IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

1. **CWP No.4925 of 2014(O&M)**

Haryana Progressive Schools Conference (Regd.)

…Petitioner

Versus

Union of India and others

... Respondents

2. **CWP No.5034 of 2014(O&M)**

Coordination Committee Private Unaided Schools Association (Regd.)

…Petitioner

Versus

Union of India and others

... Respondents

and

3. **CWP No.5259 of 2014(O&M)**

Haryana United Schools Association

…Petitioner

Versus

State of Haryana and another

... Respondents

Date of Decision: **April 01, 2015**

CORAM: HON'BLE MR. JUSTICE SATISH KUMAR MITTAL
HON'BLE MR. JUSTICE HARINDER SINGH SIDHU

Present: - Mr. Puneet Bali, Sr. Advocate with
Mr. Arun Guhra, Advocate
Mr. Aashish Chopra, Advocate
Mr. Rajbir Sehrawat, Advocate

Mr. Ramesh Hooda, Advocate
for the petitioners.

Mr. Naresh Kumar Joshi, Sr. Counsel
Special Engagement for UOI.

Mr. Amar Vivek, Addl. A.G., Haryana.

Mr. R.S. Bains, Advocate
Mr. Satvir Singh Hooda, Advocate
Mr. Ravi Bundela, Advocate
for intervenor.

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HARINDER SINGH SIDHU, J.

This judgment shall dispose of three Civil Writ Petitions bearing Nos.4925, 5034 and 5259 of 2014 as identical issues are involved in all these petitions. However, for answering the issues, the facts are being taken from CWP No.4925 of 2014.

This petition has been filed praying for directions to quash Rule 134-A of the Haryana School Education Rules, 2003 (for short '2003 Rules'), on the ground that the same is illegal, unconstitutional, without jurisdiction and repugnant to the provisions of Right of Children to Free and Compulsory Education Act, 2009 (for short 'the 2009 Act'). In the alternative, it is prayed that the respondents be directed to formulate a rule/ mechanism to implement Rule 134-A consistent with the provisions of the 2009 Act and the Rules framed thereunder. Further prayer is to quash the memo dated 23.01.2014 (Annexure P-4).

The petitioner claims to be an association of about 273 unaided privately managed schools in the State of Haryana, which are affiliated to either the Central Board of Secondary Education (CBSE) or Indian Certificate of Secondary Education (ICSE). It is claimed that the association is registered under the Societies Registration Act, 1860. It is averred that most of the members of the petitioner association have established and are running private unaided schools in the State of Haryana for almost 20 to 30 years and are engaged in providing education to approximately 5 lacs students. Though their Schools are affiliated to CBSE or ICSE, which have their own bye-laws, but for the purpose of recognition to the Schools in the State of Haryana, they are governed by the provisions of Haryana School Education Act, 1995 (for short 'the 1995 Act'). For carrying out the puposes of the 1995 Act, the State of Haryana has framed the Haryana School Education Rules, 2003.

The Ministry of Human Resources Development, Government of India had issued a communication dated February 8, 2006 circulating the recommendations of the Committee of Central Advisory Board of Education (CABE) on Girl's education and Common School system. The Commttee had recommended as under:

> *" The unaided private schools should reserve 25-30% seats for meritorious but poor students. A percentage of fees from the elite students may be*

used to create a corpus fund for meeting the fees of the above students."

For ensuring compliance with the aforesaid recommendation, Rule 134A was introduced in the 2003 Rules in the year 2007. Rule 134A as originally introduced in 2007 reads as under:

"134-A. Reservation for poor meritorious students. Sections 24(2) and 15- The recognized private schools shall reserve 25% seats for meritorious poor students. The school shall charge fee from these students at the rate as charged in government schools. The deficit of difference of fee shall be charged from the other students of the school."

This Rule was amended in 2009 as under:-

"134-A Reservation for meritorious students belonging to economically weaker sections. Section 24(2) and 15. The recognized private schools shall reserve 25% seats for meritorious students belonging to economically weaker section. The school shall charge fee from these students at the rate as charged in government schools."

Further, it was amended in 2013 and now reads as under:-

"134. Reservation for meritorius students belonging to the Economically Weaker Section. Section 24(2) and Section 15 recognized private schools, shall reserve 10% seats for meritorius students belong to economically weaker section and

BPL (Below Poverty Line) category. The school shall charge fee from these students at the same rate as charged in Government schools."

It is this Rule 134A that has been challenged in the present petitions.

Opening the case on behalf of the petitioners Sh. Aashish Chopra has raised the following arguments:

(1) Rule 134A operates in the same area as the 2009 Act. It is inconsistent with the 2009 Act and consequently void. The areas of inconsistency pointed out are as under:

(i) The 2009 Act is a wider beneficial legislation. The reservation provided there is 25% but in Rule 134-A the reservation provided is 10%.

(ii) In the 2009 Act, the reservation in Section 12(1) (c) is for and "Children belonging to weaker section and disavantaged group" whereas in Rule 134-A the reservation is provided *for "meritorius students belong to economically weaker section and BPL (Below Poverty Line) category.*

(iii) There is no provision of reimbursement in Rule 134-A, whereas, as per Section 12 (2) of the 2009 Act, the expenses incurred for providing free and compulsory education shall be reimbursed to the extent specified therein.

(iv) As per Section 13 of the 2009 Act, no school while admitting a child shall subject the child or his or her partents or guardian to any

screening procedure, whereas, under Rule 134-A, 10% seats are to be reserved for meritorious students belonging to the economically weaker section and below poverty line.

(2) There is no clear definition of "economically weaker section and below poverty category" provided in the Rule 134-A or any other Rule. Only an interim order dated 15.02.2012 was passed in CWP-7447-2010, giving an interim definition of the term `economically weaker section' to mean the parents, who have income of Rs.2 lacs or less than Rs.2 lacs. After the disposal of CWP-7447-2010 on 20th November, 2013, the said interim definition would no longer be applicable.

(3) The respondent-State of Haryana in its reply filed in CWP-7447-2010, had stated that the provision for reimbursement provided in Section 12(2) of the 2009 Act would be applicable only when there is non-availability of Government School, Government Aided School or specified school in a particular neighbourhood because it is the responsibility of the Government to provide free elementary education to every child in a neighbourhood school. It was its stand in that case that as the State Government had already made available neighbourhood School in every neighbourhood area, the mandate of the 2009 Act had been complied with. No private non-aided school had been declared as neighbourhood school by the Government for providing free elementary education and consequently, the Government was not liable to make reimbursement to the private

unaided schools in terms of the provisions of the 2009 Act. It was stated that the provisions of 10% reservation under Rule 134-A of the Rules has its own mandate under the 1995 Act and rules framed thereunder. It is argued that the aforementioned stand of the State which has also been reiterated in this case cannot be sustained, particularly, in view of the fact that the Hon'ble Supreme Court had sustained the 2009 Act, in its application to the private non-aided schools only because the private non-aided schools were entitled to be reimbursed the expenditure incurred by it in providing free and compulsory education to children to the extent of per child expenditure incurred by the State in a school established, owned and controlled by the State or a local authority. The absence of any provision for reimbursement in Rule 134-A renders it unconstitutional.

(4) The provision in Rule 134-A that the school shall charge fee at the same rate as charged in Government Schools has no meaning and significance, inasmuch as after the implementation of the 2009 Act, no fee is charged at elementary level in Government Schools and the education is totally free. In the absence of any specific provision for reimbursement, Rule 134-A cannot be sustained.

