IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CIVIL WRIT PETITION NO. 11223 of 2009
DATE OF DECISION: April 27, 2011

Haryana Progressive Schools' Conference (Regd.)

.....Petitioner

VERSUS

The State of Haryana and others

....Respondents

CORAM:- HON'BLE MR.JUSTICE RANJIT SINGH

Whether Reporters of local papers may be allowed to see the judgement?

1. To be referred to the Reporters or not?
2. Whether the judgment should be reported in the Digest?

PRESENT: Mr. Ashwani Kumar Chopra, Sr. Advocate with
Mr. Aashish Chopra, Advocate, and
Ms. Rupa Pathania, Advocate.

Mr.H.L.Tikku, Senior Advocate with
Mr.Sumeet Goel, Advocate &
Ms.Yashmeet, Advocate.

Ms. Sharuti Jain, AAG, Haryana,
for the State.

Mr.Raman Sharma, Advocate.

Mr. D.D. Sharma, Advocate.

Mr.Lokesh Sinhal, Advocate.

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RANJIT SINGH, J.

This order will dispose of Civil Writ Petition Nos.11229 of 2009 (*Appejay Education Society & another Versus The State of Haryana and others),* 15039 of 2009 (*Appejay Education Society & another Versus The State of Haryana and others)*, 17748 of 2009 (*Bhagat Singh Bisht & another Versus The State of Haryana and others,* 19311 of 2009 (*West Academy Senior Secondary School Versus The State of Haryana and others*, and COCP No.2200 of 2009 (*Bhagat Singh Bisht & another Versus The State of Haryana and others).*

Unaided school either individually or through their organisation has filed these writ petitions for quashing order/memo No.7/4/-09-PS(2) dated July 6, 2009 issued by respondent No.2 in exercise of power, which is termed as illegal, without jurisdiction and violative of Articles 14 and 19 (1)(g) of the Constitution of India. It is further urged that the same is opposed to principles of natural justice, equity and fair play. Since the common question of law and fact arises in all these writ petitions, the same are being disposed of through this common order. The facts have been taken from CWP No.11223 of 2009.

This writ petition is filed by Haryana Progressive Schools' Conference (Regd.) with a plea that most of the member schools of the petitioner Association are running schools in the State of Haryana for almost twenty to thirty years. All the schools are well established, enjoy a good reputation and a lot of goodwill. All the schools are engaged in providing education and have been established after obtaining a 'No Objection Certificate' from the

State of Haryana. The schools are either affiliated with CBSE or ICSE and are duly recognised.

Being an unaided institution, the schools are not in receipt of any grant from the State Government and the facilities, infrastructure etc. are being provided by the school authorities themselves. The Management is meeting all the requirements from its own resources. Each of the school has its own managing committee, which is functioning subject to the control of the rules of society/trust and exercise power to supervise the activities of the school, besides looking after the welfare of the teachers and employees. Managing Committee is also responsible for making appointment of teaching and non-teaching staff and is further responsible in regard to the tuition fee and other annual charges being levied by the schools. It is pleaded that the schools need lot of funds not only for providing State of Art infrastructure and facilities to the students but also for payment of salary to their teaching and non-teaching staff, for which these schools have to abide by the pay structure as fixed by the Government. These above noted acts are essentially required to be performed for establishing, administering and running private unaided schools. The petitioner would claim that looking at the standard of education and other facilities provided by such schools, the admission to such schools is coveted. To maintain this high standard, the unaided schools have to meet the requirement of funds from their own sources as they are not receiving any aid from the Government. It is, thus, pleaded that the schools have no other source but to

charge adequate fee from the students. The petitioner would like to add that only just sufficient fee is charged to meet the cost of essentials and which is required for providing and maintaining standard of education.

The petitioners then would plead that in order to meet the increasing cost and expenses every year and to maintain the high standard, the respective managing committees of the schools have taken a decision to increase the fee, which is done yearly. So far, the schools have been increasing the fee as per the requirement without any interference from any authorities much less by the respondents. However, with the advent of Haryana Education Code enacted on 4.6.1999, the things have undergone a change. It may be noted that the State of Haryana for the purpose of regulating the functioning of the schools in the State had initially formulated Haryana Education Code and later enacted Haryana School Education Act, 1995 (for short “the Act”) which was published in official gazette on 4.6.1999. Section 24 of this Act confers power on the State to make rules for carrying out the purposes of the Act. In exercise of power conferred under Section 24, the State has framed Haryana School Education Rules, 2003 (for short “2003 Rules”) which are published in the official gazette on 30.4.2003. The provisions of the Act and the Rules so framed were challenged by Haryana Progressive Schools' Conference (Regd.) through CWP No.13433 of 2003 on the ground that these enactments had sought to curtail the rights of unaided privately managed schools/institutions in the State. However, this court was

pleased to dispose of the said writ petition by observing that schools would continue to run till a final decision is taken by the State Government. Consequent upon the receipt of the report of the committee constituted under the Chairmanship of respondent No.3 and the right of the petitioners to challenge the decision was kept intact. It is averred that no report till date has been prepared by the committee but instead 2003 Rules have been amended in the year 2007, which have come into force with effect from April 1, 2007. Aggrieved against this amendment, the petitioner Association once again approached this Court through CWP No.5047 of 2007 with a prayer that the respondents be directed not to interfere in the working of unaided privately managed member schools. This court while issuing notice of motion was pleased to stay the operation of notice dated 3.3.2007, whereby the recognised/unrecognised private schools in the State of Haryana were directed to apply for recognition under the amended rules within 15 days of the publication of notice. This writ petition stands admitted and is pending final adjudication.

