs. On reconstitution of the CBSE in 1962, the erstwhile Delhi Board of Secondary Education was merged with this Board and all educational institutions hitherto recognized by the Delhi Board also came under the purview of this Board.

No legislation or other statutory instrument by the Union of India is placed before us which permits an inference that the norms or regulations prescribed by the CBSE tantamount to a regulation referable to the exercise of legislative power by the Union of India, in exercise of its legislative field under Entry-25 of List III of the Seventh Schedule of the Constitution. The provisions of the 1982 Act, the Capitation Fees Act or the Rules and regulations made thereunder cannot therefore be considered as inoperative on account of or eclipsed by any dominant legislation by the Union of India, enacted in exercise of a concurrent field of legislation. This analysis holds good for schools affiliated to ICSE Board as well. We therefore hold that exercise of regulatory power by the State including in the matter of prescribing fee structure or other

complementary measures in respect of private unaided schools is *intra-vires* the legislative and executive power of the State.

No provision of any statute or a statutory instrument, rule or regulation made by or under the authority of the State of Andhra Pradesh is brought to our notice which enjoins that a school must obtain NOC before applying for affiliation to a non-State Board such as the CBSE or the ICSE. The practice of applying for or grant of NOC by a State agency thus appears to be a matter of courtesy. In any event the mere grant of NOC by an administrative agency or instrumentality of the State or by a State official would not immunize an educational institution including a private unaided school from the obligation of fidelity to valid regulation by the State, in exercise of its legislative or complementary executive power, as the case may be. The petitioners also do not plead or establish that any State agency or instrumentality had promised by the NOC or otherwise, immunity from existing or potential State regulatory measures. On no account therefore is the State denuded of or its power eclipsed, to regulate affairs of private unaided schools, including on the aspect of prescribing the fee structure or other complementary measures, on the mere circumstance that a State agency or instrumentality has granted NOC for affiliation to a non-State Board.

The CBSE Bye-Laws:

The learned Additional Advocate General representing the respondent-State has placed for our perusal a copy of the affiliation bye-laws promulgated by the CBSE, effective from 28.01.1988 (amended thereafter from time to

time). To the extent relevant and material for the issues arising herein, these bye-laws do not contain any provisions that are inconsistent with the provisions of G.O.Ms.No.91. The CBSE bye-laws enumerate the norms for affiliation (Chp.II) including as to provisional, regular and permanent affiliation, infrastructure, quality of education; provisions prescribing composition of the society or trust running the school, the school management committee; norms regarding financial resources, physical facilities, library, staff and service conditions, fee, provisions relating to admission of students, reserve fund and with respect to transfer or sale of a school. The provisions relating to fees in this Chapter specifically enjoin that no capitation fee or voluntary donation for gaining admission in the school or for any other purpose should be charged/collected in the name of the school and that in case of such malpractice the Board may take drastic action leading to disaffiliation of the school (Para 11.1, Chp. II). Para-8 of Chapter II *inter alia* enjoins that a school should have adequate facilities for providing recreation activities and physical education as well as for conduct of various activities and programmes for developmental education and for the schooling, cultural and moral development of the students and for safeguarding the assets and that a school should have adequate ground to create out door facilities for 200 Mts track, adequate land for Kabaddi, Kho-kho and facilities for playing Volleyball. Para-20 in Chapter VI of these bye-laws sets out the composition of the Management Committee, its constitution, powers and functions. It is *inter alia* provided herein that every Managing Committee shall include two parents of students in

the school; two other persons (one a woman) who are or have been teachers in any other school or college to be nominated by the Trust/Society/Board and that not more than two members may be nominated as per the conditions, if any, laid down in the NOC. Para-3 of Chp-II specifies that a school seeking provisional affiliation must have formal prior recognition of the State and that its application must either be forwarded by the State or there should be NOC to the effect that the State has no objection to the affiliation of the school with the CBSE. Para 21 in Chapter-VI, dealing with the powers and functions of the School Managing Committee *inter alia* provides that the Committee shall have the power to propose to the Society rates of tuition and other annual charges and the power to renew the budget of the school presented by the Principal, for forwarding the same to the Society for approval.

While this court has been sensitized to the provisions of the CBSE bye-laws to illustrate the contention of the petitioners falling within issue (A), no norms or regulations of the ICSE or of any other non-State Board or body to which any of the petitioners schools are affiliated have been produced for our perusal.

The bye-laws of the CBSE neither expressly nor by any compelling inference exclude the exercise of regulatory power by the State in the matter of regulating the fee structure or the other complementary provisions, contained in G.O.Ms.No.91. The provisions of G.O.Ms.No.91 are not facially or in substance inconsistent with the obligations of a school to conform to the CBSE regulations or bye-laws.

Issue (A) is answered as above.

Issue (B): The several aspects of issue (B) may conveniently be analysed together. The contours of operational autonomy of private unaided schools and the concomitant limits on State regulatory power, vis-à-vis such autonomy, need to be identified. This exercise involves consideration of decisions of the Supreme Court and other decisions which illumine this aspect of the matter.

The precedential architecture pertaining to autonomy of private unaided educational institutions/schools:

(i) *Unni Krishnan J.P. and Ors. Vs State of A.P. and Others* (^[1]):

The provisions of the Capitation Fees Act, the Karnataka Educational Institutions (Prohibition of Capitation Fees) Act 1984, the Maharashtra Educational Institutions (Prohibition of Capitation Fees) Act 1987, the Tamil Nadu Educational Institutions (prohibition of Collection of Capitation Fees) Act 1992 and the provisions of the 1982 Act fell for consideration. Among the issues considered by the Supreme Court was whether a citizen has a fundamental right to establish an educational institution under Art. 19(1)(g) or any other provision in the Constitution and whether the grant of permission for establishment and the grant of affiliation (by the University), imposes an obligation upon an educational institution to act fairly in the matter of admission of students. The several issues were identified and considered in the context of higher and professional education but some of the observations

^[1] 1993(1) SCC 645

in the judgment have a generic trajectory, applicable to all formats, varieties and hierarchies of educational institutions.

The Supreme Court ruled that since the bodies which grant recognition or affiliation to an educational institution are authorities of the State it is obligatory on such public authority to insist upon such conditions as are appropriate to ensure education of requisite standards as also fairness and equal treatment in the matter of admission of students; that this is a duty enjoined by Article 14; and that the State cannot allow itself or its power and privilege to be used unfairly. The court also observed that private educational institutions merely supplement the efforts of the State in the education of the people; this is not an independent activity but is supplementary to the principal activity carried on by the State; and therefore the State may regulate the fee that may be charged including by unaided private educational institutions and may also prohibit institutions from collecting anything other than the permitted fee, which would be capitation fees.

The Supreme Court evolved a scheme comprising a raft of guidelines to be followed by the appropriate Government and affiliating authority in addition to such other conditions and stipulations as they might consider appropriate, as conditions for grant of permission, recognition or affiliation. The court made it clear that the scheme evolved by it is confined for the present only to professional colleges.

On whether the right to establish an educational institution is comprehended within the rights guaranteed under Art. 19(1)(g), Jeevan

Reddy, J (in the opinion recorded for self and Pandian, J) held that such activity falls outside the contours of trade, business or profession. On whether it is comprehended within the ambit of occupation, the learned Judge declined to express any opinion but observed that establishing an educational institution may constitute occupation (-perhaps it is - para 197 of SCC report). Mohan, J concluded that there is no fundamental right under Art. 19(1)(g) - to establish an educational institution, if recognition or affiliation is sought for such institution (Para 72). Sharma CJ (for self and Bharucha, J) observed that "*For the purposes of these cases, it is enough to state that there is no fundamental right to education for a professional degree, that flows from Article 21.*" (Para 5).

(ii) *T.M.A PAI Foundation and Others vs State of Karnataka* ^[2]:

This is a judgment of a Larger Bench (11 Judges). Earlier on 03.04.2002 nine questions were framed for consideration (reported in (2002) 8 SCC 713). On 10.04.2002, in modification of the earlier order dated 03.04.2002, the questions were reframed as ten questions (reported in (2002) 8 SCC 712). In the analysis the court clarified the issues under five heads.

To the extent relevant and material for the purposes of the present case the issues considered in this judgment are: (A) whether the minorities' right to establish and administer educational institutions of their choice includes the procedure and method of admission and selection of students; (B) whether the statutory provisions which regulate the facet of administration like control over

^[2] (2002) 8 SCC 481

educational agencies, control over governing bodies, conditions of affiliation including recognition/withdrawal thereof, and appointment of staff, teachers and Principals including their service conditions and regulation of fee etc., would interfere with the right of administration of minorities; (C) whether the decision in *Unni Krishnan* (1 supra) [except to the extent it holds that primary education to be a fundamental right] and the schemes framed thereunder require reconsideration/ modification; and (D) whether non-minorities have the right to establish and administer educational institutions under Articles 19 and 29(1) read with Articles 14 and 15(1) of the Constitution, in the same manner and to the same extent as minority institutions.

Five separate judgments were recorded - Kirpal CJ recorded the leading opinion (for self, Pattanaik, Rajendra Babu, Balakrishnan, Venkatarama Reddi and Pasayat, JJ); Khare, J recorded a separate opinion agreeing with the learned Chief Justice; Quadri and Ruma Pal, JJ recorded separate opinions partly dissenting with the judgment of the Chief Justice (on aspects not germane to the present *lis*) but concurring on aspects relevant to the case on hand; Variava, J (for self and Ashok Bhan, J) recorded a separate opinion agreeing with the judgment of Chief Justice Kirpal on aspects relevant to the present case and with the conclusions in the judgment of Khare, J that Art. 29(2) applies to Art. 30, but dissenting partly on the final reasoning in the lead judgment, holding that there must be a balance between Articles 29(2) and 30(1).

We proceed on the premise that the majority opinion by Kirpal CJ expounds the binding ratio on aspects relevant to resolution of the issues presented in this case. The binding ratio of *TMA Pai Foundation*:

(A) The decision in *Unni Krishnan* in so far as it framed a scheme relating to grant of admission and fixing of fee and consequent direction given to the UGC, the AICTE, the MCI and the Central and State Governments etc., is incorrect and is overruled.

(B) The establishment and running of an educational institution and the concomitant activity results in imparting of knowledge to students and must necessarily be regarded as an occupation, even if there is no element of profit generation. The right to establish and maintain educational institutions is also comprehended within Art. 26(a) which grants in positive terms the right to every religious denomination or any section thereof to establish and maintain institutions for religious and charitable purposes, subject to public order, morality and health. Education is a recognized head of charity. Members belonging to any religious denomination, including majority religious communities would be entitled to set up education institutions. 'Private educational institutions' as used in the judgment would therefore include educational institutions set up by secular persons or bodies and those set up by religious denominations; 'private', is used in contra-distinction to Government institutions.

(C) The right to establish an educational institution can be regulated; but the regulatory measures must in general be to ensure the maintenance of

proper academic standards, atmosphere and infrastructure (including qualified staff) and the prevention of mal-administration by those in charge of management. The fixing of a rigid fee structure, dictating the forms and composition of a governing body, compulsory nomination of teachers and staff for appointment or nominating students for admission, would be unacceptable restrictions. The essence of a private educational institution is the autonomy that the institution must have in respect its own management and administration. There necessarily has to be a difference in the administration of private unaided institutions and Government aided institutions. In the case of private unaided institutions maximum autonomy in the day-to-day administration has to be with the concerned institution. Bureaucratic or Governmental interference in the administration of such institutions will undermine independence. While an educational institution is not a business; in order to examine the degree of independence that can be given to a recognized educational institution, like in a private entity that does not seek aid or assistance from the Government and exists by virtue of funds generated by it, including its loans or borrowings, it is important that the essential ingredients of the management of private institution include the recruiting of students and staff, and the quantum of fee to be charged must necessarily be left to the private educational institution that does not seek or is not dependent upon any funds from the Government. However, in as much as the occupation of education is, in a sense regarded as charitable, the Government can provide regulation 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 definitionally charitable, an educational institution cannot charge such fees as is not required for the purpose of fulfilling that object. Therefore in the establishment of an educational institution or in its functioning, the object should not be to make profit. However reasonable revenue surplus may be generated by the educational institution for the purpose of development of education and expansion of the institution.

(D) Conditions that are laid down for granting of recognition should not be such as may lead to Governmental control of the administration of educational institution.

(E) All citizens have a right to establish and administer educational institutions under Articles 19(1)(g) and 26 of the Constitution, but this right is subject to the provisions of Articles 19(6) and 26(a). 'Education' in the relevant Articles of the Constitution means and includes education at all levels, from the primary school level up to the post graduation level, including professional education. Minority institutions however have a right to admit students belonging to the relevant minority group, in the manner discussed in the judgment.

(iii) *Islamic Academy of Education and Another vs State of Karnataka and Another* ^(3[3]):

The Constitution Bench had to consider the true trajectory of the judgment in *TMA Pai Foundation*, in the context of different interpretations of its

^{3[3]} (2003) 6 SCC 697

meaning, attributed by different stake holders - the Union of India, various State Governments, Educational institutions and State instrumentalities like the UGC, the AICTE, the MCI etc. Khare CJ (for self, Variava, Balakrishnan and Pasayat, jj) delivered the leading opinion. Sinha, J concurred with this opinion but for separate reasons on issues relevant to the present case, but dissented on aspects not relevant to the present *lis*. Among the issues considered (relevant for the present case) is: whether educational institutions are entitled to fix their own fee structure. The majority opinion declared:

(A) No rigid fee structure can be fixed by the Government. Each institution must have freedom to fix its own fee structure taking into consideration the need to generate funds to run the institution and to provide facilities necessary for the benefit of the students. They must also be able to generate surplus which must be for the betterment and growth of that institution. The decision on the fee to be charged must necessarily be left to the private educational institutions that do not seek and are not dependent upon any funds from the Government. Each institute could have its own fee structure. The fee structure for each institute must be fixed keeping in mind the infrastructure and facilities available, the investments made, salaries paid to the teachers and staff, future plans of expansion and/or betterment of the institution etc.

(B) There can be no profiteering and capitation fee cannot be charged since education is essentially charitable in nature. The surplus/profit that can be generated must be only for the benefit/use of that educational institution.

Profit/surplus cannot be diverted for any other use or purpose nor can be used for personal gain or for any other business or enterprise.