(5) While under the 2009 Act, private unaided schools as defined in sub-clause (iv) of clause (n) of Section 2 are required to admit children in Class I to the extent of 25% of the strength of the class, but as per Rule 134-A , 10% reservation is to be provided in all the classes from I to XII. This would not be

possible. It would entail enormous financial burden on the private unaided schools. The existing staff and infrastructure would prove insufficienct to accommodate the additional intake of 10% in every class. If this intake is insisted upon, the schools would fall foul of the stringent norms and standards specified for recognition under Section 18 of the 2009 Act.

Sh. Puneet Bali, learned senior counsel for the petitioner while adopting the aforesaid arguments additionally stressed that in Article 21-A, the responsibility of providing free and compulsory education to all children in the age group of six to fourteen years is only of the State and not of private unaided institutions. He further stressed that the 2009 Act was upheld as a reasonable restriction on the rights of private unaided institutions for two reasons, namely; one, there was a provision for reimbursement and secondly, admission was only to Class I. In this connection, he has drawn pointed attention to paragraphs 12, 27, 29, 37, 38, 40 and 49 of the judgment in **Society for Unaided Private Schools of Rajasthan v. Union of India, (2012) 6 SCC 1** (hereinafter referred as the “Society case”)

Sh. Rajbir Sehrawat, Learned counsel for some of the petitioners has stated that he has no grievance against the application of Rule 134-A to the elementary classes provided that there is a provision for reimbursement of expenses in terms of the 2009 Act. However, he states that Rule 134-A to the

extent it applies to Class IX to XII, cannot be sustained at all, being inconsistent with the provisions of the 2009 Act. He further argued that as the Schools of the petitioner association have not been declared as neighbourhood schools, hence they have no obligation to admit children belonging to the weaker section and disadvantaged group under Section 12(1) (c) of the 2009 Act. He stated that this is also the stand of the State Government in its reply filed in CWP-7447-2010 as also in the present case. With reference to **T.M.A. Pai Foundation v. State of Karnataka, (2002) 8 SCC 481**, **Islamic Academy of Education v. State of Karnataka, (2003) 6 SCC 697** and ***P.A. Inamdar v. State of Maharashtra, (2005) 6 SCC 537***, he states that three principles have been settled therein in respect of the rights of unaided private institutions:

(i) There can be no cross subsidy.

(ii) There can be no reservation of seats.

(iii) No fee can be prescribed.

He argues that Rule 134A falls foul of the aforesaid principles and hence cannot be sustained.

He states that in **Pramati Educational & Cultural Trust v. Union of India, (2014) 8 SCC 1** , it has been clearly held that the law made under Clause (5) of Article 15 of the Constitution would be valid only if there is provision in the law to ensure that the private unaided educational institutions are

compensated for the admission made therein from amongst the socially and educationally backward classes of citizens or Scheduled Castes/ Scheduled Tribes. As there is no provision for compensating the private unaided schools in Rule 134-A, it cannot be upheld.

Sh. Amar Vivek, learned Additional Advocate General, Haryana, while defending the Rule 134-A has argued as under:

(i) The pleas raised by petitioner association questioning Rule 134-A cannot be entertained, because each member of the petitioner association while applying for permission to establish the educational institution under Rule 29 of the Haryana School Education Rules, 2003 has given a specific undertaking to abide by all Rules, Regulations and instructions issued by the State Government from time to time.

(ii) The claim of the petitioner for reimbursement in terms of the provisions of Section 12(2) of the 2009 Act, cannot be sustained as the reimbursement provisions under Section 12(2) would arise only when a school is declared/ identified as a neighbourhood school within the meaning of the 2009 Act and the Rules framed thereunder. No School of the petitioner association has been declared as a neighbourhood school, so they are not covered by the provisions of the 2009 Act and are consequently not entitled to reimbursement in terms of Section 12(2) of the 2009 Act.

(iii) Rule 134-A has been framed pursuant to the

provisions of Haryana School Education Act, 1995. It operates independent of the provisions of the 2009 Act. Neither the 2005 Act nor the Rules framed thereunder including Rule 134-A is repugnant to or inconsistent with the provisions of the 2009 Act. Their operation is complementary/supplementary to that of the 2009 Act.

(iv) Article 15(5) of the Constitution as inserted by the Constitution (Ninety-third Amendment) Act, 2005 provides that nothing in Article 19(1)(g) shall prevent the State from making special provision by law for the advancement of any socially or educationally backward class of citizens or for Scheduled Caste/ Scheduled Tribes relating to their admissions to educational institutions including private educational institutions whether aided or unaided other than minority educational institutions. Rule 134-A is valid as a reasonable restriction on the rights of the petitioner unaided private schools under Article 19()(g) and is also saved by Article 15(5) of the Constitution, the validity of which has been upheld by the Hon'ble Supreme Court.

Sh. R.S. Bains, learned counsel for the intervenor states that the 2009 Act and Rule 134-A operate in different areas and there is no conflict between the two. Whereas, the object of the 2009 Act is elementary education for all, the object of Rule 134-A is that the meritorious students belonging to the economically weaker sections and below poverty line category should not be denied the best available education merely on account of their poverty. He states that it is a widely

acknowledged and admitted fact that private schools provide better quality education than the state run schools, particularly, those situated in rural areas. Making a provision for ten per cent reservation for meritorious students belonging to the economically weaker sections in private unaided schools is a reasonable restriction on rights of such schools. He states that Classes IX to XII are extremely crucial in the career of a student being the launching pad for their admissions into professional and other courses. He states that in so far as meritorious children belonging to the economically weaker sections is concerned, the full benefit of free and compulsory eduction provided under the 2009 Act would be reaped only when meritorious children of the economically weaker sections are enabled to pursue their studies in the private unaided schools which provide better facilities, infrastructure and a more competitive environment. Hence, if the State makes provision for reservation of ten per cent seats, it cannot be considered to be unreasonable. He further states that this Court in *CWP-4664 of 2012* titled as **'Haryana School Welfare Association and another Vs. State of Haryana and others'** had specifically upheld the validity of Rule 134-A as it existed in 2009 as per which 25% seats were to be reserved for meritorious students belonging to Economically Weaker Sections. By 2013 amendment to Rule 134-A of the Rules, the percentage has

been decreased from 25% to 10% making it less onerous for the schools of petitioner association. He has thus argued that the present petition is liable to be dismissed as the question regarding the validity of Rule 134A stands concluded by the decision of this Court in CWP No.4664 of 2012 *(supra)* and the same cannot be permitted to be re-agitated on the same or even additional grounds. He further states that the decision of this Court in CWP No.4664 of 2012 was not brought to the notice of this Court in CWP No.7447 of 2010 titled as **Satbir Singh Hooda Vs. State of Haryana and ors**, which was a public interest litigation seeking effective implementation of Rule 134A as amended in 2013. He states that observations in CWP No.7447 of 2010 (*supra)* that if the petitioners are aggrieved of Rule 134A they may take appropirate proceedings in accordance with law cannot be relied upon by the petitioners to contend that they have been granted liberty to challenge Rule 134A, because the liberty granted therein to challenge the vires of Rule 134-A of the Rules was granted in ignorance of the decision of this Court in CWP No.4664 of 2012. He states that the petitioner Association was a respondent in that case, but they did not bring to the notice of the Court that the challenge to the vires of Rule 134A had already been repelled by the High Court in CWP No.4664 of 2012. He has referred to Articles 15(4), 15(5), 21A, 41, 46, 51-A(k), which all emphasize the importance that the

Constitution attaches to the education. He ultimately concluded by stressing that by Rule 134-A so little is asked of the privileged class and they should not grudge the same as a part of their larger social responsibility.

Sh. Satvir Singh Hooda, who was the public interest petitioner in CWP 7447 of 2010 also addressed on similar lines and urged that Rule 134-A of the Rules is valid and needs to be implemented in the right spirit. He stressed that despite the hope expressed by this Court in CWP No.7447 of 2010 that the State and private schools would realize their responsiblities in view of the mandate of Rule 134A, and the children coming from the economically under privileged sections of society would also get the best education, there has been no change on the ground and Rule 134A has remained unimplemented and year after year has gone by with no benefit being passed on to the intended beneficiaries.