During this time, the managing committee of the respective member schools had been increasing the fee from time to time without any interference or protest from any quarter. Now the schools took a decision to increase the tuition fee ranging from 15% to 40% for the academic session 2009-2010 keeping in view all the factors which are relevant for determining such a fee. The petitioners would claim that this decision is taken keeping in view not only the increasing expenses incurred for providing better

facilities and infrastructure but primarily is to meet the requirement of additional expenditure which they would have to meet in view of the recommendation of 6th Pay Commission report. It is pleaded that in certain cases, the fee which is being charged is hardly sufficient even to meet the salary expenses and it is accordingly urged that to maintain strength of the students and to pay the salary as per the recommendation of the 6th Pay Commission report, substantial hike in tuition fee was inevitable. Respondent No.2, however, vide a general order on 6.7.2009 purportedly in exercise of powers conferred under Sections 16 (3), 21(3) read with Sections 4 and 5 of Section 17 of 1995 Act and rules framed in the year 2003 has issued directions to all unaided private schools to regulate the fees to be charged from the students w.e.f. academic session 2009-2010. Respondent No.2, inter-alia, has directed the schools that if they are to enhance the salary of staff in view of 6th Pay Commission report, then the schools may first explore the possibility of utilizing the existing reserves to meet the shortfall, if any. If the short fall cannot be so met, then direction is to increase the tuition fee only to the extent of shortfall to meet the increased expenditure. Not only that, it is further directed that tuition fee to be charged shall not be increased from 20% of the last year's tuition fee under any circumstances. A justification for the increase had also been sought for in form VI and it is further provided as a condition that only those schools which have submitted information in Form VI as per provisions of Rule 158 of the 2003 Rules within a stipulated period shall be allowed to enhance the fee. The schools

which had not submitted their information for the academic year 2009-2010 were given additional 15 days to comply with the directions. The increase of fee, if any, was to be effective from 1.4.2009. The petitioners accordingly have approached this court to challenge this direction on the ground that respondent No.2 has no authority or jurisdiction to pass such an order fixing the fee to be charged by recognised unaided private schools from the students. It is stated that there is no provision either in the act or in the rules that would entitle respondent No.2 to pass such an order. No provision in this regard is mentioned in the impugned order and hence prayer is made to quash this Annexure permitting the petitioners to raise the tuition fee.

Initially, a short written statement was filed on behalf of respondent Nos.1 to 3. Later, detailed pleas were raised in the written statement so filed. Respondents would justify the action in passing the impugned order and would contend that same is well within the jurisdiction of respondent No.2. Reference is made to Section 16(3) of the Act which provides that before commencement of academic session, the schools are required to file with the Director, a full statement of fee to be levied by all such schools during the ensuing academic session. It is accordingly pleaded that no school can charge any fee specified in the said statement. Such fee has to commensurate with the facilities provided by the schools. As per the respondents, Section 16(3) is a regulatory in nature and so the unaided recognised schools cannot claim absolute freedom to lay down the fee structure. It is accordingly pleaded that Section

16(3) of the Act is in the form of reasonable restriction on the right of petitioner-institution under Article 19 of the Constitution of India to run the unaided schools.

In the short reply, mention is made to proceedings of a meeting of all the schools affiliated with CBSE held on 11.12.2006 where some decisions were taken to the effect that all the schools shall follow the provisions of the School Education Act, 1995 and the provisions of 2003 Rules. As per this decision, it was agreed that a detailed comparative assessment of the fee charged and the facilities provided could not be made, but the management was to submit their proposal of fee structure in the coming academic session before the PTA meeting and the change was to be made, if any, jointly by the managing committee and the PTA. It is accordingly stated that it would be open to the schools with the PTA to work out the fee structure, whereas department was to deal with the anomalies/discrepancies as per law. This is termed as a balanced approach which would provide freedom to the schools to work out fee structure and on the other hand to iron out the differences, if any, in accordance with law. The respondents accordingly would plead that the recognised private schools cannot claim absolute freedom to lay down any fee structure of its own choice. As per the respondents, the schools cannot be left on to themselves to safe guard their commercial interest in absolute terms. State claims to be under bounden duty to ensure a proper fee structure, which cannot be permitted to be exploitative. It is pointed out that the school education is neither purely a business or

commercial activity nor a profit making business. To an extent, it is a social obligation. As per the respondents, the school education is a public purpose and public duty and since the State cannot monopolies facilities for school education, private unaided schools are allowed to set up schools. These schools may be unaided but they are partners with the State in discharging the public duty. Respondents would further plead that both private and Government schools have to ensure that school education reaches to all those, who are in need of the same. It is, thus, stated that the State can always impose reasonable restrictions as running of school is not purely a commercial or a business activity.

The respondents would urge that order, Annexure P-1, has been passed in exercise of specific powers conferred in the Act and Rules. The instructions/restrictions, if any, are reasonable, just and fair. It is pointed out that the schools have been given liberty to increase tuition fee upto 20% of the last year tuition fee, which is substantial increase. The schools, thus, cannot make any grievance. Reference is also made to that part of the order where schools have been asked to explore all possibilities of utilising the existing reserves to meet the shortfall. it is pointed out that the schools have been revising the fee structure frequently from time to time and the pay structures have now been increased after a gap of ten years. To justify their action, the respondents would plead that it would be reasonable for the schools to first utilise the existing reserves, which would be a balanced approach. As per the respondents, the judgment in the case of T.M.A. Pai Foundation

relied upon by the petitioners does not give right to the private schools to lay down the fee structure which may be arbitrary and violative of Article 14 of the Constitution. The plea further is that the Hon'ble Supreme Court has not granted any freedom to work out fee structure.

In the detailed written statement filed by the respondents, preliminary objection is raised about the maintainability of the writ petition. It is urged that the petitioner schools could very well challenge the impugned order before the Financial Commissioner and Principal Secretary, Government of Haryana under 2(b) of Haryana School Education Rules, 2003. Reliance is placed on Sections 16(3) & (4) of the Act and the provisions of the rules, which, as per the respondents would empower them to formulate and regulate the fee structure and other funds to be charged from the students. It is accordingly stated that these legal provisions clearly establish that the fee structure of unaided private recognised schools is always subject to the approval of the prescribed appropriate authority, i.e., Director Secondary Education, Haryana and without his concurrence, fee structure cannot be changed. The requirement of submitting Form-VI as per the rules is highlighted, besides making reference to such forms submitted by various petitioners. These forms were statedly under process as per the reply. Reference is made to the case of Action Committee, Unaided Private Schools & Others Vs. Director of Education, New Delhi, 2009(11) SCALE 77, where it is held that “to set up a reasonable fee structure is also a component of right to