(C) In order to give effect to the judgment in *TMA Pai Foundation* the respective State Governments/concerned authorities shall set up in each State a committee headed by a retired Judge of the High Court who shall be nominated by the Chief Justice of that State. The other member who shall be nominated by the Judge should be a Chartered Accountant of repute. A representative of the MCI or AICTE depending on the type of institution, shall also be a member. The Secretary of the State Government in-charge of Medical or Technical Education, as the case may be, shall be the Member Secretary of the Committee and the committee should be free to nominate/co-opt any other independent person of repute. The total number of members of the committee shall not exceed five. Each educational institute must place before this committee well in advance of the academic year, its proposed fee structure along with all relevant documents and books of accounts, for scrutiny. The committee shall then decide whether the fee proposed by the institution is justified and does not constitute profiteering or charging of capitation fee. The committee will be at liberty to approve the fee structure or propose some other fee structure which can be charged by the institution. The fee fixed by the committee shall be binding for a period of three years at the end of which period the institution would be at liberty to apply for revision. Once the fee is fixed by the committee institutions cannot directly or indirectly charge any other amount over the amount fixed. Other amounts

charged under any other head or guise such as donation would amount to charging of capitation fees. The Government/appropriate authority must frame appropriate regulation, if not already framed, to penalize including by withdrawal of recognition or affiliation, an institution charging capitation fee or indulging in profiteering.

(D) While an institution can charge the prescribed fee for one semester/year, if the institution feels that any particular student may leave midstream, it may require such student to give a bond or bank guarantee ensuring payment of balance fees.

(iv) *Modern School vs Union of India and Others* (^{4[4]}):

A federation of parents' Associations moved the Delhi High Court challenging abnormal fee hike in various schools in Delhi, by way of a public interest litigation. Some recognized and unaided public schools were impleaded thereto. The complaint was about large scale commercialization of education and the failure of the Government (of the National Capital Territory of Delhi) in performing its statutory functions under the Delhi School Education Act 1973 ('the Delhi Act'). One of the complaints was that the unaided recognized schools were transferring funds of schools to the parent society/trust and/or other schools run by the same society/trust. There was also a complaint about huge amounts being collected under the caption 'building fund' which remain unutilized and were being transferred.

^{4[4]} (2004) 5 SCC 583

The High Court appointed a committee chaired by Justice Santosh Duggal (the Duggal Committee). The committee submitted its report. This was accepted by the Government and the Director of Education (DOE) issued certain directions to management committees of all recognized unaided schools. The Modern School and other effected schools appealed against the order of the Delhi High Court constituting the Duggal Committee. During the pendency of the appeal, submission of the Duggal Committee report and issuance of directions by the DOE occurred. All these issues were considered in the judgment. Relevant to the present case, the court held:

A) The governing principles and the contours of academic and managerial autonomy of private unaided educational institutions including as regards the fee structure as spelt out in *TMA Pai Foundation* and *Islamic Academy of Education* (2 and 3 supra), are reiterated.

B) The DOE directed (i) development fee, not exceeding 10% of the total annual tuition fee may be charged for supplementing resources for purchase, upgradation and replacement of furniture, fixtures and equipment; (ii) if required to be charged, development fee shall be treated as capital receipt and shall be collected only if the school is maintaining a depreciation reserve fund equivalent to the depreciation charge in the Revenue Account and the collection under this head along with the income generated from the investments made out of this fund, will be kept in a separately maintained development fund account; (iii) the fee/fund collected from the parents/students shall be utilized strictly in accordance with the Rules 176 and

177 of the Delhi School Education Rules 1973; and (iv) no amount shall be transferred from the recognized unaided school fund to the society, the trust or any other institution. The schools challenged these directives as inconsistent with the powers under the Delhi Education Act 1973 and the Rules thereunder. The court rejected the challenge and held that the directives of the DOE were consistent with the provisions of the relevant Rules.

C) (i) In view of the report of the Duggal Committee and the directives of the DOE, every recognized school covered by the Delhi Act is directed to maintain accounts on the principles of accounting applicable to non-business organizations/not-for-profit organizations; and every school should prepare their financial statement comprising balance sheet, profit and loss account and receipts and payments account and shall file a statement of fee every year before the academic session, indicating the estimated amount derived from fees, estimated current operational expenses towards salary and allowances payable to the employees, duly indicating provisions for donation, gratuity, reserve fund and other items under Rule 177(2) of the Delhi Rules and savings if any, in terms of the proviso to Rule 177(1); (ii) No school shall increase the rates of tuition fees without prior sanction of the Directorate of Education and shall follow the provisions of the Delhi Act and the Rules thereunder.

(v) *Action Committee, Unaided Private Schools & Ors vs Director of Education, Delhi & Ors* (^{5[5]}):

This was a judgment consequent on an application for review of the judgment dated 27.04.2004 in *Modern School* (4 supra). The principal

^{5[5]} (2009) 10 SCC 1

contention in the review application was as regards the judgment in *Modern School* holding Clause (8) of the directives by the DOE to be in consonance with Rule 177 of the Delhi Rules. The review petitioners contended that the stipulation of the DOE that *no amount whatsoever shall be transferred from the recognized unaided school fund of the school to the society or the trust or any other institution* causes considerable difficulties for school managements and is unduly restrictive of the operational autonomy of educational institutions.

Accepting the suggestion on behalf of the review petitioners, the Supreme Court clarified that transfer of amounts from the fund of a recognized unaided school to a school under the management of the same society or trust, is permissible. The other aspects on which review was sought were rejected.

(vi) *P.A. Inamdar & Ors vs State of Maharashtra & Ors* ^(6[6]):

As, despite the judgment in *Islamic Academy of Education* (3 supra), the efforts to clarify the ratio in *TMA Pai Foundation* (2 supra) did not fully resolve or settle several issues, another Constitution Bench (7 Judges) set out to clarify the meaning and content of the ratio in *TMA Pai Foundation*.

In the present case we are concerned only with the issue whether the regulation of the fee structure could be taken over by the committees ordered to be constituted by the judgment in *Islamic Academy of Education*.

P.A. Inamdar held: every institution is free to devise its own fee structure which may however be regulated to prevent profiteering, no capitation fee may be charged; a committee for determining fee structure *qua* the judgment in *Islamic Academy of Education* is permissible as a regulatory measure aimed at

^{6[6]} (2005) 6 SCC 537

protecting the interests of the students community as a whole and in maintaining the required standards of professional education on non-exploitative terms in the institution. The suggestion on behalf of the institution that the purpose of the committees (for regulating fee structure) could be equally achieved by postulating post-audit or checks after the institutions have formulated their own fee structure, was rejected observing that unless the fixation of fee is regulated and controlled at the threshold stage the unfair practice of granting admissions guided by the paying capacity of the candidate cannot be curbed; further held that the committees constituted cannot be equated with the committees suggested in the scheme framed in *Unni Krishnan* (1 supra).

Dealing with the severe criticism by the petitioners as regards functioning of the some of the committees constituted, the court observed:

" 149. Certain decisions of some of the Committees were subjected to serious criticism by pointing out that the fee structure approved by them was abysmally low which has rendered the functioning of the institutions almost impossible or made the institutions run into losses. In some of the institutions, the teachers have left their jobs and migrated to other institutions as it was not possible for the management to retain talented and highly qualified teachers against the salary permitted by the Committees. Retired High Court Judges heading the Committees are assisted by experts in accounts and management. They also have the benefit of hearing the contending parties. We expect the Committees, so long as they remain functional, to be more sensitive and to act rationally and reasonably with due regard for realities. They should refrain from generalizing fee structures and, where needed, should go into accounts, schemes, plans and budgets of an individual institution for the purpose of finding out what would be an ideal and reasonable fee structure for that institution.

150. *We make it clear that in case of any individual institution, if any of the Committees is found to have exceeded its powers by unduly interfering in the administrative and financial matters of the unaided private professional institutions, the decision of the Committee being quasi-judicial in nature, would always be subject to judicial review.*"

(vii) *Tamil Nadu Nursery, Matriculation and Higher Secondary Schools Association (Regd) vs State of Tamil Nadu and Others* [Judgment dated 09.04.2010 - Division Bench of Madras High Court]:

Unaided private school managements and others challenged the provisions of the Tamil Nadu School (Regulation of Collection of Fee) Act 2009 and the Tamil Nadu School (Regulation of Collection of Fee) Rules 2009. Section 3(2) of the Act prohibits collection of any fee (by a private school in excess of the fee determined by the committee) for admission to any standard or course of study in a private school, in excess of the fee determined by the committee under the Act, either by a person who is incharge of or responsible for the management of such private school or by any other person either for himself or on behalf of the school or on behalf of the management of such private school. Sec. 3(3) enjoins that the fee collected by any school affiliated to CBSE shall be commensurate with the facilities provided. Sec.5 enjoins the Government to constitute a committee for determination of fee for admission to any standard or course of study in private schools and sub-sec.(2) thereof enumerates the composition of the committee. The other provisions of Sec.5 set out various ancillary and incidental provisions with regard to terms of office of the Chair-person of the committee. Sec.6 spells out the factors relevant for determination of fee as: (i) location of the private school; (ii) the

available infrastructure; (iii) the expenditure on administration and maintenance; (iv) the reasonable surplus required for the growth and development; and (v) other factors as may be prescribed. Other provisions of Sec.6 set out the procedure and methodology for the committee to determine the fee leviable, the process of hearing and considering of objections, the binding nature of the fee determined for a period of three academic years and the liberty to the private schools thereafter to apply for revision of fee, and the obligation of the committee to indicate the different heads under which the fee shall be levied. Sec.7 sets out the powers and functions of the committee. Sec.8 empowers the Government to regulate the maintenance of accounts by private schools Sec.9 enumerates penalties for contravention of the provisions of the Act Sec.11 provides for constitution of District Committee in every revenue district with power to enter a private school or its premises or any premises belonging to the management of such private school if it has a reason to believe that there is or has been a contravention of the provisions of the Act or the Rules thereunder, including the power to search and inspect any records, accounts, registers or any other document belonging to such private school or the management, so far as such record, account etc., relate to the private school. The committee is also empowered u/Sec. 11 to seize any such record, account etc.

The principal attack on the provisions of the Act was two fold: (A) that regulation of fee collected by unaided minority or non-minority schools is impermissible as an infringement of the fundamental right available under

Articles 19(1)(g) and 26 or 30, as the case may be; and (B) that the power of inspection, search and seizure conferred on the District Committee under Sec. 11 of the Act is excessively intrusive, arbitrary and violative of Art.14.

CJ Gokhale (as His Lordship then was) speaking for the Division Bench rejected the challenge to the other provisions of the Act dealing with determination and regulation of the fee structure. The court held that the impugned Act does not fix a rigid fee but only requires the management to forward their fee structure with details as to how they arrived at such fee structure. The idea is to verify whether under the guise of collection of fee there is an indirect collection of capitation fee or profiteering. The Act uses the term 'approval of the fee structure' and only in cases where the committee is of the view that the fee structure proposed is exorbitant or in the nature of capitation fee or for profiteering, it would intervene in the matter and for fixing the appropriate fee structure. The Act safeguards the liberty of a private institution to specify the fee structure, taking into account the expenditure necessary for running the institution as well as to meet future needs. All the provisions of the Act relating to determination and approval of fee structure, the court held, in no way impinge upon the operational, academic or managerial autonomy of private unaided schools within the contours of autonomy spelt out in the judgments of the Supreme Court in *TMA Pai Foundation, Islamic Academy of Education; Modern Schools and PA Inamdar* (2,3,4, & 6 supra), ruled the court.

The court however struck down the provisions of Sec.11 of the Act as arbitrary and irrational. The court held that conferment of wide powers of entry, search and seizure, is excessively intrusive of the autonomy of private educational institutions; the powers unguided and capable of arbitrary exercise; in the context of availability of adequate powers under the Act to cancel recognition or approval in respect of a delinquent institution including the power to prosecute u/Sec. 9 of the Act, the power conferred u/Sec. 11 for entry, search and seizure is arbitrary and irrational. Consequently Rules 4 (4) and (5) dealing with the grant of authority to various officers and the District Committee members to access the books, registers, accounts, documents, cash, securities and other property belonging to or in the custody of a private school, were struck down. The court noticed that the composition of committee as specified in Sec. 5 includes a retired Judge of the High Court as the Chair-Person and elsewhere noted in the judgment the contention of the learned Advocate General that this Act would be amended to ensure that a retired High Court Judge shall be nominated by the Chief Justice and not by the Government.

The distillate of the rationes in the binding precedents in this area - *TMA Pai Foundation, Islamic Academy of Education; Modern School and PA Inamdar* (2,3,4, & 6 supra), relevant for the purposes of this writ petition postulates:

A) The right to establish and administer an educational institution is comprehended within the term 'occupation' guaranteed under Art. 19(1)(g) (for all individuals) and for all religious denominations - majority and minority,

u/art. 26(a) of the Constitution. An additional protection is available to unaided minority educational institutions under Art. 30;

B) The right comprehends operational, academic and managerial autonomy subject only to the State's power to regulate affairs of a private unaided educational institution in matters of standards of education, health, hygiene, discipline and other such over-arching public interests concerned including the power to regulate to ensure that an educational institution does not indulge in profiteering or collection of capitation fee. The State may however regulate within the permitted contours without unduly intruding or transgressing the operational, academic and managerial autonomy;

C) The guaranteed right includes autonomy in the management and governance of the institutions, academic freedom subject to standards of education as regulated by the appropriate Government or any affiliating or recognizing body/authority, the right to admit students and to operationalise a fair, transparent and non-exploitative protocol for admission of students (this is also not an absolute but regulated right as expounded in several decisions, with many nuances - not relevant for the purposes of this *lis*); the right to exercise disciplinary control over the staff and faculty, though by following a fair and transparent process for determining misconduct, and a right and the concomitant substantive autonomy to determine an institution's specific fee structure to meet the several operational expenses like salary and allowances payable to employees, rent for premises, property tax, provisions for gratuity, pension, disability allowance or other such expenditure whether revenue or

capital and also a reasonable revenue surplus for future infrastructural, establishment or expansion needs including a reasonable reserve fund; subject to the power of the State to regulate the fee structure of each institution so as to ensure that there is no profiteering or collection of capitation fee in any form;

D) In the matter of fee regulation the State must maintain that delicate balance; between permissible regulation to verify and prevent profiteering and collection of capitation fee by the management of a private unaided educational institution in whatsoever form, garb, guise or camouflage on the one hand and avoidance of undue intrusion into the operational, managerial and academic autonomy of the institution, on the other. This balance is the nucleus and essence of the guaranteed right.

Are schools regulated by non-State Boards governed by the Capitation Fees Act?