On the arguments addressed by the Ld. Counsel, the following questions arise for consideration:

(1) Whether Rule 134A is legal and valid and not violative of the fundamental rights of the private unaided schools?

(2) Whether Rule 134A, if otherwise legal and valid, is void for being inconsistent with the 2009 Act?

(3) Whether the obligations of private unaided schools under Section 12(1) (c) and the consequential obligations of the State for reimbursement under Section 12(2) of the 2009 Act are attracted only when such schools are declared as neighbourhood schools by the State government or local authority or do these obligations exist independent of their being declared as neighbourhood schools?

(4) If the obligations under Section 12(1)(c) are absolute and unqualified obligations arising under the 2009 Act and do not arise only on account of the schools being declared as neighbouhood schools, is the State not duty bound to ensure that these provisions are complied with so that the objectives of the 2009 Act are not permitted to be frustrated by sheer apathy and inaction on the part of the concerned functionaries ?

Question No. 1:

Insofar as question No.1 is concerned, the same was held to have been concluded in the affirmative by this Court in CWP No.4664 of 2010 in view of the decision of the Hon'ble Supreme Court in **Society for Unaided Private Schools of**

Rajasthan v. Union of India, (2012) 6 SCC 1, where the Hon'ble Supreme Court upheld the validity of the 2009 Act in relation to unaided non-minority schools and aided minority schools.

Subsequently, in **Pramati Educational & Cultural Trust v. Union of India, (2014) 8 SCC 1,** (for short "Pramati Trust case") a Constitution Bench of the Hon'ble Supreme Court has upheld the validity of the 2009 Act except in relation to minority schools (both aided and unaided) and also held that Article 21A inserted by the Constitution (Eighty-sixth Amendment) Act, 2002 and the Article 15(5) as inserted by the Constitution (Ninety- third Amendment) Act, 2005 are valid.

While upholding the validity of 2009 Act in Society's case (Supra) various arguments, some of which have been advanced herein, also have been noticed and repelled by observing as under:

> *"28. To provide for right to access education, Article 21-A was enacted to give effect to Article 45 of the Constitution. Under Article 21-A, right is given to the State to provide by law "free and compulsory education". Article 21-A contemplates making of a law by the State. Thus, Article 21-A contemplates right to education flowing from the law to be made which is the 2009 Act, which is child-centric and not institution-centric. Thus, as stated, Article 21-A provides that the State shall provide free and compulsory education to all children of the specified*

age in such manner as the State may, by law, determine. The manner in which this obligation will be discharged by the State has been left to the State to determine by law. The 2009 Act is thus enacted in terms of Article 21-A. It has been enacted primarily to remove all barriers (including financial barriers) which impede access to education.

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33. It is true that, as held in T.M.A. Pai Foundation as well as P.A. Inamdar, the right to establish and administer an educational institution is a fundamental right, as long as the activity remains charitable under Article 19(1)(g), however, in the said two decisions the correlation between Articles 21 and 21-A, on the one hand, and Article 19(1)(g), on the other, was not under consideration. Further, the content of Article 21-A flows from Article 45 (as it then stood). The 2009 Act has been enacted to give effect to Article 21-A. For the above reasons, since the Article 19(1)(g) right is not an absolute right as Article 30(1), the 2009 Act cannot be termed as unreasonable. To put an obligation on the unaided non-minority schools to admit 25% children in Class I under Section 12(1)(c) cannot be termed as an unreasonable restriction. Such a law cannot be said to transgress any constitutional limitation. The object of the 2009 Act is to remove the barriers faced by a child who seeks admission to Class I and not to restrict the freedom under Article 19(1)(g).

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36. If Parliament enacts the law, pursuant to Article 21-A, enabling the State to access the network (including infrastructure) of schools including

unaided non-minority schools would such a law be said to be unconstitutional, not saved under Article 19(6)? Answer is in the negative.

36.1. Firstly, it must be noted that the expansive provisions of the 2009 Act are intended not only to guarantee the right to free and compulsory education to children, but to set up an intrinsic regime of providing the right to education to all children by providing the required infrastructure and compliance with norms and standards.

36.2. Secondly, unlike other fundamental rights, the right to education places a burden not only on the State, but also on the parent/guardian of every child [Article 51-A(k)]. The Constitution directs both burdens to achieve one end: the compulsory education of children free from the barriers of cost, parental obstruction or State inaction. Thus, Articles 21-A and 51-A(k) balance the relative burdens on the parents and the State. Thus, the right to education envisages a reciprocal agreement between the State and the parents and it places an affirmative burden on all stakeholders in our civil society.

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38. The 2009 Act not only encompasses the aspects of right of children to free and compulsory education but to carry out the provisions of the 2009 Act, it also deals with the matters pertaining to establishment of school(s) as also grant of recognition (see Section 18). Thus, after the commencement of the 2009 Act, the private management intending to establish the

school has to make an application to the appropriate authority and till the certificate is granted by that authority, it cannot establish or run the school. The matters relevant for the grant of recognition are also provided for in Sections 19, 25 read with the Schedule to the Act. Thus, after the commencement of the 2009 Act, by virtue of Section 12(1)(c) read with Section 2(n)(iv), the State, while granting recognition to the private unaided non-minority school, may specify permissible percentage of the seats to be earmarked for children who may not be in a position to pay their fees or charges.

39. In T.M.A. Pai Foundation, this Court vide para 53 has observed that the State while prescribing qualifications for admission in a private unaided institution may provide for condition of giving admission to small percentage of students belonging to weaker sections of the society by giving them freeships, if not granted by the Government. Applying the said law, such a condition in Section 12(1)(c) imposed while granting recognition to the private unaided non-minority school cannot be termed as unreasonable. Such a condition would come within the principle of reasonableness in Article 19(6).

40. Indeed, by virtue of Section 12(2) read with Section 2(n)(iv), a private unaided school would be entitled to be reimbursed with the expenditure incurred by it in providing free and compulsory education to children belonging to the above category to the extent of per child expenditure incurred by the State in a school specified in Section 2(n)(i) or the actual amount charged from the child,

whichever is less. Such a restriction is in the interest of the general public. It is also a reasonable restriction. Such measures address two aspects viz. upholding the fundamental right of the private management to establish an unaided educational institution of their choice and, at the same time, securing the interests of the children in the locality, in particular, those who may not be able to pursue education due to inability to pay fees or charges of the private unaided schools.

41. We also do not see any merit in the contention that Section 12(1)(c) violates Article 14. As stated, Section 12(1)(c) inter alia provides for admission to Class I, to the extent of 25% of the strength of the class, of the children belonging to weaker sections and disadvantaged group in the neighbourhood and provide free and compulsory elementary education to them till its completion. The emphasis is on "free and compulsory education". Earmarking of seats for children belonging to a specified category who face financial barrier in the matter of accessing education satisfies the test of classification in Article 14. Further, Section 12(1)(c) provides for a level playing field in the matter of right to education to children who are prevented from accessing education because they do not have the means or their parents do not have the means to pay for their fees."