establish and administer an institution within the meaning of Article 30(1) of the Constitution, as per the law declared in Pai Foundation. Every institution is free to devise its own fee structure subject to limitation that there can be no profiteering and no capitation fee charged directly or indirectly". As per the respondents, it is obligation of the Administrator or the Director of Education to prevent commercialization and exploitation in private unaided schools. Reference is made to notices and reminders issued to parents for payment of hike dues, which is termed as inhuman. There was accordingly a resentment against the fee hike in charging of funds and arrears of salaries of teaching and non-teaching staff due to revision in salary, which was voiced through various representations received from Millennium Parents' Association, Gurgaon and some other associations. It was then found that the aforesaid institutions were committing violation of act and rules and had hiked the fee structure without concurrence of the competent authority. In order to regulate the fee structure the impugned order was issued, which is stated to be legal, valid and binding on the petitioners.

The counsel for the parties have made detailed submissions spanning over few days and have referred to large number of precedents mostly of the Hon'ble Supreme Court. The gist of the submissions made on behalf of the petitioners to make a challenge to the impugned order is on the ground that hike is justified due to increase of cost of providing facilities and infrastructure. As per the petitioners, there has been increase of

75% in the salary as per the 6th Pay Commission from 2006-2009. The Bank rates of interest have increased. There has been substantial increase in the electricity charges and usage. The cost of training teachers in getting them certified for imparting quality education has also statedly increased by 100% from 2006-09. The cost of purchasing/replacing computers/software which have become old and obsolete have also increased and there has been tremendous increase of cost in the repairs and maintenance. The petitioners would accordingly plead that respondents are not justified at all in ignoring all these factors while issuing the impugned order and certainly had gone beyond its jurisdiction to direct the petitioners to use their reserves to meet the expenditure on account of increase in salaries. As per the petitioners, there is no authority or jurisdiction with the respondents to put a cap of 20% for increasing the salary as has been directed. The petitioners would also urge that no increase order where Form-VI is not submitted, is also highly arbitrary.

The counsel for the petitioners have mainly urged that order is totally without jurisdiction and is illegal because there is no power with the respondents to issue such direction. As per the petitioners, Sections 16(3), 21(3) and 17(4) and (5) of the Act and Rules 30(XVI), (XVII), 158, 159 and 160 of the Rules do not provide any such power and as such the impugned order is without jurisdiction. The petitioners would place heavy reliance on the case of ***T.M.A.Pai Foundation Versus State of Karnataka, AIR 2003 SC 355=(2002) 8 SCC 481*** to urge that essence of private unaided

institution is autonomy and maximum autonomy is in fixing the fee. The submission is that the decision of fixing fee is to be left with the schools and fixing rigid fee structure is an unacceptable restriction as per the view expressed in the ***T.M.A.Pai's case*** (supra).

Reliance is placed on the case of ***Islamic Academy of Education and another Vs. State of Karnataka and others,*** AIR 2003 SC 3724=(2003) 6 SCC 697, where T.M.A. Pai's judgment has been followed. Reference is also made to the case of ***P.A.Inamdar and others Versus State of Maharashtra and others, (2005) 6 SCC 537***, where it is observed by the court that every institution is free to devise its own fee structure subject to the limitation that no capitation fee can be charged and that there can be no profiteering. The petitioners would refer to the case of ***Unni Krishnan, J.P. And others Versus State of Andhra Pradesh and others,*** AIR 1993 SC 2178= (1993) 1 SCC 645, where the court had emphasized the important role being played by private unaided educational institutions and the need for private funding. On the basis of rule of law in the case of ***Cochin University of Sciences and Technology and Anr.Vs. Thomas P. John and Ors. (2008) 8 SCC 82*** it is urged that an educational institution must be left to its own devices in the matter of fixation of fees. Number of other judgments were also referred and relied upon by the counsel, reference to which would be made at relevant place while dealing with the issues.

On the contrary, the counsel appearing for the respondents alongwith some of the parents' association would

seriously join issue with the line of submissions made on behalf of the petitioners. It may be noticed here that misc.applications were filed by some of the Parents' Associations, like Faridabad Model School Parents' Association, Dynasty Parents Association, Faridabad and Eicher Parents Association for being impleaded as party respondents. This court, however, was of the view that the issue can conveniently and affectively be adjudicated even without allowing the associations aforesaid to become a party. However, in the interest of justice, these institutions were allowed to intervene but without filing any pleadings. The counsel representing such parent associations have accordingly been heard, though, prima-facie I am of the view that they have no locus. During the pendency of the case, the court had issued some interim direction for the respondent-State not to take any coercive measures against the petitioners and the petitioners were directed not to charge any enhanced fee more than permitted till the next date of hearing. This order was passed on 12.10.2009. The interim order was subsequently continued. A contempt petition also was filed which was kept for hearing alongwith these writ petitions.

The counsel for the respondents have relied upon directive principle contained in Article 41 of the Constitution, whereby the State is to make effective provision for securing right to education. Reliance is placed on the judgment of Government of ***A.P. Vs. Medwin Educational Society***, ***AIR 2004 SC 613*** to submit that the right to establish and administer educational institutions although available to all citizens as a fundamental right

under Article 19(1)(g) and to manage religious affairs under Article 26 and that of minorities under Article 30 of the Constitution, but the same is subject to reasonable restrictions. The plea accordingly is that court is to see whether the restriction imposed by the State of Haryana through the impugned circular is reasonable or not. Reference is then made to the provisions of the Education Act and also to the requirement for every recognised school to file statement of fee to be charged before the commencement of academic session. Accordingly, it is submitted that Government can regulate education. To justify the circular, the State counsel would plead that they are to utilise the existing reserves to meet the shortfall, if any, due to enhanced salary and this could be so issued in terms of Section 16(3). The counsel, thus, would justify the direction not to enhance the fee beyond 20% of the prevailing fee, which would be in consonance with terms of Section 16(3) and Rule 158.