Among the contentions by the petitioners (considered as a component of Issue-B) is that the provisions of the Capitation Fees Act do not apply to educational institutions governed by norms and regulations of non-State Boards. The petitioners represent the interests of schools which affiliated either to the CBSE or the ICSE which are not State Boards.

This is a contention that is stated to be rejected. As noticed briefly earlier in the judgment, this Act was formulated, *inter alia*, to curb the evil of commercialization of education and profiteering from it. The statement of objects and reasons accompanying the Bill that came to be enacted (as Act 5/83) reveals that the provisions of the 1982 Act were found inadequate to

effectively control the evil practice of profiteering in this area. In order to eradicate the pernicious practice of collection of capitation fee, to nurture and maintain excellence in the standards of education, the State stepped in to enact provisions to prohibit collection of capitation fee in educational institutions; to make any such collection punishable and to regulate the fee collected by educational institutions. Sec. 2(b) defines 'capitation fee' as meaning any amount collected in excess of the fee prescribed u/Sec.7. Sec. 2(c) defines an 'educational institution' to mean a college or a school imparting education up to and inclusive of 10th Class or other institution by whatever name called, whether maintained by the Government, private bodies, local authority or University and carrying on the activity of imparting education therein, whether technical or otherwise, including a Polytechnic, Industrial Training Institute and a Teachers' Training Institute, but excluding a tutorial institution. Sec. 3 which sets out provisions for regulation of admission into educational institutions does not enact an exception, even in respect of institutions governed by the provisions of federal legislations such as the AICTE, the MCI, the Dental Council or other such bodies. The regulation of admissions under the provisions of Sec.3 is intended to maintain the standards of education and in respect of all educational institutions as a part of the legislative trajectory of the Act viz., curbing of profiteering. Sections 3A and 4 set out special provisions in respect of unaided private and minority educational institutions, respectively. Sec.5 enacts a prohibition on the collection of any capitation fee by any educational institution and Sec.6 enjoins

that any donation of money to any educational institution shall be made only in such manner as may be prescribed and not otherwise and provides further that all monies received by way of voluntary donation shall be deposited in the account of the institution in any scheduled bank and shall be applied and expended for the improvement and development of the institution and educational facilities and for such other related purposes as may be prescribed. Sec.7 (this provisions has been extracted supra) contains provisions for regulation of fee. Sec.8A enumerates educational institutions to which the provisions of the Act do not apply.

Private unaided educational institutions (the petitioners herein) are not tutorials and are not among the specified institutions (u/Sec.8A) to which the provisions of the Act do not apply. The Act thus applies *proprio vigore* to private unaided educational institutions including schools. No contention regarding legislative competence of the State qua this aspect of the legislation has been urged as part of this submission. This contention therefore does not merit acceptance.

Whether G.O.Ms.No.91 is not an order/Notification issued u/Sec.7:

According to the petitioners, G.O.Ms.No. 91 is not a regulation made in exercise of or in conformity with the power u/Sec. 7 of the Capitation Fees Act. It is a mere executive order by the State and is therefore in transgression of the statutory provisions. This contention in our considered view does not merit acceptance. Sec. 7(1) empowers the Government by notification to regulate the tuition fee or any other fee that may be levied or collected by any

educational institution in respect of each class of students. 'Notification' is defined in Sec.2(f) to mean a notification published in the gazette. G.O.Ms.No. 91 has been published in the Andhra Pradesh Gazette Part-I dated 10.09.2009. The G.O. sets out several provisions for regulation of fees in private unaided schools in the State. The G.O. expressly purports to have been issued in exercise of the powers conferred u/Sec.7 of the Capitation Fees Act. It is therefore not, on text or context an order issued in exercise of executive power of the State u/Art. 162 of the Constitution. It is a statutory notification issued in exercise of the powers conferred on the Government u/Sec.7. This contention is accordingly rejected.

The other facets of challenge to the provisions of G.O.Ms.No. 91 (considered under Issue-B), are considered seriatim as framed in Issue-B.

Are Paras-3 and 4 of G.O.Ms.No.91 contrary to Sec.7 of the Capitation Fees Act?

Para-3 of G.O.Ms.No. 91 is challenged as constituting abdication and impermissible delegation by the State of its power to regulate fee, enjoined by Sec.7. Para-4 of the G.O. provides for constitution of DFRC authorized to approve a fee structure for private unaided schools in respective districts. Para-3 empowers the DFRC to approve the fee for each private unaided school within its jurisdiction; enjoins that if a school collects fees in excess of such approved fees, that shall be treated as a capitation fees and the management liable for action under the provisions of the Capitation Fees Act; and further that the recognition granted to the school and the NOC issued shall be withdrawn after due notice. The submission in specie is that u/Sec. 7 the

Government is authorized to notify the regulation of tuition fee including any other fee that may be levied and collected by an educational institution. Since the Act specifically authorizes only the Government, it is the Government and not any other body that may exercise this power. G.O.Ms.No. 91 is issued pursuant to a report (Annexure) dated 03.07.2009 submitted by a committee constituted pursuant to orders in G.O.Rt.No. 376 dated 18.06.2009 (the Navin Mittal Committee). The State Government by G.O.Rt.No. 376 constituted a committee headed by Sri Navin Mittal, IAS, calling for a report together with recommendations for regulation of fee structure with provisions for penal consequences for violation. This order was issued by the Government pursuant to a letter dated 13.05.2009 addressed to it by the Collector and District Magistrate, Hyderabad intimating a huge escalation in school fees, rampant collection of donations during the current academic year and large scale complaints in this behalf by parents. The Government also received several representations from parents complaining of collection of exorbitant fee by private schools in the State. Hence the Navin Mittal Committee was constituted to deliberate and report. The report of this committee reveals that it organized an 'open house' at Jubilee Hall, Hyderabad, after inviting stake holders such as parents, managements of institutions, students and civil society organizations for the purpose of ascertaining appropriate remedial measures (to deal with the complaint of charging of exorbitant fee and donations by the private unaided schools). The report also asserts that teams under the control of DEOs were formed to visit 'certain' institutions to verify

their income and expenditure statement. The committee also asserts to have perused the Justice Santosh Duggal Committee's report and the various judgments of the Supreme Court including *TMA Pai Foundation*, *Islamic Academy of Education* and *Modern School* (2,3,4 supra). The committee submitted recommendations which were the substantive basis for G.O.Ms.No. 91.

While dealing with this aspect, there is a contention of the petitioners that may be conveniently considered here. The petitioners challenge the constitution of the Navin Mittal Committee under G.O.Rt.No. 376. According to the petitioners the entire exercise culminating in determination/approval of fee structure must be performed by the State itself and may not be delegated to a committee. This challenge in our view is misconceived. The State has ample authority, in the amplitude of its executive power to constitute a fact finding or an expert body to identify the contours of a contemporaneous social disequilibrium and to requisition such body to identify and furnish the relevant details as also to suggest remedial measures for eventual Governmental action. The principle of the maxim *delegatus non potest delegare* has no application to the conduct of the State in constituting the Navin Mittal Committee. The maxim pertains to the extent to which a statutory authority may permit another to exercise a discretion authorized by the statute. Even delegation in its generic sense does not imply a parting with the statutory power by the authority which grants the delegation. It indicates the conferring of an authority to do things which otherwise that administrative authority would have to do itself. Where however, an authority designated by the statute

retains general control over the activities of the person or body to whom (or which) it has entrusted partly exercise of its statutory power and the control or oversight exercised by the administrative authority is of a substantial degree, there is in the eye of law no delegation and the maxim has no application - *Fowler (John) & Co, (Leeds) vs Duncun* ^(7[7]).

Thus, where a statutory authority authorizes a delegate to undertake preparatory work or even take an initial decision in the matters entrusted to it but retains in its own hands the power to approve or disapprove the decision after it has been taken, the decision will be held to have been validly made if the degree of control maintained or preserved by the authority is substantial enough to be regarded as the authority's own decision. In *Pradyat Kumar Bose vs Hon'ble Chief Justice of Calcutta High Court* ^(8[8]) the Supreme Court pointed out that it is well a recognized principle that a statutory functionary exercising such power cannot be said to have been delegated its functions merely by deputing a responsible and competent official to enquire and report; that is the ordinary mode of exercise of any administrative power; what cannot be delegated except where specifically authorized by the law is the ultimate responsibility for the exercise of such power. The Supreme Court quoted with approval the principle enunciated by the House of Lords in *Board of Education vs Rice* ^(9[9]), wherein it is held that a functionary who has to decide an administrative matter may obtain the material on which he is to act in such manner as may be feasible and convenient. The principle was reiterated by

^{7[7]} (1941) Ch 450

^{8[8]} AIR 1956 SC 285

^{9[9]} (1911) AC 179

the Lord Chancellor in *Local Government Board vs Arlidge*^{10[10]}. These principles have been revisited and reaffirmed by the Constitution Bench in *Union of India and Another vs P.K.Roy and Others* (^{11[11]}). The constitution of Navin Mittal Committee under G.O.Rt.No.376 to perform the functions authorized thereby, is not invalid for impermissible delegation or abdication of statutory obligations by the state.

The Navin Mittal Committee *inter alia* recommended (proposal-6) the constitution of a fee regulatory committee for every District and suggested its composition as well (proposal-7). Clearly the committee failed to notice the provisions of Sec.7 of the Capitation Fees Act. This fundamental error of the Navin Mittal Committee transposed itself into G.O.Ms.No. 91. Para 3(1) of G.O.Ms.No. 91 authorized the DFRC to approve the fee for each unaided school within its jurisdiction and Clause (ii) of this Para prohibits collection of any fee in excess of the fee so approved. There is nothing in the provisions of G.O.Ms.No. 91 which expressly or by compelling implication permit an inference that the DFRC is constituted only to perform a preparatory role i.e., to submit recommendations regarding fee structure for each private unaided school within its jurisdiction, subject to a later notification by the Government as enjoined by Sec.7 of the Capitation Fees Act. Clause (ii) of Para-3 clearly enjoins the prohibition of collecting fees in excess of the fee approved by the DFRC. From the provisions of para-3 it is clear that the DFRC is the final authority to approve the fee structure and such approved fee structure which is

^{10[10]} (1915) AC 120

^{11[11]} AIR 1968 SC 850

obligatory on the schools. The State Government has thus clearly abdicated its statutorily consecrated and enjoined power u/Sec.7. Sec. 7(2) prohibits an educational institution from collecting any fee in excess of the fee notified under sub-sec.(1). What is therefore prohibited to be collected as a capitation fee is a fee notified u/Sec.7 by the Government by publication in the Andhra Pradesh Gazette and not a fee approved by a body such as the DFRC.

It has been contended by the learned Additional Advocate General that the approval of a fee structure by the DFR, under the provisions of the G.O.Ms.No. 91 is only intended to be a preliminary step and that the final notification of the fee structure would have to be issued by the State Government by a notification issued u/Sec. 7(1). Such a process is clearly not contemplated by Paras 3 and 4 of G.O.Ms.No. 91. As already analysed the DFRC is constituted the final fee approving authority and clause (ii) of Para-3 reinforces this position. It is the specific plea of the 1st respondent[♦] that: *“The fees structure will be regulated by District Fee Regulation Committee for the private unaided schools in the respective districts based on the auditor statements along with proposed fees structure furnished by the governing body of the management of the school.”* That the approval of the fees structure by the DFRC is a self-sufficient action and is *per se* operational (not requiring Governmental ratification) is a conclusion that is further buttressed by the provisions of Paras 6 and 7 of G.O.Ms.No.91. Para-6 provides that the fee structure approved by the DFRC shall be valid for a period of three years

[♦] counter affidavit dated 3.10.2009 - Para 24

and Para-7 provides for an appeal against the decision of the DFRC, to the Commissioner and Director of School Education. Surely an appeal has not provided against an unfertilized executive action or a mere recommendation.

The provisions (of Paras 3 and 4) are challenged as constituting unauthorized delegation by the State of powers u/Sec.7 of the Capitation Fees Act, amounting to abdication of power. The relevant principle is, that a delegated authority cannot be redelegated. This principle tracing its origins to law of contracts imported and adopted into administrative law, is of venerated antiquity and traces its vitality to the interplay of three latin maxims:

(i) *Qui facit per alium facit per se*; (ii) *Delegata potestas non potest delegari* : or as it is otherwise expressed; (iii) *Vicarious non habet vicarium* [an agent cannot lawfully appoint another to perform the duties of his agency].

The principles underlying the maxims apply wherever the authority involves a trust or discretion in the agent for the exercise of which he is selected but does not apply where it involves no exercise of discretion. de Smith's classic work, *Judicial Review of Administrative Action* (5th Edition by de Smith, Woolf & Jowell) has summarized the several principles elicited from cases in which devolution of statutory discretion have been considered, as follows:

(i) Where an authority is vested with discretionary power affecting private rights empowers one of its committees or sub-committees, members or officers to exercise those powers independently without any supervisory

control by the authority itself, the exercise of power is likely to be held invalid -- *Allingham vs Minister of Agriculture and Fisheries*^(12[12]).

(ii) The degree of control (*a priori* or *a posteriori*) maintained by the delegating authority over the acts of the delegate or sub-delegate may be a material factor in determining the validity of the delegation. In general the control preserved (eg: by a power to refuse to ratify an act or to reject a recommendation) must be close enough for the decision to be identifiable as that of the delegating authority -- *Hall vs Manchester Corporation* ^(13[13]); *Cohen vs West Hampshire Corporation* ^(14[14]); *R vs Board of Assessment, etc* ^(15[15]); *Provident Mutual Life Assurance Association vs Derby City Council* ^(16[16]).

(iii) How far, if at all, delegation of discretionary power is impliedly authorized depends on the amplitude of the power, the impact of its exercise upon individual interests and the importance to be attached to the efficient transaction of public business by informal delegation of responsibility -- *Ex p. Forster re University of Sidney* ^(17[17]); *R vs Monopolies and Mergers Commission, Ex p. Argyll Group plc* ^(18[18]); *R vs Secretary of State for Education and Science, Ex p. Birmingham C.C.* ^(19[19]).

(iv) It improper for an authority to delegate wide discretionary power to another authority over which it is incapable of exercising direct control, unless

^{12[12]} (1948) 1 All.E.R. 780

^{13[13]} (1915) 84 L.J.Ch. 734

^{14[14]} (1933) Ch. 814

^{15[15]} (1965) 49 DLR (2d) 156

^{16[16]} (1981) 1 WLR 173 (HL)

^{17[17]} (1963) SR (NSW) 723

^{18[18]} (1986) 1 WLR 763 (C.A)

^{19[19]} (1984) 83 LGR 79

it is expressly empowered so to delegate -- *Kyle vs Barbor*^(20[20]); *Jackson, Stansfield & Sons vs Butterworth* (^{21[21]}); *Lavender (H) & Son Ltd, vs Minister of Housing and Local Government* (^{22[22]}).