The question of the validity of the 2009 Act was again emphatically put to rest by the Hon'ble Supreme Court in Pramati Trust's case (supra) by observing as under :

"51. In our considered opinion, therefore, by the Constitution (Eighty-sixth Amendment) Act, a new

power was made available to the State under Article 21-A of the Constitution to make a law determining the manner in which it will provide free and compulsory education to the children of the age of six to fourteen years as this goal contemplated in the directive principles in Article 45 before this constitutional amendment could not be achieved for fifty years. This additional power vested by the Constitution (Eighty-sixth Amendment) Act, 2002 in the State is independent and different from the power of the State under clause (6) of Article 19 of the Constitution and has affected the voluntariness of the right under Article 19(1)(g) of the Constitution. By exercising this additional power, the State can by law impose admissions on private unaided schools and so long as the law made by the State in exercise of this power under Article 21-A of the Constitution is for the purpose of providing free and compulsory education to the children of the age of 6 to 14 years and so long as such law forces admission of children of poorer, weaker and backward sections of the society to a small percentage of the seats in private educational institutions to achieve the constitutional goals of equality of opportunity and social justice set out in the Preamble of the Constitution, such a law would not be destructive of the right of the private unaided educational institutions under Article 19(1)(g) of the Constitution.

53. When we examine the 2009 Act, we find that under Section 12(1)(c) read with Section 2(n)(iv) of the Act, an unaided school not receiving any kind of aid or grants to meet its expenses from the appropriate Government or the local authority is

required to admit in Class I, to the extent of at least twenty-five per cent of the strength of that class, children belonging to weaker section and disadvantaged group in the neighbourhood and provide free and compulsory elementary education till its completion. We further find that under Section 12(2) of the 2009 Act such a school shall be reimbursed expenditure so incurred by it to the extent of per-child-expenditure incurred by the State, or the actual amount charged from the child, whichever is less, in such manner as may be prescribed. Thus, ultimately it is the State which is funding the expenses of free and compulsory education of the children belonging to weaker sections and several groups in the neighbourhood, which are admitted to a private unaided school. These provisions of the 2009 Act, in our view, are for the purpose of providing free and compulsory education to children between the age group of 6 to 14 years and are consistent with the right under Article 19(1)(g) of the Constitution, as interpreted by this Court in T.M.A. Pai Foundation and are meant to achieve the constitutional goals of equality of opportunity in elementary education to children of weaker sections and disadvantaged groups in our society. We, therefore, do not find any merit in the submissions made on behalf of the non-minority private schools that Article 21-A of the Constitution and the 2009 Act violate their right under Article 19(1)(g) of the Constitution."

Ld. Counsel for the petitioners have referred to para

40 of the decision in Society's case (supra) to contend that the validity of the 2009 Act was upheld because there was a specific provision therein to reimburse the expenditure incurred by the unaided private schools in providing free and compulsory elementary education to the weaker sections and disadvantaged groups. It is argued that there is no provision for reimbursement in Rule 134A which only provides that the schools shall charge the fee at the same rates as charged in government schools. It has been stated that with the enforcement of the 2009 Act, no fee is being charged in government schools for classes I to VIII as such education is to be free. Hence, Rule 134A , if enforced would mean that the private unaided schools would have to provide free education to the 10% students admitted under Rule 134A. As neither is there any provision for reimbursement in Rule 134A nor would any fee be chargeable by them in terms of the Rule because in government schools for Classes I to VIII education is free, hence it is contended that Rule 134A is illegal and unconstitutional being an unreasonable restriction on the rights under Article 19(1)(g) of the unaided private schools comprising the petitioner association.

There appears to be merit in the contention of the Ld. Counsel for the petitioners but only to the extent of their claim for reimbursement as explained below.

Rule 134A on its own terms does not envisage

totally free education. The principle of compensation is embedded in it as it contains provision for charging fee at the same rate as charged in Government schools. But, after the enforcement of the 2009 Act, elementary education in schools established, owned or controlled by the government or local authority is totally free, and on a combined reading of Rule 134A and the 2009 Act, for elementary classes, the private unaided schools would not be able to charge any fee for the students admitted pursuant to the mandate of Rule 134A because no fee for such classes is charged in government schools. This being the position, it has to be held, that in respect of admissions made by the private unaided schools in terms of the mandate of Rule 134A they would have a claim for reimbursement from the State on the principle as laid down in Section 12(2) of the 2009 Act.

This question was also considered by this Court in CWP No.4664 of 2012, wherein, while upholding the validity of Rule 134A it was held that the claim for reimbursement was based on the principle laid down in Section 12(2) of the 2009 Act and if the petitioner school falls within the parameters of Rule 12(2) of the 2009 Act then it may be entitled to such a claim.

We respectfully agree with the aforesaid view and hold and declare that in respect of admissions made to classes I to VIII in the private unaided schools pursuant to Rule 134A,

where the private unaided schools do not charge any fee or charges or expenses and provide completely free education to the children admitted in terms of Rule 134A, the schools would be entitled to reimbursement on the same principles as provided for in Section 12(2) of the 2009 Act. This would necessarily also mean as provided in the second proviso to Section 12(2) that where such school is already under obligation to provide free education to a specified number of children on account of it having received any land, building, equipment or other facilities, either free of cost or at a concessional rate then such school will not be entitled for reimbursement to the extent of such obligation.

It has been further contended on behalf of the petitioners that the provisions of 2009 Act provide for 25% reservation only in Class I whereas Rule 134A provides for reservation in all classes from Class I to XII. It has been urged that insofar as reservation in classes other than Class I are concerned, Rule 134A cannot be saved on the ratio of the Society case (supra) and of the Pramati Trust case (supra) which were both limited to adjudicating the validity of the 2009 Act which made provision for reservation only in Class I or in pre- school education.

Ld. Counsel for the respondents state that it is true that 2009 Act makes provision for reservation in Class I only but

they urge that the provisions of Rule 134A are saved under Article 15(5) of the Constitution, the validity of which was upheld in Pramati Trust's case (Supra). It is stated that in the said case the Hon'ble Supreme Court while upholding Article 15(5) held that the identity of the right of private educational institutions under Article 19(1)(*g*) of the .Constitution will not to be destroyed by admissions from amongst educationally and socially backward classes of citizens as well as the Scheduled Castes and the Scheduled Tribes.

In *Pramati Trust's case (supra),* Hon'ble the Supreme Court while upholding the constitutionality of Article 15(5) observed as under:

> ***"27.*** *The reasoning adopted by this Court in P.A. Inamdar, therefore, is that the appropriation of seats by the State for enforcing a reservation policy was not a regulatory measure and not reasonable restriction within the meaning of clause (6) of Article 19 of the Constitution. As there was no provision other than clause (6) of Article 19 of the Constitution under which the State could in any way restrict the fundamental right under Article 19(1)(g) of the Constitution, Parliament made the Constitution (Ninety-third Amendment) Act, 2005 to insert clause (5) in Article 15 of the .Constitution to provide that nothing in Article 19(1)(g) of the Constitution shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes insofar*

as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State. Clause (5) in Article 15 of the Constitution, thus, vests a power on the State, independent of and different from the regulatory power under clause (6) of Article 19, and we have to examine whether this new power vested in the State which enables the State to force the charitable element on a private educational institution destroys the right under Article 19(1)(g) of the Constitution.