The counsel would further submit that question of justification of enhancing fee beyond 20% can be answered in favour of the schools, if they show that despite utilisation of reserve, they would not be able to meet the enhanced pay of the teachers. Conceding that even if there is no direct provision in the Statute authorizing the respondent-Government to put a cap, such a course would be permissible as per the law laid down by the Supreme Court. In this context, reference is made to the case of ***Modern School Versus Union of India***, AIR 2004 SC 2236 and the decision in review in the case of Action Committee, Unaided Pvt. Schools (supra). Submission is that in these cases, it has been

viewed that the schools shall not increase the rate of tuition fee without the prior sanction of the Directorate of Education, Delhi Administration. The counsel for the respondents would also rely on the cases of *T.M.A. Pai, P.A. Inamdar* and *Islamic Academy* (supra) to plead that where appropriate legislation is not there, the fee can be regulated even by setting up committees. The respondents would accordingly plead that the writ petitions be dismissed.

On the basis of respective submissions advanced by the counsel for the parties, the issues which arise for consideration may be summed up as under:-

(a) Whether the Government has power to issue directive of the nature of Annexure P-1;

(b) Whether there would be any power with the Government to put a cap on the increase of fee either under the Act or in terms of the law laid down by the courts;

(c) Whether the schools have unbridled and uncontrolled power to increase the fee.;

(d) Whether the direction to increase the fee uniformly in respect of all schools could be so issued;

(e) Whether the directions as issued by the respondent-State would abridge the fundamental right of the petitioner-institution or it could be termed as a reasonable restriction to pass the test of constitutional validity;

Let us first see the provisions of the Act under which the impugned order has been issued. The main provision in this regard is section 16(3) of the Act and the same is as under:-

> "(3) The Manager of every recognised school shall, before the commencement of each academic session, file with the Director a full statement of the fees to be levied by such school during the ensuing academic session, and except with the prior approval of the Director no such school shall charge, during the academic session, any fee in excess of the fee specified by its Manager in the said statement. Such fee should commensurate with the facilities provided by such school."

Rule 158 relates to notifying of fee and funds and is as under:-

> "Notifying fees and funds.-sections 24(2), 25, 16 and 17.
>
> (1)The fees and funds to be charged from the pupils shall be notified by every recognized school.
>
> (2) The manager of every recognised school shall submit the detail of minimum facilities being provided and the maximum fee charged in Form VI. He shall before the commencement of each academic session, file with the Department a full statement of the fees and all types of funds levied by such school during the ensuing academic session justifying it. No such school shall charge any fee in excess of the fee/funds

specified by the manager in the said statement during the academic session. Each school shall submit proforma duly filled in by Ist January of every year to the appropriate authority which shall publicly display these details. Such charges can only be levied after these have been displayed in its wamper.

(3) No other charges such as capitation fee shall be taken from the children/parents.

[(4) No school shall be allowed to charge admission fee, tuition fee, pupil's fund in advance before the commencement of the academic session. However a token registration fee can be charged.

(5) No admission fee, tuition fee except school leaving certificate (SLC) fee be charged from the pupil who apply for SLC within 15 days of start of new academic session.

(6) Admission fee shall only be charged from a student at the time of admission in class Ist, 6th, 9th and 1th or fresh entry in the school.

(7) The fees shall preferably be taken from the students through bank.]"

Section 17 of the Act makes a provision regarding school funds and sub-section (4) thereof provides that income derived by unaided schools by way of fees shall be utilized only for such educational purposes as may be prescribed. Sub-sections (4) and (5) of Section 17 are as under:-

"(4) (a) Income derived by un-aided schools by way of fees shall be utilised only for such educational purposes as may be prescribed; and

(b) charges and payments realised and all other contributions, endowments and gifts received by the school shall be utilised only for specific purpose for which they were realised or received. The unspecified gifts shall also be used for academic purpose.

(5) The Managing Committee of every recognised private school shall file every year with the Director such duly audited financial and other returns as may be prescribed and every such return shall be audited by such authority as may be prescribed."

Section 21 relates to the power of the Director to give direction for rectifying the defects or deficiencies in the working of the schools. This provision may also be referred to and is as follows:-

"21. Inspection of Schools.-(1) Every recognised school shall be inspected at least once in each financial year in such manner as may be prescribed.

(2)The Director may also arrange special inspection of any school on such aspects of its working as may, from time to time, be considered necessary by him.

(3) The Director may give directions to the managing committee requiring it to rectify the defects or deficiencies found at the time of inspector or

otherwise in the working of the school.

(4) If the managing committee fails to comply with any directions given under sub-section (3), the Director may, after considering the explanation or report, if any, given or made by the managing committee, take such action as he may deem fit, including-

(a) stoppage of aid (in case of aided schools)'

(b) withdrawal of recognition; or

(c) taking over of management."

The reading of impugned order clearly shows that the Director has invoked his power under Sections 16(3), 21(3) read with sub-sections (4) and (5) of Section 17 of the Haryana School Education, Act. Here it would be convenient to make reference to the directions so issued through Annexure P-1 and the same is as under:-

"In exercise of powers conferred under Section 16(3), 21 (3) read with sub sections (4) & (5) of Section 17 of the Haryana School Education Act, 1995 and with Rules 30 (XXVI), (XXVII), 158, 159, 160 of the Haryana School Education Rules, 2003 and all other powers conferred upon the Commissioner & Director General School Education, I, Anurag Rastogi, Commissioner & Director General School Education, Haryana hereby give the following directions to all the recognized un-aided Private schools in the State of Haryana to regulate the fees to be charged from students with effect from the

academic session 2009-2010.

1. If a recognized School has enhanced the salary of the staff in the wake of the 6th Pay Commission, it may first of all explore the possibility of utilizing the existing reserves to meet the shortfall, if any. In case the shortfall cannot be met from the existing reserves it may increase the tuition fee to be charged from the students to the extent of the shortfall in funds to meet the increased expenditure. However, the tuition fee to be charged from the students shall not be increased beyond 20% of the last year's tuition fee under any circumstances. The detailed justification of the increase in the fees shall be submitted in Form VI to the Appropriate Authority.
2. Subject to the above stipulation only those schools which have submitted the information in Form VI as per provisions of Rule 18 of the Haryana School Education Rules, 2003, within the stipulated period, shall be allowed to increase the fees.
3. Those schools which have not submitted their information in Form VI for the academic year 2009-10 are given an additional period of 15 days from the date of issue of this order, to submit the same.
4. The increase of fee, if any, shall be effective from 01 April, 2009."