(v) Where the exercise of the discretionary power is entrusted to a named officer another officer cannot exercise his powers in his stead unless express statutory provision has been made for the appointment of a deputy or unless in the circumstances the administrative convenience of allowing a deputy or other subordinate to act as an authorized agent very clearly outweighs the desirability of maintaining the principle that the officer designated by Statute should act personally -- *Nelms vs Roe* (^{23[23]}); *Mason vs Pearce* (^{24[24]}); *R vs Majewski* (^{25[25]}).

(vi) The maxim *Delegate potestas non potest delegari* is applied more strictly to the further sub-delegation of sub-delegation powers than to the sub-delegation of primary delegated powers -- *Cook vs Ward* (^{26[26]}).

(vii) It may be generally presumed that express authority to sub-delegate powers is to be construed as impliedly excluding the authority to sub-delegate the performance of duties involving the exercise of deliberate judgment, unless the performance of the duty is inextricably interwoven with the exercise of the

^{20[20]} (1888) 58 L.T. 229

^{21[21]} (1948) 2 All.E.R. 558

^{22[22]} (1970) 1 WLR 123

^{23[23]} (1970) 1 W.L.R. 4

^{24[24]} The Times, October 7 1981

^{25[25]} (1977) AC 443

^{26[26]} (1877) 2 C.P.D. 255

power -- *Mungoni vs Att. Gen. of Northern Rhodesia* (^{27[27]}); *R vs DPP, Ex p. Association of First Division Civil Servants* (^{28[28]}); and

(viii) Even where the power to sub-delegate prescribed functions has been conferred by statute, the delegation must be conveyed in an authorized form to the designated authority and must sufficiently identify what are the functions thus delegated instead of leaving the sub-delegate to decide the ambit of his own authority - *Pamplin vs Gorman* (^{29[29]}); *Record Tower Cranes Ltd. vs Gisbey* (^{30[30]}); *R vs Secretary of State for the Environment, Ex p. Hillingdon L.B.C.* (^{31[31]}); *Ratnagopal vs Att. Gen* (^{32[32]}); *Lever Finance Ltd vs Westminster L.B.C.* (^{33[33]}).

The normative position is broadly similar in India. In *Barium Chemicals and Another vs Company Law Board and Others* (^{34[34]}), the Secretary of the Company Law Board ('the Board') issued an order on behalf of the Board (made u/Sec. 237(b) of the Companies Act, 1956) appointing four persons as inspectors for inspecting into the affairs of the Company, since its incorporation in 1961 and to report to the Board *inter alia* "all the irregularities and contraventions in respect of provisions of the Companies Act, 1956 or of any other law for the time being in force and the person/persons responsible for such irregularities and contraventions." The order was passed by the Chairman of the Board on behalf of the Board by virtue of the power

^{27[27]} (1960) AC 336

^{28[28]} The Times, May 24 1988

^{29[29]} (1980) RTR 54

^{30[30]} (1969) 1 WLR 148

^{31[31]} (1986) 1 WLR 192

^{32[32]} (1970) AC 972

^{33[33]} (1971) 1 Q.B. 222

^{34[34]} AIR 1967 SC 295

conferred on him under certain rules. After an unsuccessful challenge before the Punjab High Court, the Company preferred an appeal by special leave to the Supreme Court. The order of the Board was challenged *inter alia* on the ground that it was invalid because it was made by the Chairman of the Board and not the Board. The Supreme Court dismissed the appeal. The Court considered the fact that by a notification the Central Government had delegated amongst others the powers and functions conferred upon it (as authorized by the statute), to the Company Law Board. By another notification the Central Government made and published Rules in exercise of its powers u/Sec. 642(1) r/w Sec.10-E(5) under which the Chairman of the Board was authorized to distribute the powers and functions of the Board. The Court held that the Chairman to whom the business of the Board was allocated does not become a delegate of the Board at all; he acts in the name of the Board and is no more than its agent. The Court observed that even if he is looked upon as a delegate of the Board and therefore a sub-delegate vis-à-vis the Central Government, he would be as such subject to the control of the Central Government as the Board itself since Section. 10-E(6) enjoins that the Board, shall, in the exercise of powers delegated to it, be subject to the control of the Central Government. In upholding the order of the Board passed by the Chairman the Supreme Court observed;

“ Bearing n mind that the maxim Delegate potestas non potest delegari sets out what is merely a rule of construction, sub-delegations an be sustained if permitted by an express provision or by necessary

implications. Where, as here, what is sub-delegated is an administrative power and control over its exercise is retained by the nominee of the Parliament, i.e., the Central Government, the power to make a delegation may be inferred.” (emphasis is added)

In *P.K.Roy* (11 supra) the provisional and final gradation list prepared by the State of Madhya Pradesh under the relevant provisions of States Reorganization Act, 1956 were challenged as unauthorized on the ground that there was usurpation of the powers of the Central Government under the Act, by the State. Sec.115 of the Act set out provisions relating to the methodology of integration of services of persons serving in connection with the affairs of the Union or the States concerned in the process of integration and conferred power on the Central Government to decide on the principles and modalities of integration. The Central Government was also authorized to establish Advisory Committee to assist it with regard to matters enumerated in sub-sec. (5) of Sec. 115. Sec. 117 authorised the Central Government to issue directions to any State Government for the purpose of giving effect to the preceding provisions of the Act and enjoined that the State Government shall comply with such directions. A meeting of Chief Secretaries of the concerned States was requisitioned by the Central Government whereat the principles for equation of posts and other matters concerning integration were evolved. The Central Government also constituted an Advisory Committee for assisting it in dealing with the problems arising out of allocation and integration of the services with specified functions. Thereafter under the control and

supervision of the Central Government and in accordance with the principles evolved in the conference of Chief Secretaries and under the oversight of the Advisory Committee, the provisional and final gradation lists were prepared and published by the State. In upholding the series of transactions culminating in the preparation of the provisional and final gradation lists, the Supreme Court observed: *so long as the act of ultimate integration is done with the sanction and approval of the Central Government and so long as the Central Government exercises general control over the activities of the State Government in the matter, it cannot be held that there has been any violation of the principle Delegate potestas non potest delegari.*

In *Sahni Silk Mills (P) Ltd and another vs ESI Corporation*^{35[35]}, the Regional Directors of the ESI Corporation issued notices u/Sec.85-B of the Employees State Insurance Act, 1948 to the appellants during 1979-81 proposing imposition of damages on account of delay by the appellant in making payment of contributions in accordance with the provisions of the Act. After receiving explanations from the appellants, the Regional Directors passed orders imposing damages. The challenge was based *inter alia* on the ground that the power u/sec.85-B could not have been exercised by the Regional Directors and should have been exercised either by the Corporation or its Director General. After analysis of the relevant provisions including Sections 85-B and 94-A, the Supreme Court observed that by a resolution the Corporation had not only delegated its power u/Sec. 85-B(1) to the Director

^{35[35]} (1994) 5 SCC 346

General but also left it to the Director General to authorize another officer to exercise the power under the said provision. The Court observed that Sec.94-A does not indicate that the Parliament vested power in the Corporation to delegate its power on any officer or authority subordinate to the Corporation and further vested a power in the Corporation to empower such officer or authority to authorize any other officer to exercise the power u/Sec. 85-B(1). Since the Regional Directors exercised powers u/Sec. 85-B(1) while passing the impugned orders for recovery of damages from the appellants, having been authorized to do so by the Director General of the Corporation, made on the basis of a resolution of the Corporation and since the very resolution of the Corporation was invalid on account of authorizing further delegation, the consequent orders by the Regional Directors u/Sec.85-B(1) were vitiated, ruled the Supreme Court.

From the guidance and direction provided by textual and precedential authority, it is apparent that the State has sub-delegated to the DFRC the entirety of its obligation enjoined u/Sec.7 of the Capitation Fees Act. The DFRC's recommendations on the fee structure are not required to be forwarded to the Government, for consideration and notification by the State as enjoined by Sec.7; the fee approved by the DFRC is at once operational and if any school collects fee in excess of what has been approved by the DFRC, such conduct is treated as a capitation fees and the management liable for action under the provisions of the Capitation Fees Act, and further the recognition granted to a school and the NOC issued shall be withdrawn. Since no control is preserved in

the Government with regard to approval of the fee structure, the delegation tantamounts to abdication.

On the aforesaid analysis we hold that Paras 3 and 4 of G.O.Ms.No. 91 constitute an abdication by the State Government of the powers specifically consecrated to it in the matter of regulation of fee, under the provisions of Sec.7 of the Capitation Fees Act. *Qua* the provisions of this Act, the entrustment of the power to approve the fee structure and the prohibition enjoined on a school to collect fees in excess of the fees approved by the DFRC, is violative of the provisions of Sec.7.

Paras 3 and 4 of G.O.Ms.No. 91 are therefore unsustainable and are accordingly quashed.

Is Para 5(ii) of G.O.Ms.No.91 invalid for excessive interference with operational autonomy?

Para-5(ii) enjoins the governing body of the school to be constituted in accordance with G.O.Ms.No.1 Education Department 01.01.1994 (the 1993 Rules). Earlier in this judgment we have considered the matrix of the 1993 Rules. These are statutory rules issued in exercise of powers under the 1982 Act. There is no challenge to the validity of the 1993 Rules in these writ petitions. The challenge is confined to Para-5(ii) of the notification (G.O.Ms.No.91) which enjoins that the governing body of a private unaided school shall be constituted as per the 1993 Rules.

Contextually relevant provisions of the 1993 Rules:

Rule 15 stipulates the composition of the governing body and Rule 16 enumerates its functions. Rules 17 and 18 set out the criteria and procedure for fixing salary structure for the staff and fee structure and allocation of revenue earned as fee, respectively and further mandate that these areas shall be prescribed by the governing body. Rule 15 (applicable to both aided and unaided schools) mandates that the governing body should comprise (i) the President of the educational agency; (ii) the Secretary/Correspondent/Manager of the educational agency; (iii) the Headmaster/Principal of the school; (iv) one representative of the teaching staff to be chosen among themselves; (v) President of the parents-teachers' association constituted under the provisions of G.O.Ms.No.246, Education dated 17.02.1987; and (vi) the Vice-President of the Parent-Teachers' Association. Rule 15(4) of these Rules prescribes the quorum for the governing body meeting, to be four(4).

Rule 16 enumerates the functions of the governing body as including the power to fix salary structure for the staff keeping in view the financial position of the institution and the power to determine the fee structure i.e., the fee to be collected from students for various classes, keeping in view the various expenses involved in the maintenance of the institution.

Rules 17 and 18 delineate the guidelines for fixing the salary structure for the staff, which include allocation from the total revenue collection as fees for payment of regular salaries, for provision of other benefits like the Teachers Provident Fund, Group Insurance etc.; and the criteria for fixing fee structure and percentage specific allocations of the revenue earned as fee; the

specified percentages to be earmarked under the various heads specified in Rule 18(4).

On an interactive analysis of the provisions of Rules 15 to 18 it is clear that the governing body has a deep and determinative role in the management of a school. The prescribed composition of the governing body (under Rule 15) discloses that only two of the six classes of members that comprise the governing body represent the management of (even a private and unaided) school viz., (i) the President of the Education Society and (ii) the Secretary/Correspondent/Manager of the educational agency. The other categories of members comprising the governing body are outsiders to the management i.e., the Headmaster/Principal of the school (an employee); a representative of the teaching staff; President of the Parents/Teachers' Association; and the Vice-President of the Parent-Teachers' Association.

Considered in conjunction with the provisions of Rule 15(4) (prescribing the quorum for the governing body meeting to be four), the decision making process in areas integral to the managerial autonomy of a private unaided educational institution (including formulation of policies, in particular critical aspects intrinsic to autonomy such as functions relating to fixation of staff salary and fee structure) are substantially and effectively denied to the management and vested in a governing body wherein the management is numerically in a minority.

The 1993 Rules were issued prior to the decisions in *TMA Pai Foundation*, *Islamic Academy of Education*, *Modern School* and *PA Inamdar* (2,3,4 & 6 supra).

On extant and binding precedential authority (summarized supra) private unaided schools are entitled to operational, academic and managerial autonomy including in the matter of determination of fee structure. While State regulation is permitted to ensure prescription and maintenance of standards of education, health, hygiene, discipline and oversight; and regulation to ensure non-exploitative fee prescription and collection by the private educational agency (i.e., prohibiting of profiteering or collection of capitation fee), the private unaided institution is entitled to formulate an institution-specific fee structure to meet its variegated expenditure and expenses, current and potential including a reasonable revenue surplus for future infrastructure or expansion needs.

From the binding precedential authority [which identify the right to establish an educational institution within contours of 'occupation' guaranteed under Art. 19(1)(g)] and delineate the limits of the State's right to regulate the guaranteed freedom vide Art. 19(6), the conclusion is irresistible that the regulatory power of the State does not extend to a place on the managerial table either for itself or for its chosen class or category of nominees, either generically described or specifically sponsored.

On the analysis above Para 5(ii) of G.O.Ms.No.91 (in as much as it mandates the composition of the governing body to conform to the provisions of the 1993 Rules) transgresses the managerial and operational autonomy of private unaided schools, as identified and expounded in *TMA Pai Foundation*, and reiterated in *Islamic Academy of Education*, *Modern School* and *PA Inamdar*

(2,3,4 & 6 supra). Para-5(ii) of G.O.Ms.No.91 is therefore unsustainable and is accordingly quashed.

Is Para-6 of G.O.Ms.No.91 valid?

To the extent relevant for this analysis, Para-6 provides that the fee structure approved by the DFRC shall be valid for three academic years but the management may increase the fee every year based on the increase in the CPI. Power is also conferred on the DFRC to review its decision *on reasonable ground suo motu or on representations from the parents or management of the school*.

On a true and fair construction of Para-6 it is clear that though normally the fee structure approved by the DFRC would be operative for three academic years, the management may increase the fee every year as well but proportionate to increase in the CPI.