According to Dr. Dhavan, the right of a private educational institution under Article 19(1)(g) of the Constitution as laid down by this Court in T.M.A. Pai Foundation has a voluntary element. In fact, this Court in P.A. Inamdar has held in para 126 at p. 601 of SCC that the observations in para 68 of the judgment in T.M.A. Pai Foundation merely permit unaided private institutions to maintain merit as the criterion of admission by voluntarily agreeing for seat-sharing with the State or adopting selection based on common entrance test of the State and that there are also observations in T.M.A. Pai Foundation to say that they may frame their own policy to give freeships and scholarships to the needy and poor students or adopt a policy in line with the reservation policy of the State to cater to the educational needs of the weaker and poorer sections of the society. In our view, all freedoms under which Article 19(1) of the Constitution, including the freedom under Article 19(1)(g), have a voluntary element but this voluntariness in all the freedoms in Article 19(1) of the Constitution can be subjected to

reasonable restrictions imposed by the State by law under clauses (2) to (6) of Article 19 of the Constitution. Hence, the voluntary nature of the right under Article 19(1)(g) of the Constitution can be subjected to reasonable restrictions imposed by the State by law under clause (6) of Article 19 of the Constitution. As this Court has held in T.M.A. Pai Foundation and P.A. Inamdar the State can under clause (6) of Article 19 make regulatory provisions to ensure the maintenance of proper academic standards, atmosphere and infrastructure (including qualified staff) and the prevention of maladministration by those in charge of the management. However, as this Court held in the aforesaid two judgments that nominating students for admissions would be an unacceptable restriction in clause (6) of Article 19 of the Constitution, Parliament has stepped in and in exercise of its amending power under Article 368 of the Constitution inserted clause (5) in Article 15 to enable the State to make a law making special provisions for admission of socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes for their advancement and to a very limited extent affected the voluntary element of this right under Article 19(1)(g) of the Constitution. We, therefore, do not find any merit in the submission of the learned counsel for the petitioners that the identity of the right of unaided private educational institutions under Article 19(1)(g) of the Constitution has been destroyed by clause (5) of Article 15 of the Constitution."

The enabling power under Article 15(5) to make a law making special provisions for admission of socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes for their advancement is not limited to Class I or even elementary education. It extends to all levels including professional education as mentioned in the Statement of Objects and Reasons for the Ninety-third Amendment which is as under:

> *"Greater access to higher education including professional education to a larger number of students belonging to the socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes has been a matter of major concern. At present, the number of seats available in aided or State maintained institutions, particularly in respect of professional education, is limited in comparison to those in private unaided institutions.*
>
> *2. It is laid down in Article 46, as a directive principle of State policy, that the State shall promote with special care the educational and economic interests of the weaker sections of the people and protect them from social injustice. To promote the educational advancement of the socially and . educationally backward classes of citizens or of the Scheduled Castes and Scheduled Tribes in matters of admission of students belonging to these categories in unaided educational institutions, other than the minority educational institutions referred to in clause (1) of Article 30 of the Constitution, it is*

proposed to amplify Article 15.

3. The Bill seeks to achieve the above objects."

Thus, reservation of 10% seats for meritorious students of economically weaker sections in all the classes (I to XII) in private unaided schools is permissible and valid in terms of Article 15(5).

However, the Hon'ble Supreme Court held that the power in clause (5) of Article 15 of the Constitution is a guided power to be exercised for the limited purposes stated in the clause and as and when a law is made by the State in purported exercise of the power under clause (5) of Article 15 of the Constitution, the Court will have to examine and find out whether it is for the purposes of advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes and whether the law is confined to admission of such socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes to private educational institutions, whether aided or unaided, and if the Court finds that the power has not been exercised for the purposes mentioned in clause (5) of Article 15 of the Constitution, the Court will have to declare the law as ultra vires Article 19(1)(*g*) of the Constitution. Further in regard to private unaided institutions it was held that the law would have to be examined to see if the State has made provisions in the law to ensure that private unaided educational

institutions are compensated for the admissions made in such private unaided educational institutions from amongst socially and educationally backward classes of citizens or the Scheduled Castes and the Scheduled Tribes. The relevant observations Pramati's case (supra) are as under:-

> ***"29.*** *We may now examine whether the Ninety-third Amendment satisfies the width test. A plain reading of clause (5) of Article 15 would show that the power of a State to make a law can only be exercised where it is necessary for advancement of socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes and not for any other purpose. Thus, if a law is made by the State only to appease a class of citizens which is not socially or educationally backward or which is not a Scheduled Caste or Scheduled Tribe, such a law will be beyond the powers of the State under clause (5) of Article 15 of the Constitution. A plain reading of clause (5) of Article 15 of the Constitution will further show that such law has to be limited to making a special provision relating to admission to private educational institutions, whether aided or unaided, by the State. Hence, if the State makes a law which is not related to admission in educational institutions and relates to some other aspects affecting the autonomy and rights of private educational institutions as defined by this Court in T.M.A. Pai Foundation, such a law would not be within the power of the State under clause (5) of Article 15 of the Constitution. In other words, power in clause (5) of Article 15 of the Constitution is a guided power to*

be exercised for the limited purposes stated in the clause and as and when a law is made by the State in purported exercise of the power under clause (5) of Article 15 of the Constitution, the Court will have to examine and find out whether it is for the purposes of advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes and whether the law is confined to admission of such socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes to private educational institutions, whether aided or unaided, and if the Court finds that the power has not been exercised for the purposes mentioned in clause (5) of Article 15 of the Constitution, the Court will have to declare the law as ultra vires Article 19(1)(g) of the Constitution. In our opinion, therefore, the width of the power vested on the State under clause (5) of Article 15 of the Constitution by the constitutional amendment is not such as to destroy the right under Article 19(1)(g) of the Constitution.

30. We may now examine the contention of Mr Nariman that clause (5) of Article 15 of the Constitution fails to make a distinction between aided and unaided educational institutions and treats both aided and unaided alike in the matter of making special provisions for admission of socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes. The distinction between a private aided educational institution and a private unaided educational institution is that private .educational institutions receive aid from the State, whereas private unaided

educational institutions do not receive aid from the State. As and when a law is made by the State under clause (5) of Article 15 of the Constitution, such a law would have to be examined whether it has taken into account the fact that private unaided educational institutions are not aided by the State and has made provisions in the law to ensure that private unaided educational institutions are compensated for the admissions made in such private unaided educational institutions from amongst socially and educationally backward classes of citizens or the Scheduled Castes and the Scheduled Tribes. In our view, therefore, a law made under clause (5) of Article 15 of the Constitution by the State on the ground that it treats private aided educational institutions and private unaided educational institutions alike is not immune from a challenge under Article 14 of the Constitution. Clause (5) of Article 15 of the Constitution only states that nothing in Article 15 or Article 19(1)(g) will prevent the State to make a special provision, by law, for admission of socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes to educational institutions including private educational institutions, whether aided or unaided by the State. Clause (5) of Article 15 of the Constitution does not say that such a law will not comply with the other requirements of equality as provided in Article 14 of the Constitution. Hence, we do not find any merit in the submission of Mr Nariman that clause (5) of Article 15 of the Constitution that insofar as it treats unaided private educational institutions and aided private educational

institutions alike it is violative of Article 14 of the Constitution."

We have already held above that in respect of admissions made to classes I to VIII where the private unaided schools charge no fee, charges or expenses and provide completely free education to children admitted in terms of Rule 134A, reimbursement would be required to be made in terms of Section 12(2) of the 2009 Act. Consequently, the challenge to Rule 134A on the ground of lack of a provision for reimbursement does not survive.

So far as classes IX to XII are concerned, education in Government schools is not free and the schools are entitled to charge fee from the students at the same rate as charged in Government schools. Though this may not be comparable to the fee ordinarily charged by the private schools, yet it cannot be held to be a case of compulsion to impart free education without any recompense and it would thus be valid and legal in terms of the ratio in Pramati Trust's case (Supra).

Ld. Counsel for the petitioners have also assailed the provision in Clause 2(A) of the MECHANISM FOR IMPLEMENTING THE PROVISIONS OF RULE 134-A OF THE HARYANA SCHOOL EDUCATION RULES, 2003 (Annexure P-4) to the extent it requires that in case of schools built or situated on HUDA land, the reservation would be up to 20%. It is contended that by an executive circular the extent of

reservation as provided in the Rule 134A cannot be enhanced. In the light of this it has to be held that the aforesaid Clause 2A to the extent that it requires that in case of schools built or situated on HUDA land, the reservation would be up to 20% cannot be given effect to. It is held that the obligation of the private unaided schools is to reserve 10% seats for children as specified in Rule 134A.