Section 16(3) requires a Manager of every recognised

school to file with the Director full statement of fees during the ensuing academic session and thereafter no school can charge, without prior approval of the Director, any fee in excess of the fee specified by its Manager in the said statement. The Section further provides that such fee should commensurate with the facilities provided by such school. Section 17(4) makes a provision regarding utilisation of the income derived by unaided schools and it has to be only for such educational purposes as may be prescribed. Further provision is made that the charges and payments realised and all other contributions, endowments and gifts received by the school are to be utilized only for specific purpose for which these are realised or received. Sub-section (5) of Section 17 requires the managing committee of the school to file a duly audited financial and other returns every year with the Director. Section 21 of the Act gives a power to the Director to give direction to the managing committee to rectify the defects or deficiencies found at the time of inspection or otherwise in the working of school. Rule 158 of the Rules talks of notifying the fees and funds by making a provision that the fees and funds to be charged from the pupil shall be notified by every recognised school. Rule 158(2) requires of a Manager to submit details of facilities being provided and the maximum fee charged in Form-VI. This form is required to be filed at the commencement of academic session and the school cannot charge any fee in excess of the fee/funds specified by the Manager. Then Rule 158(3) makes a specific provision that “no other charges such as capitation fee shall be taken from the children/parents.”

Rule 159 makes a provision for issue of printed receipt for every fee and funds collected and employee collecting any such fee or funds is required to immediately enter the particulars of such collection in the attendance register of the class. Rule 160 prohibits charging of any fund from the students except red cross fund, child welfare fund and sports funds as per the instructions issued by the department from time to time.

Detailed analysis of the relevant provisions would prima-facie show that there is no enabling power with the Director to put a cap on the tuition fee. What all these provisions would require of the school is to file a full statement of fees, which, the school is going to charge for ensuing academic session and provisions are made for statements to be filed about the details of minimum facilities. The restriction, if any, is for charging any fee in excess of fee so specified by the Manager and in case any fee in excess is to be charged, the prior approval of the Director would be needed. Though the counsel for the respondents were vehement in this submission that these provisions clearly show that Government can regulate education but realising the difficulty had to concede that even if there is no direct provision in the Statute authorizing the Government to put a cap, the same would be permissible as per the law laid down by the Hon'ble Supreme Court. The reference, therefore, would have to be made to the judgments referred to and relied upon by the counsel for the parties to see if there is such enabling power which is so recognised by the Hon'ble Supreme Court or would emerge from the ratio of law laid down in these

cases.

Both the parties in this regard have placed heavy reliance on the case of ***T.M.A.Pai Foundation*** (supra). The Hon'ble Supreme Court in this case has considered in detail large variety of issues. The first issue which the court has considered is under the head "if is there a fundamental right to set up educational institution and if so under which provision." After making reference to various provisions in the judgments, the court in this regard held as under:-

> "The establishment and running of an educational institution where a large number of persons are employed as teachers or administrative staff, and an activity is carried on that results in the imparting of knowledge to the students, must necessarily be regarded as an occupation, even if there is no element of profit generation. It is difficult to comprehend that education, per se, will not fall under any of the four expressions in Art. 19(1)(g). "Occupation" would be an activity of a person undertaken as a means of livelihood or a mission in life. The above quoted observations in Sodan Singh's* case correctly interpret the expression "occupation" in Art. 19(1)(f)."

The Court then had considered the fact if ***Unni Krishnan's*** (supra) case required reconsideration. In this case, the court had considered the condition and regulation , if any, which the

*** Sodan Singh and others v. New Delhi Municipal Committee and others (1989) 4 SCC 155.**

State could impose in the running of private unaided/aided recognised or affiliated educational institution, conducting professional courses, such as medicine, engineering etc. The court in ***Unni Krishnan's*** (supra) had taken a view that private unaided recognised/unaffiliated educational institution running professional courses were entitled to charge a fee higher than that charged by the Government institution for similar courses, but that such a fee could not exceed the maximum limit fixed by the State. The Hon'ble Supreme Court in ***T.M.A. Pai Foundation's case*** (supra) in this regard has held as under:-

> "In view of the discussion hereinabove, we hold that the decision in Unni Krishnan's case, insofar as it framed the scheme relating to the grant of admission and the fixing of the fee, was not correct, and to that extent, the said decision and the consequent directions given to UGC, AICTE, Medical Council of India, Central and State Governments etc., are overruled."

While taking the above noted view, the Hon'ble Supreme Court has clearly observed that the scheme framed by the court in this case and followed by the Government could not be called a reasonable restriction under Article 19(6) of the Constitution. Court was of the view that ***Unni Krishanan's*** judgment has created certain problems and raised thorny issues. The court in its anxiety to check commercialization of education, framed a scheme of "free" and "payment" seats on the assumption that economic capacity of first 50% of admitted students would be greater than the remaining

50%, whereas the converse has proved to be a reality. Noticing that normally the reason for establishing an educational institution is to impart education and that such institution would need qualified and experienced teachers and so also the proper facilities and equipment for which there would be requirement of capital investment. Teachers are also required to be paid properly. The court was, therefore, to observe that **Unni Krishanan's** case made it difficult, if not impossible, for the educational institution to run efficiently. Otherwise, the Hon'ble Supreme Court in ***T.P.A. Pai's case*** (supra) had noted the observation of the court in ***Unni Krishanan's case,*** wherein it was observed that private educational institutions are a necessity in the present day context. It was also observed that it is not possible to do without them because the Governments are in no position to meet the demands particularly in sector of medical and technical education, which call for substantial outlays. Thus, the role of private educational institutions, including minority educational institutions was duly recognised.

