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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(C) 202/2014

FORUM FOR PROMOTION OF
QUALITY EDUCATION FOR ALL ....Petitioner

Through: Mr. Sunil Gupta, Senior Advocate with Mr. Vedanta Varma,Advocate

versus

LT. GOVERNOR OF DELHI & ORS. ..... Respondents

Through Mr. P.P. Malhotra, Senior Advocate with Mr. V.K.Tandon and Mr. Yogesh Saini, Advocates for Govt. of NCT of Delhi.
Mr. Anurag Ahluwalia, CGSC with Mr. Prashant Ghai and Mr. Amrit Singh, Advocates for UOI.
Mr. Ashok Agarwal with Ms. Nisha Tomar, Advocates for Social Jurist.

WITH

\+ W.P.(C) 177/2014

ACTION COMMITTEE UNAIDED
RECOGNIZED PRIVATE SCHOOLS ..... Petitioner

Through Mr. Neeraj Kishan Kaul and Mr. Rakesh Khanna, Senior Advocates with Mr. Kamal Gupta, Advocate.

versus

HONBLE LT.GOVERNOR & ORS. ..... Respondents

Through Mr. P.P. Malhotra, Senior Advocate with Mr. V.K.Tandon and Mr. Yogesh Saini, Advocates for Govt. of NCT of Delhi.
Mr. Anurag Ahluwalia, CGSC with Mr. Prashant Ghai and Mr. Amrit Singh, Advocates for UOI.
Mr. Ashok Agarwal with Ms. Nisha Tomar, Advocates for Social Jurist.

Reserved on : 5th November, 2014
% Date of Decision : 28th November, 2014

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

J U D G M E N T

MANMOHAN, J:

PRIMARY ISSUE

1. The primary legal issue that arises for consideration in the present writ petitions is whether private unaided schools have the autonomy to admit students and the children through their parents have a right to choose a school in which they wish to study or whether the executive by way of an office order can impose a formula on the basis of which nursery admissions have to be carried out by such schools.

BACKGROUND FACTS

2. Present writ petitions have been filed by a committee and a forum representing private unaided recognized schools challenging office orders dated 18th December, 2013 and 27th December, 2013 issued by Lieutenant Governor of Delhi amending Clause 14 of the earlier notifications pertaining to nursery admissions on the ground amongst others that they are illegal, arbitrary and without jurisdiction. Though in WP(C) 202/2014 even the legality of the office order dated 24th November, 2007 had been impugned, yet during rejoinder arguments, Mr. Vedanta Varma, learned counsel for the petitioner had stated that the petitioner was not pressing the challenge with regard to the said office order. Even otherwise, the challenge with regard to 2007 office order would be barred by delay and laches.

3. By the impugned office orders, the Lieutenant Governor has directed that seventy five per cent nursery students, i.e., after excluding twenty five per cent seats reserved for economically weaker section, shall be admitted on the following basis:-

- 70 marks for neighbourhood;
- 20 marks for siblings;
- 5 marks for parent /alumni; and
- 5 marks for inter-state transfers.

4. By a subsequent circular, five marks for inter-state transfers were withdrawn and the controversy with regard to the same has been put to rest by the judgment dated 7th May, 2014 passed by the Apex Court.

PETITIONER'S ARGUMENTS IN WP(C) 202/2014

5. Mr. Sunil Gupta, learned senior counsel for Forum for Promotion of Quality Education for All stated that in every civilised society, a good school for children gets started because of inner zeal, inspiration and honest personal conviction of either the founder-tutor or philanthropist who feels strongly about a particular curriculum or method of teaching and/or wants to lay emphasis on certain aspects of upbringing of children in society like sports, music or academic excellence. It is this emphasis that, according to him, gives a distinct character and identity to each school and is described as the individual philosophy, motto, ethos or objective(s) of that school.

6. According to him, this inspiration of the tutor gives rise to the personal bond and relationship between a tutor and a parent as well as a child. He submitted that the said bond constitutes an essential core of the 'life and personal liberty' of both the entities, namely, the tutor and school on the one hand, and the parent and/or child on the other. The school and teaching therein become a medium for expression of those values in life and the propagation of those values in the society. He contended that but for the assurance of the permanent and lasting

preservation, protection and promotion of said values, no founder would start a new school.

7. He stated that every founder or tutor or philanthropist or society of individuals establishing and/or running a school desires to have a choice of parents/children so that she or he can work on the pupils so as to give due expression and shape to her or his vision and values. Correspondingly, the parent/child also desires to have the choice to attend such a school where he or she can identify with the values of that school and can hope to promote her or his own cause.

8. Consequently, Mr. Gupta submitted that it is these choices of the tutor/school on one hand, and the parent/child on the other, which lie at the core of the sacred relationship between the two entities and constitute a basic human right of those persons.

9. Learned senior counsel for the petitioner submitted that in the written and democratic Constitutions, these choices in regard to teaching of pupils in a school figure mostly in the form of guaranteed and enforceable Bill of Rights. According to him, freedom of these two interested parties constitutes autonomy of every school, which needs to be preserved and protected. He submitted that any interference with this autonomy constitutes a serious inroad into basic human rights.