For challenging this provision it is contended that the CPI is neither *per se* nor in all circumstances a normatively relevant or even an approximate empirical index for determination of the fee structure of a school (for an academic year in question). The petitioners elaborate that random circumstances, occasionally or often outside the CPI matrix may necessitate an increase in the salary and emoluments of teaching and non-teaching staff and other establishment and operational expenses or expenditure. In the contemporary context of substantive and accreting private participation considered in conjunction with the ever increasing demand and expectation among the consumers (students and parents) for better quality education,

lower student-teacher ratio, infrastructure and comforts, a private unaided school is required in the highly competitive environment, to pay competitive salary (to forestall frequent and recurring faculty and staff attrition); and to maintain competitive standards in other areas of infrastructure as well. Poaching of faculty among competing private educational institutions is now a recurring phenomenon and this could be avoided by a management only by providing conditions of service including salary and emoluments and other perquisites of a measure sustainable in the competitive environment. The CPI is not in all events a rational index for determination of an appropriate fee structure, when a revision is proposed by a private management, before the conclusion of the three academic years (the normal tenure for a fee structure), is the contention of the petitioners. The petitioners also contend that this provision is also beyond the legitimate regulatory ambit of the State.

The learned Additional Advocate General would contend that the reference to the CPI in para-6 of G.O.Ms.No.91 is merely illustrative and the DFRC is free to approve an application for revision of the fee structure, by reference to parameters other than the CPI if a case is made out by the management in this behalf. This contention of the State is inconsistent with the provision in question. Para-6 clearly enjoins that the increase in the fee (within the 3 year spectrum) 'shall be based' on the increase in the CPI. The DFRC is a creature of the notification and cannot liberate itself from its specific mandate.

The power conferred on DFRC in Para-6 to review its decision (on the fee structure) *suo motu* or on representation of the parents or the management of the school, is also a regulation which is assailed as irrational, for vagueness. If under the guise of exercising the power conferred in Para-6 the DFRC were to *suo motu* review the fee structure, on representation of the parents, on what parameters or indicia must the DFRC base its decision to review an approved fee structure? From the binding precedents it is apparent that formulation of the fee and determination of a fee structure is an essential and integral component of the 'occupation' autonomy of a private unaided educational institution/school. The limited power of the State to regulate in this locus is to ensure that there is no profiteering or collection of capitation fee. Legitimate regulation by the State must conform to the clear distinction between permissible over-sight and naked invasion of the guaranteed autonomy.

In the considered view of this court the regulatory contours of para-6 of G.O.Ms.No.91 clearly transgress the limits of permissible oversight and constitute an unlawful invasion of the operational autonomy of private unaided educational institutions/schools. On the precedential authority considered herein, a private unaided educational institution inheres (as a component of its operational autonomy) a discretion and liberty to provide even luxurious pay, emoluments and perquisite packages to faculty and staff; high quality academic environment or infrastructural facilities of opulent standards (subject however to an obligation to audit and account when called upon), subject only to the requirement to abstain from profiteering. Para-6 of the G.O.Ms.No.91 is

therefore unsustainable except to the extent that it prescribes that the fee structure shall normally be valid for a period of three academic years, subject to review on rational and germane grounds. The other aspects of para-6 viz., that the management may increase the fee every year but on the basis of the increase in the CPI and conferment of power in the DFRC to review its decision (on fee structure) *suo motu* or on representation from the parents are unsustainable. This conclusion is independent of our earlier determination that the very conferment of power to the DFRC (to fix/approve the fee structure), is invalid. Our conclusion as to the invalidity of the power of DFRC, devitalises the power conferred on the DFRC in Para-6 as well. This aspect of Issue-B is answered accordingly.

Whether para-8(ii) of G.O.Ms.No.91 is valid?

The petitioners urge that Para-8(ii) which enables the Navin Mittal Committee to submit detailed guidelines for guidance of the DFRC, including the format for submission of statement of management to the DFRC, is invalid. It is contended that the failure to associate the principal stake-holders (managements of private unaided schools) in the formulation of guidelines by the Committee, is irrational. This contention does not merit acceptance.

As considered earlier, the Navin Mittal Committee is an administrative body constituted by the State (in exercise of its executive power) to study and report to the State including by formulating recommendations, to meet an identified governance exigency i.e., the asserted problem of collection of excessive and extortionary fee by certain private unaided schools in the State.

Para 8(ii) enjoins the committee to submit guidelines for infusing functional clarity to the DFRC. While it would perhaps have in the fitness of things (given the established contours of autonomy of private unaided schools), to associate the managements or a representative section of them with the committee so as to ensure formulation of sustainable and rational guidelines, such is not obligation ordained by law or extent administrative law principles.

If the Navin Mittal Committee formulates guidelines and as a consequence of following the guidelines the DFRC transgresses the limits of the State's regulatory domain, the specific determination by the DFRC could be challenged by the aggrieved party. The 'wisdom' of the State in not choosing to associate the principal stake-holders i.e., the managements of private unaided schools in the deliberations of the Committee is however not *per se* actionable.

On the above analysis the challenge to the provisions of Para 8(ii) of G.O.Ms.No.91 fails and is rejected.

The several aspects of issue-B are answered as above.

Issue (C) :

Para-1(a) of G.O.Ms.No.91 enjoins that no other fee by any name whatsoever shall be charged as a one time measure except those enumerated in clauses (i) to (iii). The petitioners aver that the stipulations of an application fee not exceeding Rs.100; a registration fee not exceeding Rs.500; and a refundable non-interest bearing caution deposit not exceeding Rs.5,000 (to be submitted to the DFRC with due justification for approval), are arbitrary

stipulations since these are made applicable to all private unaided schools without calling for and verifying proposals from each school. Further according to the petitioners, the prescription of uniform amounts for the three categories above, without regard to the endemic distinctions and dissimilarities in the several relevant parameters pertaining to different schools across the State (having regard to the location, whether urban or rural; the nature of the infrastructure; quality of education; the operational expenses involved in considering and processing applications and registrations; the requirement that the caution deposit must bear a nexus to the nature and quality of the infrastructure and equipment made available, institution wise etc), violates the judgments in *TMA Pai Foundation*, *Islamic Academy of Education*, *Modern School* and *PA Inamdar* (2,3,4 & 6 supra). Since the judgments enable each school to have its own fee structure (subject to regulation by the State to prevent profiteering), the undifferentiated stipulations in Para 1(a) violate the contours of operational autonomy of private unaided educational institutions as delineated by the above judgments, urge the petitioners.

There is justification in this contention. We are however left with the impression that the challenge on this aspect is essentially conceptual; and not as much on account of the gross inadequacy or the illusory nature of the amounts stipulated. We therefore consider it appropriate, that instead of striking down the provisions of Para 1(a), it would be in the fitness of things to direct the State Government to review the stipulations in Para-1(a) after inviting proposals from managements of the several private unaided schools in

the State and take an appropriate decision thereafter, including, if found appropriate, on an independent survey by the State as to the relevant parameters for determination of application fee, registration fee and refundable non-interest bearing caution deposit, duly considering the circumstances viz, location, infrastructure of the institution, the operational costs in processing applications and registrations and other relevant circumstances. We direct accordingly.

With respect to Para 1(b) of G.O.Ms.No.91 (regulating TUTION FEES), the petitioners' grievance is focused on the provisions of Clause (iii). Para 1(b)(iii) reads: *Any activity which is not directly linked to education, if provided, shall be optional to the student and shall not be built as part of the tuition fee.* The challenge is presented on the premise that the discretion conferred on the DFRC *qua* this provision is capable of abuse or irrational exercise having regard to the vagueness of the provision. The petitioners urge that "*activity which is not directly linked to education*" is a phrase that is capable of different interpretations by different DFRCs. It is further contended that the operational and academic autonomy available to a private unaided school as a component of the guaranteed right under Art.19(1)(g) and as delineated by the decisions in *TMA Pai Foundation, Islamic Academy of Education, Modern School* and *PA Inamdar* (2,3,4 & 6 supra) include the liberty of the management of an educational institution to define for itself the contours of 'education', as the management considers appropriate for its institution. To illustrate, the petitioners contend that sports, indoor or outdoor, minimal or expansive play

grounds, extra curricular activities including provision for educational tours, refined teaching aids and equipment etc, are matters falling within the sphere of the guaranteed autonomy and within the exclusive policy choices of the management, immune to regulation by the State; and that State regulation in this area is beyond legitimate governmental interest and the concomitant regulatory power viz., prevention of profiteering and prohibition of collection of capitation fee. Unless an activity (curricular or extra curricular) proposed or provided by the management is clearly subversive of public policy, immoral or essentially injurious to the health and well being of the students, the State cannot interfere under the guise that such activity is not 'directly linked to education', is the contention.

Petitioners urge that since under G.O.Ms.No.91 it is the DFRC that exercises the power of approval of fees structure, different DFRCs might entertain different notions on what constitute activities *directly linked to education*. In view of the ambiguity and absence of conceptual clarity the DFRC would exercise unguided and whimsical discretion leading to discriminatory application of standards, across the State.

The above contention merits serious consideration. We are however not inclined to invalidate the provisions of Para 1(b)(iii) of G.O.Ms.No.91 only on the ground of vagueness. It is the settled position that unless a provision is *per se* illegal and therefore unsustainable for any reason, it cannot be struck down. The mere possibility of abuse or irrational interpretation would not render the provision itself invalid. The eventual decision of the DFRC may

however be open to question. We are also not satisfied that the provision is ambiguous to a degree that renders it *per se* irrational. There is enough guidance in the structure of the provision considered in conjunction with established contours of autonomy of private unaided educational institutions that provide the conceptual *locus* within which the DFRC is required to consider whether an activity is directly linked to education. Earlier in this judgment we have assayed a broad analysis of the conceptual contours of 'Education' and the evolutionary history of the systems of schools. This analysis would assist and provide a framework for a comprehension of what 'education' connotes in its expansive vitality.

Private unaided educational institutions have a broad measure of autonomy: to define for themselves what *activities should be pursued under the rubric of education*; the appropriate teaching methodology; curricular and extra curricular activities that they consider integral to education and a wide spectrum of discretion as to the extent and quality of infrastructure that is best suited. While even private unaided educational institutions are bound to conform to regulations of the Boards of education they are affiliated to (State or non-State) and other regulations promulgated by the State in the interests of health, hygiene, sanitation, public order or standards of education, those standards comprise the minimal standards. All educational institutions within the territory of the State are obligated to conform to legitimate regulation by the State. An institution's policy as to infrastructural facilities, curricular or extra-curricular activities, teaching methodologies, student-teacher ratio and

such other activities generically pertaining to education, beyond the minimal standards prescribed by the affiliating Board/State, cannot be regulated by the State unless an activity clearly violates health, hygiene, public order, sanitation or other norms rationally determined by the State to be deleterious to the health and interest of the students.

In a competitive and dynamic global environment parents and students clamor for higher and better standards of education, demand better opportunities for exposure of the ward to a diversity of curricular and extra-curricular education, sports, games, dance, music, painting, art or sculpture and other activities associated with education in its liberal sense. A private educational institution is legitimately entitled to cater to this demand but without regressing into profiteering or collection of capitation fees.

We must not be oblivious to the fact that provision of mid-day meal to school children is an activity which is promoted by almost all States across the Nation. A private educational institution may legitimately perform this function and by providing a better package of mid-day meals to children than State administered or assisted schools. There may be wide variations in the quality of the transportation that might be provided for commuting to the school, ranging from provision of minimal standards to higher levels of comforts. Provisions for extra coaching hours or special coaching classes including at higher levels of secondary education are also options that are desired by children and parents in recognition of the intense competition in professional educational, commencing from Class 10+ stage or even earlier.

In the context, activities pursued by private unaided educational institution, unless rationally and clearly determined to be wholly unconnected with the education, cannot be interfered with by the State (or the DFRC) on the specious assumption that such activity *is not directly linked to education*. Whether all students of a school or particular classes in a school should take up particular activities is a matter normally within the discretion of the managements of educational institutions as an integral component of academic autonomy. If an educational institution is of the view that participation in sports and outdoor activities enriches education and should be compulsory to all students, the institution must be free to pursue its academic agenda in the comprehensive premise. Of course the health and other interests of particular students or the differently abled students, to participate in some or all the sports, must be considered by educational institutions. The State may step in to regulate this area.

The fee regulating authority must be sensitive to and conscious of the broad spectrum of academic and operational autonomy that inheres in a private unaided educational institution. The regulating authority of the State must recognize the paradigm shift that the decisions in *TMA Pai Foundation*, *Islamic Academy of Education*, *Modern School* and *PA Inamdar* (2,3,4 & 6 supra) have wrought on the contours of the State's regulatory power. While regulating a private unaided educational institution the State cannot treat such institution on par with a State or State controlled or aided institution.

On the aforesaid analysis and in view thereof we are not inclined to quash Para 1(b)(iii) of G.O.Ms.No.91. We declare that the appropriate fee regulatory authority shall exercise its powers consistent with the observations herein above, while considering whether an activity *is not directly linked to education*.

User Charges:

Para 1(c) of G.O.Ms.No.91 sets out regulations pertaining to user charges. Sub-clause (i) of Clause (c) is challenged to the extent of the prescription therein that *sale of books/notebooks/stationery at school counter, if any, shall be made at discount* as being arbitrary, vague and misconceived. The petitioners contend that while it may be permissible to the State to mandate that these facilities shall be provided on a non-commercial, no-profit-no loss basis; to enjoin that they should be sold at discount, is unreasonable. It is not clear whether the provision requires the institution to vend these items at prices lower than the procurement price nor at what discount they should be sold.

The learned Additional Advocate General contends that this provision means that the benefits of bulk purchases of these commodities/items by the school should be passed on to students and not that the school should supply them at a price lower than the procurement price. With this clarification the provisions of Para 1(c)(i) do not invite interference, if construed as enjoining that the sale of books/note books/stationery at the school counter, if any, should be on a non-commercial, no-profit-no loss basis.

Para 1(c) (iv) is challenged as arbitrary and illegal. This provision reads:

(iv) Private Schools are advised not to run schools beyond stipulated time. In case extra classes are held, it should be optional for children to attend extra classes and no extra fee shall be charged for this.