The Hon'ble Supreme Court in ***T.M.A.Pai's case*** (supra) also considered the power of the Government to regulate a private institution and if so to the extent it could be done. It was noted by the court that right to establish and administer education institution broadly comprises of right to admit students, to set up reasonable fee structure, to constitute a governing body, to appoint staff teaching and non-teaching and to take action if there is dereliction of any duty. After considering various aspects, the court ultimately held that right to establish an educational institution can be

regulated but such regulatory measures must be to ensure maintenance of proper academic standards etc. Not only that, the court observed that fixing of a rigid fee structure, dictating the formation and composition of a governing body, compulsory nomination of teachers and staff for appointment or nominating students for admissions would be an unacceptable restriction. The relevant observations in this retard are as under:-

> "54. The right to establish an educational institution can be regulated; but such 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-admission by those in charge of management. The fixing of a rigid fee structure, dictating the formation and composition of a governing body, compulsory nomination of teachers and staff for appointment or nominating students for admissions would be unacceptable restrictions.
>
> 56. An educational institution is established for the purpose of imparting education of the type made available by the institution. Different courses of study are usually taught by teachers who have to be recruited as per qualifications that may be prescribed. It is no secret the better working conditions will attract better teachers. More amenities will ensure that better students seek admission to that institution. One

cannot lose sight of the fact that providing good amenities to the students in the form of competent teaching faculty and other infrastructure costs money. It has, therefore, to be left to the institution, if it chooses not to seek any aid from the Government, to determine the scale of fee that it can charge from the students. One also cannot lose sight of the fact that we live in a competitive world today, where professional education is in demand. We have been given to understand that a large number of professional and other institutions have been started by private parties who do not seek any governmental aid. In a sense, a prospective student has various options open to him/her where, therefore, normally economic forces have a role to pay. The decision on the 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.

57. We, therefore, wish to emphasize one point, and that is that inasmuch as the occupation of education is, in a sense, regarded as charitable, the Government can provide regulations that will ensure excellence in education, while forbidding the charging of capitation fee and profiteering by the institution. Since the object of setting up an educational institution is by definition “charitable” , it is clear that

> an educational institution cannot charge such a fee as is not required for the purpose of fulfilling that object. To put it differently, in the establishment of an educational institution, the object should not be to make a profit inasmuch as education is essentially charitable in nature. There can, however, be reasonable revenue surplus, which may be generated by the educational institution for the purpose of development of education and expansion of the institution."

The issue again came up for consideration before the Hon'ble Supreme Court in ***Islamic Academy's Case*** (supra). The Hon'ble Supreme Court followed the ratio of law as laid own in ***T.M.A.Pai Foundation's case*** ***(supra)*** and held that there should be maximum autonomy of unaided schools. While interpreting para 56 of the judgment in ***T.M.A.Pai Foundation***, the Hon'ble Supreme Court clearly upheld the autonomy of private unaided professional colleges minority and non-minority as regard determination of his own fee structure was concerned. As held in ***T.M.A. Pai Foundation case***, decision on fees to be charged must be necessarily left to private institution. While so observing, the Hon'ble Supreme Court also clarified that though the private institution has a right to fix its own fee structure but no profiteering and capitation fee can be charged. Like in the present case, the parties appearing in ***Islamic Academy's case*** (supra) also relied on various passages and the observations made in ***T.M.A. Pai***

Foundation 's case (supra). In this context, the Hon'ble Supreme Court listed the following questions for consideration in ***Islamic Academy's case*** (supra):-

1) Whether the educational institutions are entitled to fix their own fee structure;
2) whether minority and non minority educational institutions stand on the same footing and have the same rights;
3) Whether private unaided professional colleges are entitled to fill in their seats, to the extent of 100%, and if not to what extent; and
4) Whether private unaided, professional colleges are entitled to admit students by evolving their own method of admissions."

The question of right of the educational institutions to fix their own fee structure, thus, was considered by the Hon'ble Supreme Court in ***Islamic Academy's case*** (supra) as well. The Hon'ble Supreme Court observed that so far as this question is concerned, the view of majority judgment was very clear. The court further observed that:-

> ".....there can be no rigid fee structure by the government. Each institution must have the freedom to fix its own fee structure taking into consideration the need to generate the funds to run the institution and to provide facilities necessary for the benefits of the students. They must also be able to generate surplus

which must be used for the betterment and growth of that educational institutions."

After making reference to paragraph 56 of the judgment in ***T.M.A. Pai Foundation's case*** (supra), it is observed that it was categorically laid down that the decision on the fees to be charged must necessarily be left to the private educational institutions that do not seek aid and which are not dependent upon any funds from the Government. Each institution was held entitled to have its own fee structure and this fee structure for each institution must be fixed keeping in mind the infrastructure and facilities available, the investments made, the salaries paid to the teachers and the staff, future plans for expansion and/or betterment of the investment etc. Here again it was observed that there can be no profiting and capitation fees cannot be charged. The Hon'ble Supreme Court also emphasized the need noticed in the majority view expressed in ***T.M.A.Pai Foundation's case*** to the effect that imparting of education is essentially a charitable in nature and, thus, the surplus/profits that can be generated must be for the benefit of the education institution. It is also held that profits/surpluses cannot be diverted for any other use and purpose and cannot be used for personal gain and any other business or enterprise.

Significantly, the court also observed that there are some statutes/regulations which govern the fixation of fee but at the same time viewed that the court has not yet considered the validity of these statutes/regulations and accordingly issued directions to each State to set up a committee headed by a retired High Court

Judge to go into the fee structure. Right to establish an institution is provided for under Article 19(1)(g) of the Constitution of India. Such a right, however, is subject to reasonable restriction which may be imposed as per the law laid down in ***T.M.A. Pai Foundation's case*** and ***Islamic Academy*** case (supra).