Question No. 2:

It has been contended on behalf of the petitioners that Rule 134-A operates in the same area as the 2009 Act. It is contended that it is inconsistent with the 2009 Act and hence is void. The areas of inconsistency pointed out are as under:-

(i) The 2009 Act is a wider beneficial legislation. The reservation provided there is 25% but in Rule 134-A the reservation provided is 10%.

(ii) In the 2009 Act, the reservation in Section 12(1) (c) is for is for "child belonging to disavantaged group" and "Child belonging to weaker section" whereas in Rule 134-A the reservation is provided for "meritorious students belong to economically weaker section and BPL (Below Poverty Line) category."

(iii) There is no provision for reimbursement in Rule 134-A whereas as per Section 12 (2) of the 2009 Act, the expenses incurred for providing free and compulsory education shall be reimbursed to the extent specified therein.

(iv) As per Section 13 of the 2009 Act, no school

while admitting a child shall subject the child or his or her parents or guardian to any screening procedure whereas under Rule 134-A 10% seats are to be reserved for meritorious students belonging to the economically weaker section and below poverty line.

To the contrary, Ld. State Counsel as well as other Ld. Counsel appearing for the respondents have contended that Rule 134A and the 2009 Act operate in different areas. The objective of the two are different. Rather than being in conflict with the 2009 Act, Rule 134A is complementary to the 2009 Act.

The test for determining repugnancy in relation to legislation in the concurrent field are well settled.

In **Animal Welfare Board of India v. A. Nagaraja, (2014) 7 SCC 547**, law was summarised as under:

> ***"75.*** *We may now examine whether the provisions of the TNRJ Act, which is a State Act, is repugnant to the PCA Act, which is a Central Act, since, both the Acts fall under Entry 17 in the Concurrent List. Repugnancy between the parliamentary legislation and State legislation arises in two ways:*
>
> *(i) Where the legislations, though enacted with respect to the matters in their allotted sphere, overlap and conflict, and*
>
> *(ii) Where two legislations are with respect to the same matters in the Concurrent List and there is a conflict.*
>
> *In both the situations, the parliamentary legislation will predominate in the first by virtue of the non obstante clause in Article 246(1), and in the second*

by reason of Article 254(1) of the Constitution. The law on this point has been elaborately discussed by this Court in Vijay Kumar Sharma v. State of Karnataka.

76. *Instances are many, where the State law may be inconsistent with the Central law, where there may be express inconsistency in actual terms of the two legislations so that one cannot be obeyed without disobeying the other. Further, if the parliamentary legislation, is intended to be a complete and exhaustive code, then though there is no direct conflict, the State law may be inoperative. Repugnancy will also arise between two enactments even though obedience to each of them is possible without disobeying the other, if a competent legislature with a superior efficacy expressly or impliedly evinces by its legislation an intention to cover the whole field.*

77. *In M. Karunanidhi v. Union of India, this Court held that, in order to decide the question of repugnancy, it must be shown that the two enactments contain inconsistent and irreconcilable provisions, therefore, they cannot stand together or operate in the same field. Further, it was also pointed out that there can be no repeal by implication, unless inconsistency appears on the face of those statutes. Further, where two statutes occupy a particular field, but there is room or possibility of both the statutes operating in the same field without coming into collision with each other, no repugnancy results. Further, it was also noticed that there is no inconsistency, but a statute occupying the same field seeks to create distinct and separate*

offences, no question of repugnancy arises and both the statutes continue to operate in the same field.

78. *In Jaya Gokul Educational Trust v. Commr. & Secy. to Govt. Higher Education Deptt., this Court took the view that the repugnancy may arise between two enactments even though obedience of each of them is possible without disobeying the other, if a competent legislature of superior efficacy, expressly or impliedly, evinces by the State legislation a clear intention to cover the whole field and the enactment of the other legislature, passed before or after, would be over-borne on the ground of repugnancy."*

Applying the above tests, it needs to be determined as to whether Rule 134A is repugnant to any of the provisions of the 2009 Act.

The 2009 Act, as stated in its Preamble, is an Act to provide free and compulsory education to all children of the age of six to fourteen years. It is an enactment to give effect to Article 21 A as per which the State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may by law determine.

As per Section 12(1) (c) an unaided school not receiving any kind of aid or grant from the State Government is required to admit in Class I, to the extent of at least twenty five per cent of the strength of that class, children belonging to weaker section and disadvantaged group in the neighbourhood and provide free and compulsory education till its completion.

There a provision for remibursement of expenditure to such schools in Section 12 (2). As per Rule 134 A the recognized private schools are required to reserve 10% seats for meritorious students belonging to economically weaker section and Below Poverty Line category. There is no restriction that such students are to be from the neighbourhood. The school shall charge fee from these students at the same rate as charged in Government schools.

Thus, in so far as admission to Class I for the economically weaker and disadvantaged sections is concerned, there is obvious overlapping of the provisions of the 2009 Act and the Rule 134A. However percentage of children to be admitted is different, the methodolgy of admission is different. Even the terminology used for identifying the children to be admitted is different.

As per Section 12(1)(c) 25% of the strength of class I is required to be admitted from amongst children belonging to the weaker section and disadvantaged group in the neighbourhood. Rule 2(f) of the Haryana Right of Children to Free & Compulsory Education Rules, 2011(hereinafter referred to as the "2011 Rules") defines the term child belonging to weaker sections and disadvantaged group to mean a child belonging to any of the following categories:

> *"(i) a child of a family covered under the latest list of Below Poverty Line of both rural and urban*

areas issued and approved by the Government; (ii)an orphan; (iii) a HIV affected child; (iv) a child with special needs; (v) a child of war widow."

The procedure for admission of children belonging to the weaker sections and disadvantaged group is explained in Rule 7. The proviso to Rule 7 (4) provides for reservation of five percent seats for children of Scheduled Castes, four per cent seats for children of Backward Classes (A) and two and half per cent for children of Backward Classes (B). It is further provided that if the number of applicants for admission in a particular school is more than the number of seats for children belonging to weaker sections and disadvantaged groups, the admission shall be done by draw of lots. Rule 134A requires 10% of the students belonging economically weaker sections and below poverty line categories to be admitted.

The admission under Section 12(1) (c) is to be from the neighbourhood. Rule 7(3) of the 2011 Rules states that the areas or limits of neighbourhood specified in Rule 4(1) of the 2011 Rules shall apply to admissions made pursuant to Section 12(1)(c) of the 2009 Act. As per the proviso to Rule 7 (3) for the purposes of filling up the requisite number of seats, these limits may be extended with the prior approval of the Director . To the contrary in Rule 134A there is no restriction that such children should be from the neighbourhood. In fact in the mechanism for implementation of the provisions of Rule 134-A

(Annexure P-4), it is stated that students can give upto 25 preferences with regard to the desired school of admission within a district without any block or area restriction.

There is no criteria of merit in 12(1)(c) whereas Rule 134A talks of merit.

Clearly, in so far as admission to Class I is concerned, the provisions overlap and there is inconsistency between Section 12(1) (c) and the 2011 Rules and Rule 134A. Thus, in so far as admission to class I in private unaided educational institutions is concerned Rule 134A has to make way for Section 12(1)(c) and (2) of the 2009 Act, the latter being an Act of Parliament and evincing an intention to cover the whole field in relation to admissions contemplated by Section 12(1)(c). Accordingly, it is directed that reservation and admissions to Class I in private unaided schools are to be made as per provisions of Section 12(1) (c) and 12(2) of the 2009 Act and not in accordance with Rule 134A.