The petitioners contend that extra classes may be required to be conducted for improving academic standards; to provide additional support to students requiring additional coaching to cope with the increasingly competitive academic environment; or for higher classes in secondary education as students must be prepared for the rigor of competitive examinations for entry into professional courses. In order to maximize the academic standards, managements of private unaided schools might consider it appropriate to organize and provide extra classes/coaching either to all or some of the students in all classes or in some of the classes or limited to higher classes. These decisions are intrinsically within the academic judgment of school managements and constitute the core of academic autonomy of a private unaided schools, guaranteed under Articles 19(1)(g) read with 26(a) or 30, as the case may be. The regulatory power of the State in this area is limited, only to ensure that the subjection of students to extra coaching does not impair their health and well being. The legitimate regulatory role of the State may extend to oversight function to ensure that under the rubric of conducting extra classes or providing additional coaching, private schools do not charge fees without providing the service or have contrived this devise to camouflage profiteering and collection of capitation fees. In the absence of any such invalidating circumstances rationally ascertained or determined, the

State may not legitimately prohibit private schools from providing extra classes/coaching and collecting fees therefore, is the summation on this aspect.

The State offers no justification for this provision except a breezy contention that extra classes conducted beyond stipulated school hours are imposing a general burden on the student and a vague assertion that some schools are collecting fees for extra classes without offering any such facility.

In our considered view this provision is invalid. Part of the provision *not to run school beyond stipulated time*, is in the nature of an advisory. There is no empirical basis at present for an assumption that the stipulated timings of schools constitute the limits beyond which imparting of instruction would be deleterious to the physical or mental health of students. Even according to the advisory trajectory of this provision, a private school would be at liberty to provide coaching, regular or by way of extra classes beyond stipulated timings, as is considered proper and requisite in the academic assessment of the private management. If the holding of classes/extra classes is not prohibited in law, it would be legitimate to collect fee for the facility provided since provision of school education by a private unaided educational institution is 'occupation' guaranteed under Article 19(1)(g) and is not obligated by any law to be entirely charitable in nature.

While it may be legitimate for the State to regulate and fix ceiling limits on the number of hours of instruction that may be imparted to students, for different classes or standards, in the interests of health; or to verify and

approve the fee structure for the extra classes as well to ensure that there is no profiteering; the State cannot lawfully mandate that if extra classes are conducted the private management should not charge any extra fees for the same. This is a wholly perverse and misconceived provision and must perish.

Para 1(c)(iv) of G.O.Ms.No.91 is accordingly quashed.

The major attack is on Para 1(c)(vi), which reads:

“(vi) Interim Measure of fee for the academic year 2009-10:- Until District Fee Regulatory Committee (DFRC) approves fee for the school for the academic year of 2009-10, the School shall charge fee as was charged during 2008-09 academic year.”

The petitioners contend that this provision is without the authority of law, unreasonable and void. Sec. 7(2) of the Capitation Fees Act in terms prohibits collection of any fee in excess of the fee notified under sub-sec.(1) but authorizes no restriction till the fee is notified u/Sec. 7(1). The impugned provision which freezes the fee for the academic year 2009-10 to the fee charged during the previous academic year 2008-09, until the DFRC approves the fee for the current academic year is thus plainly without the authority of law and contrary to the provisions of Sec.7 of the Capitation Fees Act. The petitioners contend further that the provision is also wholly arbitrary, irrational and misconceived.

In defense, the HS Parents Association (an intervener in several of the writ petitions) contends that the provision in question is only in the nature of an interim measure, till fee for the academic year 2009-10 is approved. Once the approval is through, the embargo imposed in Para 1(c)(vi) would

automatically lapse. In the circumstances the provision cannot be construed as a measure impairing the independence or autonomy of managements of private unaided educational institutions.

While the counter affidavit dated 3.10.2009 (by the Secretary to the Government, School Education) does not offer any justification for incorporating sub-clause (vi) in Para 1(c), since G.O.Ms.No.91 was issued pursuant to the report and recommendations of the Navin Mittal committee, we have perused the said report to ascertain any justification for this provision. To the extent relevant and material for this analysis, the report of the committee states that it was constituted on account of the public outcry in view of the hefty increase in fees by private educational institutions during the past 2 to 3 years and in view of the complaints of parents that the fee increase is prohibitive. Para 19 of this report suggests the action plan for fee to be charged during the present academic year (2009-10); which reads:

“Certain schools have already started forcibly charging the higher fees from the students using various threats etc., As proposed by the Committee, the Fee Regulatory Committee needs to be established in every district and institutions need to get approval of the fees to be charged from the Committee. Since the same will be initiated this year, it may take some time before the fees as accepted by the Fee Regulatory Committee is put in place. In the meantime to ensure that neither the Management suffers nor parents are forcibly charged arbitrarily enhanced amounts, it is proposed that the institutions be directed to charge fees as prevailing during last year in their schools till the time their fees are fixed by Fee Regulatory Committee as an interim measure.”

There is nothing in the Committee's report which indicates that there was an examination by the committee of the fee structure of each educational institution; or an attempt to classify the large number of private unaided educational institutions across the State into a few rational categories and to study the fee structure of representative institutions from each such category; nor any study by the committee to identify whether the increase of fee by each school was unwarranted or constitutes profiteering; nor even was a sample study conducted of a few randomly selected representative private unaided schools, to ascertain patterns of irrationality in the fee enhancement for the academic year 2009-10. The committee appears to have indulged in a visceral, intuitive and whimsical reaction to the public outcry of exorbitant increase in the school fees during the current academic year and the consequent 'prohibitive' cost on the parents. The recommendation of the committee on this aspect is thus fundamentally irrational and wholly perverse.

In the context of the established legal position from the precedential authority of *TMA Pai Foundation*, *Islamic Academy of Education*, *Modern School* and *PA Inamdar* (2,3,4 & 6 supra) it is clear that every private unaided educational institution including a school is guaranteed academic and operational autonomy including in the matter of determining its own fee structure, subject only to a legitimate interventionist role of the State for prohibition of profiteering or the collection of capitation fees. The rational process for the State to execute its regulatory powers is to analyse the fees structure of each private school, make a detailed analysis of its income and

expenditure, on the basis of material submitted by the school or ordered to be furnished by the State/State agency/committee and thereafter to determine whether the fee structure proposed by each private management is rationally related to the over all legitimate expenditure including a reasonable revenue surplus allowable for future development or expansion. Without such disciplined anterior exercise the State cannot apply a guillotine and mandate that the fee structure for the academic year 2009-10 shall be the same as it was in the previous academic year 2008-09, until approved for the current academic year. In the report of the Navin Mittal committee, no material exists and no evidence whatsoever is discernable to support an assumption that the increase in the fee during the current academic year or even a part of it constitutes profiteering or collection of capitation fees.

The petitioners contend that the current fee increase is on account of a variety of factors such as continual and high inflationary trends in the economy; quantum increases in establishment and maintenance costs of infrastructure; increase in salaries of faculty and staff; increase in rentals for premises; frequent and steep increases in transportation costs due to increases in prices of fuels and accessories and many such components that comprise the over all expenditures.

The learned counsel for the petitioners further submit that a range of other circumstances also substrate increase in school fees. It is contended that some recently started private schools have a lower intake in the initial years until recognized by the community and have to absorb the losses occasioned by

the expenditure exceeding the income, during formative years. Till well established and recognized, schools may also charge a fee below the per capita share of the expenditure as an incentive to attract admissions. As and when a school reaches a comfortable degree of community acceptance and recognition, it may formulate its fee structure proportionate to its current operational costs; partly to offset the losses incurred in the formative years; and providing a cushion for expansion and development. All these would be legitimate strategies; not on any account amounting to profiteering or collection of capitation fees. According to the petitioners, while, the State is required to exercise its regulatory power in the area of fee structure with due sensitivity to the spectrum of guaranteed autonomy, the State has exhibited a crude and sledgehammer approach to the issue, in issuing G.O.Ms.No.91.

In our considered view Para 1(c) (vi) of G.O.Ms.No.91 is unsustainable for the following reasons:

A) There is no empirical basis whatsoever for the underlying assumption (of this provision) that the fees that was charged by every private unaided educational institution in the State during the academic year 2008-09 was rational and did not amount to profiteering; that the previous academic year's fee structure is equally relevant and adequate for the current academic year, 2009-10; or that any increase in fees during the current academic year would wholly constitute profiteering or amount to collection of capitation fees, pending consideration by the DFRC;

B) Neither the Navin Mittal committee nor any other body or authority invested efforts to verify the income and expenditure of each private school, or (where a rational pattern of categorization of the several schools across the State was possible) study the relevant particulars of a representative sample of each identified category of school, to justify the impugned provision. This provision in substance suspends the fee structure of every private school which enhanced its fee during the academic year 2009-10, without any justification pleaded or established. The asserted temporal or transient nature of this provision would not immunize its essential illegality;

C) This provision cannot be sustained as a regulation determining the fee structure notified u/Sec. 7(1) of the Capitation Fees Act, considered in the context of autonomy of private unaided schools as declared in *TMA Pai Foundation*, *Islamic Academy of Education*, *Modern School* and *PA Inamdar* (2,3,4 & 6 supra);

D) Bereft of any rational basis the provision cannot also be justified, even as an interim regulation of profiteering and is vitiated for being an unlawful intrusion into the operational autonomy of private unaided schools.

On the aforesaid analysis Para 1(c)(vi) of G.O.Ms.No.91 is unsustainable and is quashed.

The several aspects of issue-C are determined as above.

Issue (D): The essential premise and contention underlying this issue is that since none of the writ petitioners are citizens (not being natural persons), they

cannot claim abrogation or violation of the contours of the rights guaranteed under Art.19.

Sri C.V.Mohan Reddy, the learned Senior Counsel representing HS Parents' Association, contends that the petitioners are either registered education societies administering private unaided schools or schools and are not therefore citizens; that the challenge to the impugned provisions is predicated upon claims to rights guaranteed under Art. 19(1)(g), which are available only to citizens; that the challenge is thus misconceived.

Reliance is placed on the decision of the Constitution Bench (9 Judges) in *State Trading Corporation of India Ltd. vs Commercial Tax officer and Ors* (^{36[36]}). The State Trading Corporation of India Ltd, ('the STC') a private limited company registered under the Indian Companies Act 1956, in a writ petition filed under Art.32 of the Constitution, sought certiorari against certain proceedings instituted by Commercial Tax Officers and the State of Andhra Pradesh claiming violation of rights guaranteed under Art. 19. On the basis of the preliminary objections to the maintainability of the writ petition the matter was referred for consideration to a Larger Bench. The preliminary objection (relevant for the present analysis) is whether the STC is a citizen within the meaning of Art.19 and may seek enforcement of the fundamental rights guaranteed therein. The majority opinion was delivered by Sinha CJ [for himself, S.K.Das, P.B.Gajendragadkar, A.K.Sarkar, K.N. Wanchoo and Rajagopala Ayyangar, JJ]. The majority held that the Constitution has

^{36[36]} AIR 1963 SC 1811

altogether left out of consideration juristic persons in Part-II of the Constitution relating to 'citizenship'; and made a clear distinction between 'persons' and 'citizens' in Part-III of the Constitution. Part-III, which proclaims fundamental rights, was very accurately drafted delimiting those rights like freedoms of speech and expression, the right to assemble peaceably, the right to practice any profession etc, as belonging to 'citizens' only and those more general rights like the right to equality before law, as belonging to 'all persons'. In separate dissenting opinions K.C.Das Gupta and J.C. Shah, JJ, held that the STC so long as it consists only of citizens of India may seek enforcement of the fundamental rights guaranteed to citizens under Art. 19(1)(f) and (g); and that the STC, a company registered under the Indian Companies Act 1956 is a citizen within the meaning of Art. 19 of the Constitution and may seek enforcement of fundamental rights granted to citizens under the said Article.

In *Barium Chemicals Ltd* (34 supra) Mudholkar, J (for himself and Sarkar CJ) representing the majority view (on several aspects not relevant to the present controversy) quoted with approval the judgment in *STC* (12 supra) and observed that while the Company (Barium Chemicals Ltd) could not claim the benefits of the provisions of Art. 19(1)(g), the 2nd appellant (the Managing Director of the Company) can do so (Para 17 of the AIR report).

Sri P.P.Rao, the learned Senior Counsel placing reliance on the decision in *Dharam Dutt and Others vs Union of India and Others* (^{37[37]}) would contend

^{37[37]} (2004) 1 SCC 712

that while Art. 19 grants rights to citizens as such, an association can lay claim to fundamental rights guaranteed by this Article on the basis of it being an aggregation of citizens i.e., the rights of citizens composing the association. Reliance is placed on Para 24 of this judgment.

We have referred at some length to the competing contentions on this issue as these were urged vigorously. In the factual context of the cases before us however, this court is not required to pronounce on whether an education society, as an aggregation of citizens, can maintain an action for enforcement of rights guaranteed to citizens under Art. 19(1)(g).

In several writ petitions individuals who are office bearers of the education societies, which initially filed the writ petitions, have by appropriate applications impleaded themselves as petitioners. These individuals are all citizens who are entitled to claim rights guaranteed under Art. 19(1)(g). The contention as to the maintainability of the writ petitions on this ground is thus misconceived. Issue (D) is answered accordingly.

Before parting with the case after recording our conclusions, we consider it appropriate to record some observations. There is a general and increasingly strident complaint by a section of essential stake-holders of the system of education in India i.e., parents and students, that there is crass commercialization of education which is reaching alarming proportions; that the administration of private unaided educational institutions is ineffectively regulated by the State; that the process of inspection and verification of these institutions, the grant of authorization, recognition or affiliation as well as the

oversight of their operations is grossly ineffective; and this pathology is the product of patronage catalyzed by a venal systemic nexus. While many areas of the Indian economy have been liberated to a substantive measure from the stranglehold of the license-raj syndrome, few areas, in particular education are apparent and yet vibrant vestiges of the license-raj regime. The processes of visitation, inspection, verification; the grant of NOC/authorization/permission/recognition/affiliation by appropriate agencies of the State, (Federal or Provincial) to private unaided educational institutions is by and large perceived to operate under the dialectics of a spoils system and patronage. This is more so in respect of authorization and verification by State or State instrumentalities of private institutions operating in the sphere of professional education; the degree of unprincipled patronage being proportional to the potential for private profiteering.