Yet again, an issue came up for consideration in ***P.A.Inamdar's case*** (supra). Two out of the four questions, which the court formulated for consideration in this case were:-

> "(i) whether Islamic Academy (supra) could have issued guidelines in the matter of regulating the fee payable by the students to the educational institutions? and;
>
> (ii) can the admission procedure and fee structure be regulated or taken over by the committees ordered to be constituted by ***Islamic Academy's case ?***

It may be noticed that the real task of the court in ***P.A.Inamdar's case*** was to cull out the ratio decidendi of T.M.A. Pai foundation's case and to examine if the explanation or clarification given by the five-Judge bench in Islamic Academy ran counter to T.M.A. Pai Foundation case and if so to what extent. The seven-Judge bench in ***P.A.Inamdar's case*** clearly noticed that it was not to pronounce its own independent opinion on several issues which arose for consideration in ***T.M.A.Pai Foundation's case*** (supra). The Bench has clearly observed that even if it was inclined to disagree with any of the findings amounting to declaration of law by the majority in T.M.A. Pai Foundation case, it cannot that being a pronouncement by an eleven-Judge bench

which was stated to be binding on this bench. The Court accordingly had noticed that it cannot express the dissent or disagreement, howsoever it may be inclined to do so on any of the issues. That being the position of law, the same would be the position of any observation that may have been made in ***Islamic Academy's case***.

In regard to the fee structure, the court while interpreting ***T.M.A.Pai Foundation's case*** has held that to set up a reasonable fee structure is also a component of the "right to establish and administer an institution" within the meaning of Article 30(1) of the Constitution as per the law declared in ***T.M.A. Pai Foundation's case*** (supra). It is further observed that every institution is free to devise its own fee structure subject to the limitation that there can be no profiteering and no capitation fee can be charged directly or indirectly or in any form. Thus, the court answered the question by observing as under:-

> "Our answer to Question 3 is that every institution is free to devise its own fee structure but the same can be regulated in the interest of preventing profiteering. No capitation fee can be charged."

On the other hand, the counsel for the respondents would not only invoke the fiat of Article 41 of the Constitution which enjoins upon the State to make effective provisions for securing right to education but would rely upon observations made by the Hon'ble Supreme Court in ***Medwin Educational Society's case***

(supra). Reference in this regard is on the observations made by the court to the effect that right to establish and administer education institution although is available to all citizens, but the same are subject to reasonable restrictions. It is accordingly emphasized that this court has to see whether the restriction imposed by the State of Haryana by issuing impugned circular is reasonable or not. To justify the direction issued in the circular, it is highlighted that the schools have been told to meet the requirement of enhanced salary by utilising the existing reserves to meet the short fall. Plea is that every school has reserved funds and so this part of direction could be issued and is reasonable. The second part of direction is that if the short fall cannot be met from the existing reserves, then the tuition fees may be increased to meet the short fall.

The direction issued to the effect that the tuition fees cannot be enhanced beyond 20% of the prevailing fees is justified in terms of Section 16(2) and Rule 158 of the Rules. Reliance has also been placed on the observations made by the Hon'ble Supreme Court in ***Modern School's case*** (supra) where it is observed that Director of Education has authority to regulate quantum of fees charged by the schools. Object is to prevent commercialization of education. This observation primarily has been made on the basis of the provision made in Delhi Education Act. Section 18(3) of this Act makes a provision for every recognised unaided school to maintain a fund called “regcognised unaided school fund” consisting of income accruing to the school by way of

fees, charges and contribution. Section 18(4)(a) of the Act then provides that income derived by unaided schools by way of fees shall be utilised only for educational purposes. Rule 172(1) of the Rules framed states that no fee shall be collected from any student by the trust/society running any recognised school whether aided or unaided. While interpreting these provisions and some other provisions of the rules, these observations have apparently been made.

The provisions of the Haryana Act are somewhat different. As already noticed, the impugned order has been passed under Section 16(3), 21(3) read with sub-sections (4) and (5) of Section 17 of the Act and Rules 30 (XXVI, XXVII), 158, 159, 160 of the Education Rules. Section 16(3) requires of a Manager only to file with the Director a full statement of fees to be levied by such school during the ensuing academic sessions, and except with the prior approval of the Director, no school can charge, during academic session any fee in excess of the fee specified by the Manager. This provision, thus, cannot be read to empower the Director to issue direction for putting a cap on the fees structure. Rule 158 again talks of notifying fees and funds to be charged and for Manager to submit details of minimum facilities being provided and the maximum fee charged in Form VI. The Manager is also required to file a full statement of fees and all types of funds levied by such schools during the ensuing academic session justifying the same and no school, thus, shall charge any fees in excess of the fee/funds specified by the Manager. Section 17 of the Act then

makes a provision for utilising the income derived by unaided schools only for such education purposes as may be prescribed. Managing Committee of every such recognised private school is also enjoined upon to file with the Director duly audited financial and other returns as may be prescribed. These provisions, thus, apparently are not giving any power to the Director to lay down any fees structure for unaided institutions. No doubt, the Director has power to seek rectification of the defects and deficiencies in the working of the schools and if he issues any such directions and the managing committee fails to comply with these, then the Director is entitled to take such action which may include stoppage of aid, withdrawal of recognition or taking over of management. These provisions, thus, in no way leave any power with the Director to issue direction for fixing the fees.

Reference in detail has been made to the authoritative pronouncement of eleven Judges bench in ***T.M.A. Pai Foundation*** (supra) to notice that educational institutions are free to fix their fee structure. The provision of Haryana Act as enacted is in consonance with these observations.

The ratio of law laid down in ***T.M.A.Pai Foundation's case*** has been culled out on more than one occasion initially by five Judges bench and later on by seven Judges bench in the cases of ***Islamic Academy*** and ***P.A.Inamdar*** (supra). So far as the aspect of right of education institution to fix the fee is concerned, it has consistently been held that the institutions are free to fix their fee structure. However, what cannot be done and certainly can be