However, in so far as admission in private unaided schools to classes II to XII are concerned, the field is not covered by the 2009 Act except to the extent that children admitted in Class I in terms of Section 12(1)(c) have been promoted to the higher classes. So for admission to classes II to XII, Rule 134 A will have full play and admissions would be required to be made in accordance therewith.

Question No. 3:

The respondent-State of Haryana has contended that it has no obligation to reimburse the expenditure to private unaided schools in these cases as these admissions are in terms of Rule 134A and not in terms of the provisions of Section 12(1)(c) of the 2009 Act. Sh. Amar Vivek has contended that the obligation under Section 12(2) to reimburse would arise only if a private unaided school is declared as a neighbourhood school by the State Government. It has been contended that none of the schools of the petitioner association has been declared to be a neighbourhood school because the State of Haryana is providing free and compulsory education to children in terms of the mandate of the 2009 Act in its own schools. So the private unaided schools are not entitled to any reimbursement from the State Government.

Before we can answer this question, it would be necessary to analyse the provisions of 2009 Act and the Rules framed thereunder. Section 3 declares that every child of the age of six to fourteen years, including a child referred to in clause (d) or clause (e) of Section 2, shall have the right to free and compulsory education in a neighbourhood school till the completion of his or her elementary education. No child shall be liable to pay any kind of fee or charges or expenses which may prevent him or her from pursuing and completing elementary education. Section 6 mandates that for carrying out the

provisions of the Act, the appropriate Government and local authority shall establish a neighbourhood school where it is not established within a period of three years from the commencement of the Act. Section 7 states that the Central and the State Governments have concurrent responsibility for providing funds for carrying out the provisions of the Act. It also contains provisions to ensure that finances are raised for the said purpose. Sections 8(a) and 9(a) mandate that it shall be the duty of the appropriate Government and local authority to provide free and compulsory elementary education to every child. The provisos to both Sections 8(a) and 9(a) state that where a child is admitted by his or her parents in a school other than the one owned, established, controlled or substantially financed by the appropriate Government or local authority there shall be no entitlement for a claim for reimbursement qua such child.

Sections 8(b) and 9(b) oblige the appropriate government and the local authority respectively to ensure availability of neighbourhood school as specified in Section 6. Section 8(d) and 9(f) oblige the appropriate Government and local authority respectively to provide infrastructure including school building, teaching staff and learning equipment.

All these provisions read together make it clear beyond doubt that it is the appropriate Government and the local

authority which have to ensure availability of neighbourhood schools by establishing such schools if not already established within the period as specified in Section 6 .

None of these provisions specifically empower the appropriate Government or local authority to treat or direct or notify or declare any private unaided school to be a neighbourhood school. As per the mandate of the 2009 Act a neighbourhood school would have to be `established' by the appropriate Government or local authority where one does not exist. Thus, even if in a particular area one or more private schools already exist, the Government would not be absolved of its obligation to set up or establish a neighbourhood school. There is no provision in the Act whereby the Government or local authority could be considered to have discharged its obligation to set up or establish such schools by merely treating or declaring a private school as neighbourhood school.

The fallacy in the stand of the State Government is further evidenced when the situation is looked at from another angle. As per section 3 of the 2009 Act every child of the age of six to fourteen years shall have a right to free and compulsory education in a neighbourhood school. If a private school were to be declared to be a neighbourhood school then all children and not only such as find mention in Section 12(1) (c) would be entitled to free and compulsory education therein, not only in

Class I but in all classes from I to VIII. In that situation the private school would be burdened with all the responsibilities of a government school as defined in Section 2(n)(i). There is no provision in the Act where under such an obligation/ responsibility to provide free and compulsory education is cast on the private unaided schools. Thus, it has to be held that there is no provision in the 2009 Act whereby a private unaided school as defined in Section 2(n)(iv) could be declared to be neighbourhood school.

The extent of the responsibility of schools for free and compulsory education is to be found in Section 12, which reads as under:

> ***"12. Extent of school's responsibility for free and compulsory education.—***
> *(1) For the purposes of this Act, a school,—*
> *(a) specified in sub-clause (i) of clause (n) of Section 2 shall provide free and compulsory elementary education to all children admitted therein;*
> *(b) specified in sub-clause (ii) of clause (n) of Section 2 shall provide free and compulsory elementary education to such proportion of children admitted therein as its annual recurring aid or grants so received bears to its annual recurring expenses, subject to a minimum of twenty-five per cent;*
> *(c) specified in sub-clauses (iii) and (iv) of clause (n) of Section 2 shall admit in Class I, to the extent of at least twenty-five per cent of the strength of that class, children belonging to weaker section and disadvantaged group in the neighbourhood and*

provide free and compulsory elementary education till its completion:

Provided further that where a school specified in clause (n) of Section 2 imparts pre-school education, the provisions of clauses (a) to (c) shall apply for admission to such pre-school education.

(2) The school specified in sub-clause (iv) of clause (n) of Section 2 providing free and compulsory elementary education as specified in clause (c) of sub-section (1) shall be reimbursed expenditure so incurred by it to the extent of per-child-expenditure incurred by the State, or the actual amount charged from the child, whichever is less, in such manner as may be prescribed:

Provided that such reimbursement shall not exceed per-child-expenditure incurred by a school specified in sub-clause (i) of clause (n) of Section 2.

Provided further that where such school is already under obligation to provide free education to a specified number of children on account of if having received any land, building, equipment or other facilities, either free of cost or at a concessional rate, such school shall not be entitled for reimbursement to the extent of such obligation.

(3) Every school shall provide such information as may be required by the appropriate Government or the local authority, as the case may be."

A plain reading of Sections 12(1) (c) and 12(2) would make it clear that there is a mandatory obligation imposed on schools specified in sub- clauses (iii) and (iv) to admit in class I to the extent of 25% of the strength of the class, children

belonging to weaker sections and disadvantaged groups in the neighbourhood and provide free and compulsory education to them. This is not contingent on such schools being declared as neighbourhood schools by the State Government or local authority. We have already held that there is no provision in the 2009 Act whereby private unaided schools as defined in Section 2(n) (iv) could be so declared. Thus, the corresponding obligation of the State to reimburse the expenditure as provided in Section 12(2) of the Act is also independent of the such schools being declared neighbourhood schools. It is an obligation consequent to the free and compulsory education that the private unaided schools are obliged to provide in terms of Section 12(1)(c). The objective behind the obligation so imposed on private unaided schools was to achieve the Constitutional goal of equality of opportunity through inclusive elementary education of satisfactory quality to children from disadvantaged and weaker sections.

Thus, the argument of the State that it has no obligation to provide reimbursement to the private unaided schools for admitting children belonging to weaker sections and disadvantaged groups unless they are declared neighbourhood schools, is without merit and the same is rejected. It is held that on the coming into force of the 2009 Act, the private unaided schools as defined in Section 2(n)(iv) have a mandatory

obligation to admit in class I and also in pre- school education where such pre- school education is imparted, to the extent of 25% of the strength of the class, children belonging to weaker sections and disadvantaged groups in the neighbourhood and provide free and compulsory education to them and the State is to reimburse the expenditure as per the provisions of Section 12(2).

Question No. 4:

We now briefly refer to certain provisions of the 2009 Act which impose duty on the appropriate Government and local authority to ensure implementation of the provisions of the Act, which would also reveal the extent of obligation of the State and local authorities to ensure that the mandate of Section 12(1) (c) is complied with by private unaided schools.

As per Section 8(c), the appropriate Government shall ensure that the children belonging to weaker section and the children belonging to disadvantaged group are not discriminated against and prevented from pursuing and completing elementary education on any grounds. Section 9(c) imposes a similar duty on every local authority.

Section 8(f) makes it the duty of the appropriate Government to ensure and monitor admission, attendance and completion of elementary education by every child.