One goal of democracy is to ensure autonomy not merely in the satisfaction of preferences but fundamentally in the processes of preference formation. The wide spread disjunction between political and consumption choices present something of a puzzle. It sometimes leads to the view that market ordering is undemocratic and that choices made through the political process are always a preferable basis for social ordering. This is too broad a generalization in the light of the multiple break-downs of the political process and the advantages of market ordering in many arenas. While respect for private markets is an important way of respecting divergent conceptions of the good and is thus properly associated with individual liberties, it would be a

mistake to assume that market always reflects individual choices more reliably than politics; or that democratic choices differ from consumption outcomes only because of confusion, as voters fail to realize that they must ultimately bear the costs of the programmes they favour; or that voting patterns merely reflect a willingness to seek certain goods so long as other people are footing the bill. Almost by definition, markets incorporate the norms and practices of advantaged groups. Except in limited contexts and under limited conditions competitive market will not prevent discrimination and a free market condition does not normally incentivize altruism. **(For an insightful analysis on this aspect see Cass R. Sunstein's "Free Markets and Social Justice" – 1997 Oxford University Press).**

Since the State is increasingly shifting from the participatory towards a mere regulatory role in the administration and nurturing of educational institutions (at all levels), the State must evolve effective and sensitive tools to regulate this sphere, to maintain that delicate balance between academic and operational autonomy of private unaided educational institutions and the legitimate Governmental interest in ensuring that these private entities do not indulge in profiteering. The instruments of regulation must be nuanced and appropriately calibrated to ensure effective but non-invasive oversight. The decisions of our Supreme Court since *Unnikrishnan JP* and to the extent affirmed by *TMA Pai Foundation*, *Islamic Academy of Education*, *Modern School* and *PA Inamdar* (2,3,4 & 6 supra) have painstakingly deliberated, clinically analyzed and clearly identified the permitted contours of State intervention in

the area of fees regulation. *Modern School* (4 supra) has also suggested a fiscal accountability model that could be fruitfully pursued. An effective execution of this role appears possible only on informed discourse, rational analysis after due consultation with relevant areas of expertise and only thereafter the process of evolving a raft of regulations.

In the matter of fee structure, post *Unnikrishnan JP* a methodology of cross subsidization of one section of students by others is outlawed; private unaided educational institutions are entitled to have an institution specific fee structure; inhere a liberty to incur legitimately accounted expenditure on faculty, staff, infrastructure and development; and liberty to evolve for themselves a variety and diversity of education methodologies including the choice of providing higher and variegated standards of instruction and infrastructure, subject only to State/State regulatory agency/affiliating body regulation in the area of education standards, health, hygiene, public order, safety and analogous considerations. The fee structure evolved by private educational institutions is not *per se* illegal and would be legitimate and operative unless the State rationally determines that the fee structure incorporates components that amount to or enable profiteering or collection of capitation fees. On such rational assessment alone is the State entitled to exercise its regulatory domain, to disapprove the fee structure proposed by the educational institution and approve a fee structure that disables profiteering. Evidently, the exercise of such sensitively calibrated regulatory role requires due diligence, association of expertise across a variety of fields like

educationists, management experts, finance and accounting expertise. No such effort preceded the State regulation impugned in these writ petitions. It is distressing that despite the guidance provided by *Modern School* (4 supra) the impugned regulation does not even incorporate an audit and accounting methodology that ensures transparent and verifiable fee collection practices and which disables diversion of funds from private educational institutions to fill the coffers of the promoters. We hope and trust that the State would evolve with utmost expedition, fair and effective instruments to curb profiteering and the collection of capitation fees in the light of the settled principles reiterated herein.

Conclusions :-

On Issue (A):

The bye-laws of the CBSE, neither expressly nor by any compelling inference exclude the exercise of regulatory power by the State in the matter of regulating the fee structure or the other complementary provisions, contained in G.O.Ms.No.91 Education (SE:PS-1) Department, dated 06.08.2009. The provisions of G.O.Ms.No.91 are neither facially nor in substance inconsistent with the obligations of school to conform with the CBSE regulations or bye-laws.

On issue (B):

1. The provisions of the Capitation Fees Act apply *proprio vigore* to private unaided educational institutions including schools as well.

2. G.O.Ms.No.91 is not a mere executive order but is a notification issued by the State in exercise of the powers under Section 7 of the Capitation Fees Act.
3. Provisions of Paras 3 and 4 of G.O.Ms.No.91 enable abdication by the State Government of powers specifically consecrated to it under Section 7 of the Capitation Fees Act and entrustment of such powers to the District Fees Regulatory Committee (to approve the fee structure and enjoin a prohibition on private unaided schools to collect fees, in excess of the fees approved by the DFRC), contrary to the provisions of Section 7. Paras 3 and 4 of G.O.Ms.No.91 are therefore unsustainable and are quashed.
4. Para 5(ii) of G.O.Ms.No.91 mandates the composition of the governing body of a private unaided school to conform to the provisions of the Andhra Pradesh Educational Institutions (Establishment, Recognition, Administration and Control of Schools under Private Managements) Rules 1993. This provision abrogates the managerial and operational autonomy of private unaided schools; is unsustainable and is accordingly quashed.
5. Para-6 of G.O.Ms.No.91 is unsustainable except to the extent that it prescribes that the approved fee structure shall normally be for a period of three academic years, subject to review. Such review shall be on rational and germane grounds. The other clauses of Para-6 i.e., that the management may increase fees every year but on the basis of the

increase in the consumer price index; and the conferment of power in the DFRC to review its decision of fee structure *suo motu* or on representation from the parents, are unsustainable. This conclusion is independent of our other conclusion that the very conferment of power to the DFRC in the matter of fixing/approving the fee structure is invalid. Since we have concluded that the conferment of such power on the DFRC is invalid this conclusion invalidates the power conferred on DFRC in para-6 as well.

6. Para-8(ii) of G.O.Ms.No.91 is not inherently invalid. However, while following the guidelines formulated by the Navin Mittal Committee [under Para 8(ii)], if the DFRC transgresses the permissible limits of State regulatory powers as analyzed in this judgment, the specific determination by the DFRC is open to challenge by any aggrieved party. The challenge to Para 8(ii) however is rejected in specie.

On issue (c):

1. The challenge by the petitioners on this aspect is essentially conceptual and not as much on account of the gross inadequacy or the illusory nature of the amounts stipulated in Para 1(c) of G.O.Ms.No.91. We therefore consider it appropriate, that instead of striking down the provision, it would be in the fitness of things to direct the State Government to review the stipulations in Para-1(a) after inviting proposals from managements of the several private unaided schools in the State and take an appropriate decision thereafter (including, if

found appropriate, after an independent survey by the State as to the relevant parameters for determination of application fee, registration fee and refundable non-interest bearing caution deposit, duly considering the relevant circumstances viz, location, infrastructure of the institution, the operational costs in processing applications and registrations and other relevant circumstances), in respect of each school or classes of schools. We direct accordingly.

2. The provisions of Para-1(b)(iii) of G.O.Ms.No.91 are not *per se* invalid. The fee regulating authority must however be sensitive and conscious of the broad spectrum of academic and operational autonomy that inhere in a private unaided educational institution. The regulating authority of the State must recognize the paradigm shift that the decisions in *TMA Pai Foundation*, *Islamic Academy of Education*, *Modern School* and *PA Inamdar* (2,3,4 & 6 supra) have brought about on the contours of the State's regulatory power. While regulating a private unaided educational Institution the State cannot treat such institution on par with a State administered or State assisted institution. The appropriate fee regulatory authority must exercise its power consistent with the observations in this judgment with respect to what constitutes 'education', while considering whether an activity *is not directly linked to education*.
3. The provisions of Para 1(c)(i) are not invalid if construed as enjoining merely that the sale of books/note books/stationery at the school

counter, if any, should be on a non-commercial, no-profit-no-loss basis, in the light of the observations in this judgment on this aspect.

4. Para 1(c)(iv) of G.O.Ms.No.91 is invalid and is quashed. While it would be legitimate for the State to regulate and fix ceiling limits on the duration of instructions that may be imparted to students or with respect to school timings, for different classes or standards, in the interests of health and well being of the students, for efficient traffic management or similar rational public policy considerations; or to verify and approve the fee structure for the extra classes as well to ensure that there is no profiteering; the State cannot mandate that if extra classes are conducted the private management should not charge any extra fee for the same.
5. Para-1(c)(vi) of G.O.Ms.No.91 is unsustainable. There is no empirical basis to assume that the fee charged by every private unaided school during the previous academic year 2008-09 was rational and did not amount to profiteering; that the previous academic year fee structure is relevant and adequate for the current academic year 2009-10; or that collection of a higher fee during the current academic year *per se* constitutes profiteering and would amount to collection of capitation fees. The asserted temporal or transient nature of this provision would not immunize this essential perversity and illegality. This is not a provision legitimately referable to the power of the State u/Sec. 7(1) of the Capitation Fees Act and the provision is also inconsistent with the

operational and managerial autonomy of private unaided schools *qua* the decisions in *TMA Pai Foundation, Islamic Academy of Education, Modern School* and *PA Inamdar* (2,3,4 & 6 *supra*).

Issue (D):

As individuals (citizens) also figure as petitioners in the several writ petitions, the writ petitions do not require to be rejected as not maintainable on the ground that rights guaranteed under Article 19(1)(g) of the Constitution (available only to citizens), are claimed as the foundation for the challenge to the impugned provisions herein.

We record our appreciation and gratitude to the learned counsel for the respective parties who have assisted the court in the resolution of this *lis* with fairness, clinical analyses and commendable forensic effort.

The several issues are answered and the writ petitions are allowed, as above.

Dated: 27/08/2010
LR Copy to be marked
(B/o)
Pvsn

Justice Goda Raghuram

Justice Noushad Ali

Annexure

REPORT OF THE COMMITTEE CONSTITUTED VIDE G.O.Rt.No. 376 Education dated 18-06-2009:

“Education is an important tool for all round development of an individual. An educational institution is established to impart knowledge to the students to facilitate his development. In the beginning education used to be a charity or philanthropy. Individuals, institutions or trusts used to establish and maintain educational institutions without profit motive. Taking advantage of the demand, more number of private educational institutions were, however, established in the guise of public interest and now a days it has become an occupation, carried for the purpose of profit. Since the occupation of education is charitable, government has an obligation to see that the private educational institutions should not commercialize education and to prevent them from charging capitation fee and from profiteering by making suitable regulations. In the past two-three years there has been a hefty increase of fee by the private educational institutions without any valid reasons leading to huge public outcry. The parents allege that the increase is unbearable and it is prohibitively costly to join or continue their children in private institutions. Further, there are large entry costs barriers to shift the children into another institution if the fees in the present institution become unbearable especially during the course of academic year. There is widespread demand for the Government to interfere in the matter and enforce rules strictly.

In view of this public outcry, Government, Vide G.O.Rt.No. 376 dated 18-06-09 formed a Committee to go into regulation of fee structure in the private schools, corporate schools, CBSE schools and ICSE schools functioning in the State having its members:

1. Sri Lav Agarwal, I.A.S., Commissioner, Intermediate Education, Andhra Pradesh., Hyderabad.
2. Sri Navin Mittal, I.A.S., Collector & District Magistrate, Hyderabad.
3. Sri Ramana Murthy Raju, Additional Secretary, Law Department.
4. Mrs. B. Mallamma, Joint Director, o/o. Director of School Education, Andhra Pradesh., Hyderabad.
5. Sri Narayana Reddy, Principal & Correspondent, Warangal.

The Committee was directed to give its report along with recommendations on regulation of Fee Structure along with penal provision for violation of the same. The Committee organized its first meeting on 20/06/09. The same was followed by another meeting dated 22/06/09. With a view to obtain stakeholders feedback, an Open House was organized in Jubilee Hall in Hyderabad duly issuing press release wherein all stakeholders i.e., Parents, Management of Institutions, Students and their representative bodies beside public representatives, Civil Society organizations attended and highlighted the issues and suggested the remedial course of action. Besides this to obtain further feedback from various other places in the State, a Special Cell was organized in Director, School Education Office under the control of Joint Director which received representations from all concerned till 26/06/09 duly giving wide publicity. Teams under the control of DEOs were formed to visit certain institutions to verify their income and expenditure statement so as to come to clarity with respect to fees charged by them. These included CBSE, ICSE and State board affiliated schools under various managements. The same was followed by meetings at Committee level on 27/06/09, 29/06/09, 2/07/09 and 3/7/09.

The Committee also studied the report given by the Hon'ble Delhi High Court appointed committee headed by Hon'ble Justice Santosh Duggal to examine the economics of each of the recognized unaided schools in Delhi. The same was accepted by the Government of Delhi in 1999.

Various judgments given on the issue by various Hon'ble High Courts as well as Hon'ble Supreme Court were analyzed to understand the legality of issues as has been interpreted by the judiciary. It was thus noted as following.

The Supreme Court in *TMA Pai Foundation v. State of Karnataka* (2002 (8) SCALE 1) held that there can be no fixing a rigid fee structure by the Government. Each institute must have the freedom to fix its own fee structure. The fee structure for each institute must be fixed keeping in mind the infrastructure and facilities available, the investment made, salaries paid to the teachers and staff and future plans for expansion and for betterment of institution etc., of course there can be no profiteering and capitation fee cannot be charged. The surplus/profit that can be generated must be only for the benefit/use of that educational institution. Profits/surplus cannot be diverted for any other use or purpose and cannot be used for personal gain or for any other business or enterprise.

The Hon'ble Supreme Court in *Islamic Academy of Education v. State of Karnataka* (2003 (6) SCALE 325) directed the Government to set up a committee to approve the fee structure prepared by the educational institution. The Supreme Court held that there could be no rigid fee structure and that each institution should have the freedom to fix its own fee structure after taking into account the need to generate funds to administer the institution and provide facilities to the students.

Hon'ble Supreme Court in its judgment in *Modern School v. Union of India & others*, delivered on April 27, 2004 (2004 (5) SCC 583) held that the Director, School Education, Government of Delhi is authorized to regulate the fees and other charges to prevent the commercialization of education. The Supreme Court

opined that one of the methods of preventing the commercialization of education in schools is to insist that every school follow the principles of accounting applicable to not-for-profit organizations/non-business organizations. The Court thus directed the Director to analyze the statements of fees of the schools and apply the above principle in each case. The Court upheld the collection of development fees by schools for supplementing resources for the purchase, up-gradation and replacement of furniture, fixtures and equipment. It permitted the managements of unaided schools to charge development fees not exceeding 15 per cent of the total annual tuition fee. The Court interpreted the Delhi School Education Act, 1973 so as to bring in transparency, accountability expenditure management and utilization of savings for capital expenditure/investment without infringement of the autonomy of the institution in the matter of fixing fees.

The Supreme Court held that: "It is now well settled by a catena of decisions of this Court that in the matter of determination of fee structure the un-aided educational institutions exercises great economy as like any other citizen carrying on an occupation are entitled to a reasonable surplus for development of education and expansion of the institution. Such institutions have to plan their investment and expand so as to generate profit. What is however prohibited is commercialization of education." The Division Bench of the Orissa High Court in *Institute of Professional Studies v. State of Orissa* (AIR 2007 (NOC) 775) held that: Government has set up Fee Structure Committee for determining fee and the committee is required to assess and determine fee structure in respect of each private technical/professional institution separately taking into consideration infrastructure and other facilities. It could not have fixed up fee uniformly in respect of such institution imparting a particular category of course".