checked is that no profiting can be done and no capitation fees can be charged. Analysising the impugned circular in the light of law as laid down, it would emerge that the directions are not issued on the ground that the schools are indulging in some profiting or are using capitation fees. The detailed reference made to the law laid down in ***T.M.A. Pai Foundation's case*** (supra) would show that right to establish an education institution can be regulated but such regulatory measures must be to ensure maintenance of proper academic standards. Fixing of a rigid fee structure, dictating the formation and composition of a governing body, compulsory nomination of teachers and staff for appointment or nominating students for admission was held to be unacceptable restrictions. The court has observed that the better working conditions will attract better teachers and more amenities will ensure that better students will seek admission to the institution. Further, providing good amenities to the students in the form of component teaching faculty and other infrastructure would cost money. These were the considerations which weighed with the court to conclude that fixing of a fee structure has to be left to the institution if it chooses not to seek any aid from the Government. The court has also held the education to be an occupation, which in a sense, is regarded as charitable. Accordingly, the Government was held entitled to provide regulations that could ensure excellence in education and could also forbid charging of capitation fee and profiteering by an institution. The object of such institution which to an extent is charitable should not be to earn a profit. The need to have revenue

surpluses which may be generated by the education institution was also felt for the purpose of development of education and expansion. The impugned order apparently is passed while ignoring these aspects and the important observation made by the Hon'ble Supreme Court. Rather, the petitioner institutions are being asked to eat up their reserves to meet the enhanced requirement of paying salary to the teachers on the basis of recommendation of 6th pay Commission, which would in a way gag these institutions to generate revenue surpluses and may ultimately lead to retarding the development and expansion of the institution. The Director certainly would have been in a position to issue direction in case he found that the schools were indulging in charging capitation fee or primarily are resorting to profiting. The impugned notification does not make any mention to any of these two aspects and has directed the institutions to utilise their existing reserves to meet the short fall and if still there is a need to increase the fee, then there is a cap of 20% of the last year tuition fees.

The petitioner institutions would be justified in making a grievance that this cap has been put without any study if 20% increase would meet the additional requirement which would have to be incurred by the institutions. The submission also is that this embargo has been placed uniformly in all the institutions irrespective of conducting any study as regards the facilities that are being provided by a particular institution. The counsel for the petitioners. therefore, would plead that this will reflect non application of mind. The petitioner institutions, thus, would term this

order to be violative of equality clause under Article 14 of the Constitution and one which would abridge their fundamental right to run this institution as contained in Articles 19(1)(g) and 19(6) of the Constitution. The plea apparently is not without substance when it is urged that the Director could have applied his mind by asking the institution to give details of the extra expenditure required to be incurred by them. The Director could have gone into all these aspects and competently issued certain directions if he found that the increase is only for the purpose of profiting or if any capitation fee was being charged. The order as it stands gives an impression that no such exercise was done and without any basis a yardstick of 20% cap in increase was put. The considerations which really are needed to be kept in mind apparently have been ignored.

Modern School's case (supra) apparently is not taking any different view and perhaps could not go against the ratio of law laid down in ***T.M.A.Pai Foundation's case*** (supra). The unaided institutions were found to exercise great autonomy for determination of fee structure as these were entitled to generate a reasonable surplus for development of education and expansion of the institution itself. In ***Modern School's case*** (supra) thus, it is clearly observed that what is prohibited is commercialization of education and diversion of profit/surplus for any other use or purposes and the use thereof for personal gain or for other business or enterprise. Restrictions on profiteering and charging of capitation fees were highlighted in ***Modern School's case***. No doubt, it was observed that balance is to be struck between autonomy of such institutions

and measures to be taken to prevent commercialization of education. Thus, in the ***Modern School's case*** (supra) also, the court required the balance to be struck between the autonomy of such institution to fix fee structure and right of the authorities to prevent commercialization. The impugned order (Annexure P-1) certainly does not give any indication that aim of this order is to prevent commercialization or to stop profiting. The respondent authorities would well be within their right to regulate the fixing of fee if the finding is that the fee has been fixed in a manner which leads to profiteering or is resulting in commercialization of the education or if any capitation fee is being charged. The perusal of the provision of the Act would also show that by ensuring Manager to file details of the fee structure every year the authorities are only exercising the power to over see if there is any commercialization or profiting being indulged in by the unaided institutions. If there is any finding in this regard by the authorities, they would certainly be in a position to act in view of the law laid down in ***T.M.A.Pai Foundation*** and ***Islamic Academic etc.***

An application for review of Modern School's case was also filed which was declined by making reference to the principle as enunciated in ***T.M.A.Pai Foundation*** and ***Islamic Academy cases*** (supra) for fixing fee structure which were found to have been illustrated. It is noticed that these principles did not deal with determination of surplus and a portion of savings. It was noticed that as per certain directions issued, every school was required to prepare a balance sheet and profit and loss account. Such

condition was found to be of a nature which did not sub-plant the rule in this regard. It was observed that if reasonable fee structure is the test, then transparency and accountability are equally important. That is what the aim of Section 16(3) and 21(3) of the Act and Section 17 thereof alongwith other rules. The net result of the above discussion, thus, is that the impugned order putting a cap on the fixing of increase in the tuition fees not more than 20% is beyond the scope of statute as well as in violation of the law laid down by the Hon'ble Supreme Court. I would hasten to add here, however, that if the Director of School Education finds that the petitioner institutions are in any manner resorting to profiteering and have increased the fee for the purpose of commercialization or are charging the capitation fee, then the Director would certainly be in a competent position to issue direction to interfere in the charging of fee to the extent that it leads to commercialization/profiting etc. There has been no challenge to the right of the respondents to require of the petitioner institutions to submit yearly returns giving out the details in form IV and that is well within the right of the respondents to ensure transparency and accountability. Mere asking of these reports would be meaningless ritual if it is construed that the Director would lack in power to issue any direction to check the profiting commercialization or charging of capitation fee. Mere right to interfere in fixing of fee structure without any finding that the institutions are resorting to charging of capitation fee or are indulging in profiteering or commercialization of the education would be unreasonable restriction on the right of these institutions to

engage themselves in this occupation.

The writ petitions are accordingly allowed. The impugned order (Annexure P-1) is set-aside. However, liberty is given to the respondent-Director School Education to reconsider the entire issue and pass an appropriate order/directions in accordance with law as noted above. In case the Director finds that the present institutions are indulging in any commercialization, profiting or charging of capitation fee, then he would have authority to check and prevent the same by passing an appropriate order. There shall, however, be no order as to costs.

April 27, 2011 ***(RANJIT SINGH)***
ramesh ***JUDGE***