As per Section 9(d), it shall be duty of every local

authority to maintain records of children upto the age of fourteen years residing within its jurisdiction, in such manner as may be prescribed. As per Section 9(e) a local authority shall ensure and monitor admission, attendance and completion of elementary education by every child within its jurisdiction. Section 2(l) obliges it to monitor functioning of schools within its jurisdiction.

Section 12 (3), requires every school to provide all such information as may be required by the appropriate Government or local authority

As per section 31, the National Commission for the Protection of Child Rights or the State Commission for the Protection of Child Rights constituted under the Commissions for the Protection of Child Rights Act, 2005 shall in addition to their functions under the said Act also have the power to inquire into complaints relating to child's rights to free and compulsory education.

In addition to the mechanism in Section 31, Section 32 contains other provisions for redressal of grievances whereby any person having any grievance relating to the right of a child under this Act may make a written complaint to the local authority having jurisdiction. After receiving the complaint the local authority shall decide the matter within a period of three months after affording a reasonable opportunity of being heard

to the parties concerned. Any person, aggrieved by the decision of the local authority, may prefer an appeal to the State Commission for Protection of Child Rights or the authority prescribed under sub-section (3) of Section 31, as the case may be.

Detailed procedure has been laid down in the 2011 Rules to carry out the purposes of the 2009 Act. Particularly, relevant for the present discussion are Rule 5 which deals with the responsibilities of the Government and Local authority, Rule 6 which requires the maintenance of records of children by the Local authority, Rule 7 which deals with admission of children belonging to weaker sections and disadvantaged groups and Rule 8 which deals with the reimbursement of per child expenditure by the Government.

The provisions of the 2009 Act and the 2011 Rules referred to above manifest the intention of the law that the rights of the children as provided in the 2009 Act are fully effectuated. For this purpose appropriate power has been vested in the concerned authorities and they also have a duty to monitor and ensure that the provisions of the Act are complied with and complaints regarding non implementation of the provisions of the 2009 Act are redressed. The mention of the above provisions is only illustrative and there may be number of other provisions which would enable to State and its functionaries to

ensure effective implementation of the mandate of the 2009 Act and the Rules framed thereunder.

During the course of the hearing of these cases, Ld. Counsel for the intervenors were at pains to point out that neither the benefits of the provisions of the 2009 Act nor of Rule 134A have been provided to the weaker sections and disadvantaged groups. It was pointed out that despite the provisions of the 2009 Act and the 2011 Rules clearly mandating that the private unaided schools admit children to the extent of 25% students of the class strength in Class I and pre-school education where such education is provided, such admission has not been made or where made the percentage admitted is much below that prescribed. If this is so, it clearly indicates that the Schools as well as State authorities has been remiss in discharging their Constitutional and statutory obligation towards the weaker sections and disadvantaged groups. It is pointed out by Ld. Counsel that even the truncated benefit as envisaged in Rule 134A after its amendment in 2013 has eluded the children of class I and other classes.

It is high time that the State and its functionaries realize that the power and responsibilities conferred by the provisions of the Act and Rules are meant to be exercised to ensure their meaningful implementation to achieve the laudatory objectives of providing free and compulsory education especially

to the weaker and disadvantaged sections of society. The duties and responsibilities as indicated in the Act ought to be conscientiously and faithfully discharged. The powers assigned to various authorities are with a view to ensure protection of the rights of the children and monitor the effective implementation of the Act. These are powers coupled with duty to exercise it when the conditions for its exercise arise.

It has been held by the Hon'ble Supreme Court in **Chief Controlling Revenue Authority v. Maharashtra Sugar Mills Ltd., 1950 SCR 536** as under:

> "8. ... ...*But when a capacity or power is given to a public authority there may be circumstances which couple with the power a duty to exercise it. To use the language of Lord Cairns in the case of Julius v. Bishop of Oxford: 'There may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed to exercise that power when called upon to do so.. .."*

Accordingly, we hold that the State and its functionaries have a duty to ensure that the provisions of the 2009 Act and Rule 134A in the manner as interpreted above are implemented. The State and its functionaries are also duty bound to initiate necessary action in terms of the law against any

private unaided school which does not comply with the mandate of the 2009 Act and Rule 134A .

This Court while disposing of CWP No.7447 of 2010 seeking implementation of Rule 134A had observed that the private schools must look at the matter in larger perspective of social responsibility. It was held that it was their bounden duty to ensure that there is no breach of the Rules which have statutory force and if they are violated they will have to blame themselves for it. It was also observed that if there is any violation of the Rule, there is no paucity of powers with the State Government to take appropriate action under the Haryana School Education Act, 1995 and Haryana School Education Rules, 2003 framed thereunder. We respectfully concur with and reiterate the above observations.

Accordingly, these petitions are disposed of by holding and directing as under:

(i). Rule 134A is legal and valid. However in respect of admissions to classes I to VIII in the private unaided schools pursuant to Rule 134A, where the private unaided schools do not charge any fee or charges or expenses and provide completely free education to the children admitted in terms of Rule 134A, the schools would be entitled to reimbursement on the same principles as provided

for in Section 12(2) of the 2009 Act.

(ii). In respect of admissions to classes IX to XII in private unaided schools as per Rule 134A , the schools are entitled to charge fee from the students at the same rate as charged in Government schools. Though this may not be comparable to the fee otherwise charged by the private schools, yet it cannot be held to be a case of compulsion to impart free education without any recompense and it would thus be valid and legal in terms of the ratio in Pramati Trust's case (supra).

(iii). In so far as admission to Class I is concerned, there is inconsistency between Section 12(1) (c) and Rules 134A. Thus for admission to class I in private unaided educational institutions, Rule 134A has to make way for Section 12(1)(c) and (2) of the 2009 Act. Accordingly, it is directed that reservation and admissions to Class I and pre- school education wherever provided, in private unaided schools is to be made as per provisions of Section 12(1) (c) and 12(2) of the 2009 Act and not in accordance with Rule 134A.

(iv). In respect of admission in private unaided schools to classes II to XII , the field is not covered by the 2009 Act, so Rule 134 A will have full play and

effect and admissions would be required to be made in accordance therewith as explained above.

(v). The argument of the State that it has no obligation under Section 12(2) of 2009 Act to provide reimbursement to the private unaided schools for admitting children belonging to weaker sections and disadvantaged groups as per Section 12(1)(c), unless they are declared neighbourhood schools is without merit and is rejected.

(vi). It is held that on the coming into force of the 2009 Act, the private unaided schools as defined in Section 2(n)(iv) have a mandatory obligation to admit in class I and and in pre- school education where such pre- school education is imparted, to the extent of 25% of the strength of the class, children belonging to weaker sections and disadvantaged groups in the neighbourhood and provide free and compulsory elementary education to them till its completion and the State is required to reimburse the expenditure as per the provisions of Section 12(2).

(vii). The private unaided schools cannot be permitted to deny admission to the children in terms of Section 12(1)(c) and Rule 134A on the ground

that reimbursement has not been made by the government or that any previous reimbursement claims are pending. The schools are obliged to grant admission to the children in terms of the above provisions irrespective of the pendency of any previous claim for reimbursement. Where reimbursement has not been made the schools would have a right to maintain action for recovery of the amount of reimbursement.

(viii). The State and its functionaries have a duty to ensure that the provisions of the 2009 Act and the Rule 134A are implemented. The State and its functionaries are duty bound to initiate necessary action in terms of the law against any private unaided school which does not comply with the mandate of the 2009 Act and Rule 134A .

(SATISH KUMAR MITTAL)
JUDGE

(HARINDER SINGH SIDHU)
JUDGE

April 01, 2015
Atul

Refer to Reporter- YES