The Committee after due deliberations took into consideration all above and worked with the twin objective on one hand ensuring that institutions do not get starved of funds for meeting their legitimate needs and on the other there is no undue or avoidable burden on the parents as a result of institutions indulging in crass commercialization of education.

It finally proposes the following:

1. Some institutions are using the suffixes and prefixes along with the name of the school such as IIT Olympiad/Concept/e-Techno/e-shastra etc., to confuse the parents. They collect huge fee by using such attractive names. It is proposed that the same shall be banned.
2. It is alleged by the parents that certain schools are functioning from 7-00 am to 7-00 pm and are collecting huge additional amounts under various heads besides the tuition fee for these extra hours. It is proposed that all institutions should scrupulously follow the time schedules as stipulated by the authorities i.e., District Collector, DEO etc., and shall not charge any extra amount in the name of special coaching etc., Any institution violating the same shall be banned and de-recognized.
3. It is noted that some of the institutions issues advertisements highlighting the achievement of their students to attract the prospective parents. This crass-commercialization of education is unfair and leading to a situation where disparities are created through this hype giving inferiority complex to students studying in other schools. A huge amount of money is spent on these advertisements. This expenditure is met effectively from the exorbitant fees collected from the students. It is proposed that this practice of giving advertisements should be banned. In any case, if the same is not accepted for any reason, the advertisement cost should not be charged from the students in any form or the same shall not be included as an admissible expenditure as part of fee calculation.
4. Institutions are charged under Commercial category by the Electricity Distribution Companies which adds huge burden on the schools and is unjustified. It is, therefore, proposed that the Electricity Regulatory Commission may be requested to charge the electricity bills at

domestic/subsidized rates to the educational institutions as they are social services rather than purely commercial ventures.

5. There is heavy burden on the Educational Institutions with respect to property tax payment. It is proposed that Government may consider either reducing the same or exempting the education institutions from its purview.
6. Most importantly, it is proposed to constitute a Fee Regulatory Committee for every district to scrutinize and approve the Fee structure for each and every private educational institution in the District.
7. Constitution of Committee: The Committee shall consist of District Collector or his nominee, the District Education Officer and the District Audit Officer/Auditor in PAO Office.
8. The institution should ensure that the Parents Teaches Association (PTA) may be constituted as per the norms and guidelines with respect to elections to PTA. Clear guidelines for the same are already enunciated vide The Andhra Pradesh Educational Institutions (Parents-Teaches Association) Rules, 1987. The procedure as indicated in Rule 7 shall be followed with respect to Election of Office Bearers of the Association. The PTA should compulsorily meet every 3 months and discuss various issues related to welfare of the teachers, students.
9. The existing rule issued in G.O.Ms. 1, Education (P.S.2), Dated 01-01-1994, regarding constitution of Governing Body may be continued. (Rule 15) duly deleting "only this meeting can be held even in the absence of parent-representatives in case of institutions when the Parent-representatives are yet to be elected" (Rule 15.5.a).
10. The Governing body shall prepare and approve the proposed fee structure and submit to the District Fee Regulatory Committee along with audited statements by 30th September, for the fee to be collected from the next academic year. The PTA of the institution shall also be marked a copy of the details so submitted to Fee Regulatory Committee so as to facilitate them to give representations, if any, to the Fee Regulatory Committee.
11. The District Fee Regulatory Committee will approve/disapprove/amend and give its decision on the fee structure by 31st December for the next academic year, to enable the management to publish the fee structure in the prospectus/application form and also for the awareness of the parents.
12. The fee shall include:

? One time fees: It is noticed that the huge amount is being charged in the name of Sale of Applications and Registration fee etc., The Committee is at a loss to understand why such a huge amount is charged and why sale of applications itself shall be a restricted process. Anyone desirous of buying application shall be given an application and in case the child is not given the admission, they shall specifically issue a Regret letter citing reasons instead of making the whole process of issue of application forms as non-transparent and in turn creating agony & frustrations at the parent's level. The only act involved in this exercise is some clerical processing of application paper for which at times thousands of rupees are charged, which is unacceptable. It is proposed that Fee, if any, charged for the sale & processing of the application shall not exceed Rs.100/- (to account for clerical expenditure). Thus as a onetime measure the schools may only be permitted to collect

? Application Fee at the maximum cost of Rs.100/-.

? A reasonable sum not exceeding Rs.500/- as Registration fee and

? Refundable Caution Deposit not exceeding Rs. 5,000/-. The same shall also be submitted to the Fee Regulatory Committee with due justification for approval.

No other fee by any name, whatsoever, shall be charged as a onetime measure.

? Tuition fee which includes Special fee, Annual fee, Development fee, Term fee and any other miscellaneous fee:

The tuition fee shall be collected basing on the payment of salaries to the teaching and non-teaching staff and statutory retirement benefits to them. The cost of running expenses such as water, electricity, sanitation facilities, municipal taxes, telephone, postage stationery, upkeep of buildings, payment of rents, maintenance of libraries, purchase of newspapers, magazines, chemicals and specimens for labs and expenditure towards national day celebrations shall also be included in the same.

Besides the above running expenses the school may be permitted to collect 15% of tuition fee as development fee as profit margin for the purpose of development and expansion of education facilities of the same school or for giving scholarships.

Some of the institutions are collecting huge additional amounts in the name of Annual Day/Sports Day/Fresher's Day/Teacher's day etc., These additional collections shall not be allowed. Relevant components, if any, shall be built as part of the Tuition fee duly giving suitable justification.

Additional fees are collected by certain institutions in the name of Laboratory Fee/computer classes/Library Fee/Activity Fee etc., and in extreme cases even without any related infrastructure or activities. The same, if any, shall be built as part of the Tuition fee duly giving suitable justification. It shall be linked to the availability of required infrastructure.

The details of the Tuition fee so proposed shall be submitted to the Fee Regulatory Committee which shall see the reasonableness of the expenditure so proposed before approving the same.

The amount of interest on refundable caution deposit, depreciation reserve and other deposits shall be included as the income of the institution.

In case of Aided institutions for unaided classes/sections also the fees need to be approved by the Fee Regulatory Committee duly deducting the amount of aid received from the Government.

The tuition fee shall be collected is not less than 3 installments.

Any amount so collected from the students, shall be exclusively spent only for the recurring expenditure, development/expansion of the same institute only and same shall not be utilized for development of other branches or shifted to society funds etc.,

? User charges which include transportation, books and uniforms and hostel/mess charges: It is noted that school books are being sold by the institutions at much higher prices than the MRP rates by affixing the stickers of higher denominations at the places where the price is being mentioned on the Text Books and similarly very high prices are charged for the note books. Students are also forced to buy the same from the counter opened in the schools itself. Selling of the same has become a commercial activity in itself and is against the relevant laws. It is generally understood that if schools were to buy the books/note books they should be getting hefty discounts and opening of sale counter in the schools should imply that the benefit shall be passed on to the students instead of a premium being charged. It is, therefore, proposed that in case a counter is opened

in the school, it necessarily shall be at a discount (premium is banned and is illegal) and besides this the whole exercise should not limit options of parents and the schools should necessarily notify a minimum of 3 shops in the town where such books/note books/stationery are available.

Certain schools, similarly, open counters or designate shops from where it is made compulsory for the students to buy the uniforms, it is agonizing to see queue of parents and students before such shops/counters which treat the parents with contempt besides charging more than the market price for such uniforms. An activity, which need not be done or if done should make life of parents easier and should provide discount to the parents, becomes a source of revenue for the institution and a reason for harassment for the parents. The Committee is not able to understand the rationale for such monopolizing act on behalf of institutions. It should, therefore, not be compulsory to purchase uniforms from the designated shops or sales counter of the schools. The students shall be allowed to purchase the uniforms from the outside outlets of his choice as per the specifications prescribed by the schools. Hefty amounts are charged in the name of transportation fees from students. The rationale for proposing such high fees is never given and a student picked from a close by place is also forced to pay pre-decided higher charges with no justification to the actual expenditure incurred. It is proposed that transportation facility, if any, shall be optional and the transportation charges shall be fixed as per the number of km from where the student is picked up. Rate per Km shall be fixed as per the expenditure statement submitted to the Fee Regulatory Committee by the institution.

Certain institutions provide hostel/mess facilities also. In case the same is provided, it shall be optional and student shall not be forced to join the same. The fee so charged for the hostel/mess shall also be brought to the notice of Fee Regulatory Committee and taken approval of.

The school is thus permitted use specific charges on no profit and no loss basis for the purpose of providing transport, school books and uniforms, hostels/mess to the pupil.

Any activity which is not directly linked to education, if provided, shall be optional and shall not be built as part of the tuition fee.

13. Separate accounts shall be maintained for collection of different types of fees for the purpose of adequate clarity, transparency & auditing.
14. To have an overall ceiling on the tuition fee (all inclusive): As per the records made available with respect to calculations of income & expenditure from various institutions, it is noted that there are wide variations in amounts collected as fees, various names being given to collect multitude of charges like development fee, special fee, activity fee, annual fee etc., not justified expenditure shown under various heads and in the end parents are fleeced and hence these agitations. As already proposed above, in order to avoid the same, institutions are directed to account for multitude of charges collected as Tuition Fee only.

It is further noted that unless there is an upper limit assigned to the tuition fees (all inclusive) so collected, there is a tendency on the part of Management to show unjustified amounts for infrastructure development, to divert funds from one school to other or in the name of society, show abnormally high benefits to teachers etc., in order to justify higher fees. The same will defeat the very purpose of the regulating the profiteering tendency and commercialization of education.

It is noted that even if the best of facilities are to be provided in these institutions, these facilities definitely are not going to surpass the infrastructure so provided by professional institutions like Engineering etc., which require larger number of labs, better and bigger class rooms and much more qualified lecturers. There is, thus, no reason for abnormal Tuition fees (all inclusive) being charged by certain schools.

Section 7 (1) of Andhra Pradesh Educational Institutions & Regulation of Admissions & Prohibition of Capitation Fee) Act, 1983 states that it shall be competent for the government by notification to regulate the tuition fee or any other fee that may be levied or collected by any educational institution in respect of each class of students. Sub-section (2) states that no educational institution shall collect any fees in excess of the fee notified under sub-section (1). In view of the above provision, it is implied that a ceiling on tuition fee can be imposed.

Taking into consideration the world class facilities also it is estimated and proposed that the tuition fee (all inclusive) for classes up to V class shall

have a ceiling of Rs.24,000/- per annum and VI to High School shall have a ceiling of Rs.30,000/- per annum. This ceiling can be automatically increased by the increase in CPI every year to keep in tune with time.

It is however, cautioned that the ceiling so proposed shall not become a plea on the part of certain institutes charging lesser fees (commensurate to the facilities provided) to increase it to the ceiling amounts. In any case the tuition fee so charged has to be in correlation to their income & expenditure as well as the available infrastructure.

The ceiling is presumed to be applicable to cases where world class facilities are provided by the institutes. It is presumed that in most of the cases the tuition fee which may be calculated to be charged would be much lesser than the ceiling so prescribed.

15. In order to facilitate the district level Fee Regulatory Committee detailed guidelines on how to scrutinize the statements submitted by various institutions so as to arrive at the fee which may be charged will be issued separately by the present committee.
16. Any charges in excess of the fee fixed by the Fee Regulatory Committee will be treated as capitation fee. If any educational institution collects any other fee other than the fee fixed by the Fee Regulatory Committee and a complaint is received, penal action against the educational institution under Section 9 of the Andhra Pradesh Educational Institution (Regulation of payment prohibition of Capitation Fee) Act, 1983 shall be initiated and the recognition granted and NOC issued shall be withdrawn after giving due notice. The excess fee collected shall be refunded to the students and the Director of School Education can also levy fine against such institutions.
17. An appeal against the decision of Fee Regulatory Committee will lie to Director of School Education.
18. Section 7 (1) of the Andhra Pradesh Educational Institution (Regulation of payment prohibition of Capitation Fee) Act, 1983 provides that it shall be competent for the Government by notification to regulate the tuition fee or any other fee that may be levied or collected by any educational institution in respect of each class of students. In view of the above provision, it is open for the Government to issue statutory notification, since immediate

action is warranted, specifying that no school shall charge the tuition fee or any other fee without the approval of Fee Regulatory Committee,

Or

In order to give teeth to the above recommendations, the government may also consider enacting a suitable legislation regulating the fees charged by the institutions on the above lines.

19. Action plan for fees to be charged during the present academic year: Certain schools have already started forcibly charging the higher fees from the students using various threats etc., As proposed by the Committee, the Fee Regulatory Committee needs to be established in every district and institutions need to get approval of the fees to be charged from the Committee. Since the same will be initiated this year, it may take some time before the fees as accepted by the Fee Regulatory Committee is put in place. In the meantime to ensure that neither the Management suffers nor parents are forcibly charged arbitrarily enhanced amounts, it is proposed that the institutions be directed to charge fees as prevailing during last year in their schools till the time their fees are fixed by Fee Regulatory Committee as an interim measure.

Once this Committee recommendations are approved by the Government, the district level committees may be formed within a fortnight and another one month may be given to all institutions to submit their proposed fee structure as per Governing Body meeting along with their income and Expenditure statement, duly justifying the fees so proposed. The committee shall in turn approves the same within another 15 days.

20. As of now the proposed fee once approved shall be valid for a period of three years. During this period the management is also at liberty to increase the fees to a maximum extent of increase in Consumer Price Index (C.P.I.) (year to year) so as to account for increase in prices during the year without taking prior approval of the Fee Regulatory Committee.

The institutions may also approach the Fee Regulatory Committee for permission to increase the fee with due justification in case of extraordinary increase in Government taxes, Professional Taxes, Transportation Taxes etc., before the 3 years period. The same shall be resorted to only in extraordinary circumstances though Fee Regulatory Committee on its own or after

representation from the institutions Fee Regulatory Committee on its own or after representation from the institutions can issue general permission to all schools in its jurisdiction to increase fee in such cases so as to obviate the need for individual institutions to approach the Committee.

The same is submitted to the government for favour of consideration and approval.

Dated: 27/08/2010
Pvks

Justice G. Raghuram

Justice Noushad Ali