10. According to him, in the American Constitution, these rights are protected by the First and the Fourteenth Amendments viz. the Right of Freedom of Speech and the Right to Life, Liberty and pursuit of happiness in accordance with due process of law.

11. He submitted that even under the Indian Constitution, these rights are protected as fundamental rights under Articles 19(1)(a), 19(1)(g), as well as Article 21 of the Constitution. He stated that the impugned office orders violate the aforesaid fundamental rights.

12. According to Mr. Gupta, the impugned office orders are against public interest and contrary to principles of autonomy as enunciated in ***T.M.A. Pai Foundation and Others vs. State of Karnataka and Others, (2002) 8 SCC 481*** as well as the Directive Principles enshrined in Articles 38(2), 41, 45 and 46 and the Fundamental Duties in Article 51A(e), (j) and (k) of the Constitution.

13. Learned senior counsel for the petitioner submitted that schools had to be left free and flexible to adopt the criteria of admission as per their own philosophy and objectives. He contended that though the earlier expert opinion and the 2007 order had been against the lottery system, yet the impugned office orders relied on the draw of lots after a blind adherence to the four criteria of neighbourhood, sibling, parent/alumni and inter-state transfer.

14. In short, according to Mr. Gupta, by a blind adherence to the neighbourhood rule and that too, for an exaggerated quantum of seventy points, the respondent in one stroke had destroyed the reasonableness and collective wisdom of all previous orders.

15. He contended that the direct and inevitable result of the impugned neighbourhood rule was that now only the rich in the affluent localities would have exclusive access to good schools situated in their localities, whereas the poor people staying in distant areas of Delhi stood excluded from the same.

16. Mr. Gupta pointed out that previously twenty five weightage points had been left to the discretion of a school to sub-serve its individual needs. However, the same had been done away with under the new policy.

17. He submitted that the impugned office orders also flew in the face of the provisions of the Delhi School Education Act, 1973 (for short "DSE Act, 1973"), Delhi School Education Rules, 1973 (for short "DSE Rules, 1973") as well as the Right of Children to Free and Compulsory Education Act, 2009 (for short "RTE Act, 2009 ") and Guidelines framed thereunder and, therefore, were *ultra vires*, illegal, null and void.

18. Learned senior counsel for the petitioner submitted that Rule 145 of DSE Rules, 1973 was the relevant rule and it left the method of

admission in any school/ pre-primary school to be regulated by the head of the school. He pointed out that the impugned office orders over and above the twenty five per cent reservation stipulated in the RTE Act, 2009 also provided for five per cent staff quota and five per cent girls quota as an additional/extra reservation contrary to Sections 12 and 13 of the RTE Act, 2009.

19. He submitted that by the impugned office orders, Section 13 of the RTE Act, 2009, which was deliberately not applied by the Parliament to pre-primary admission in private unaided schools, had been applied.

20. He stated that the Lieutenant Governor had passed the impugned office orders in an unseemly haste and without any application of mind. He pointed out that though on 10th December, 2013 the Lieutenant Governor had applied for extension of time, yet on 18th December, 2013, when he did not obtain the extension of time, he passed the impugned office order.

21. Mr. Gupta stated that from the application dated 10th December, 2013 filed before this Court in WP(C) 2463/2013, it was clear that for the current year 2014-15 the Lieutenant Governor's decision was to continue with the existing 2007 Order; but going against his own decision, the impugned office order had been issued.

22. He contended that the Lieutenant Governor had not had the benefit of the mandatory advice of the Delhi School Education Advisory Board or the Council of Ministers.

23. Learned senior counsel for the petitioner also submitted that the impugned office orders are in breach of principles of natural justice and fair play inasmuch as the Lieutenant Governor had failed to give an opportunity of hearing to all stake holders, at least to all those schools and associations who had been heard by the Ganguly Committee.

24. Mr. Gupta lastly stated that a public interest litigation activist had been stating that if all children are compelled to attend schools in their own neighbourhood, then even the comparatively bad schools in the distant areas would draw talent and would become good schools with the help of talented students! According to him, this logic was perverse, irrational and absurd as rather than the school shaping the child into a good student, the child was expected to shape the school into a good school.

PETITIONER'S ARGUMENTS IN WP(C) 177/2014

25. Mr. Neeraj Kishan Kaul, learned senior counsel appearing for the petitioner, Action Committee Unaided Recognized Private Schools submitted that the impugned office orders are not only in violation of Rule 145, but also without jurisdiction as Sections 3(1) and 16 of the DSE Act, 1973 read with Rule 43 of the DSE Rules, 1973 did not

empower the Administrator to override Rule 145 which conferred power to regulate admissions upon the head of a recognised unaided school.

26. He contended that the impugned orders are diametrically opposite and absolutely contrary to the earlier admission orders dated 24th November, 2007 and 15th December, 2010 issued by the Administrator and Directorate of Education.

27. He stated that the impugned orders are contrary to the stand taken by the Delhi Government as well as by the Ministry of Human Resource Development, Union of India in various affidavits filed before the Division Bench of this Court and in the Supreme Court.

28. Mr. Kaul reiterated that the impugned orders had been issued without any application of mind in a hasty manner. In support of his contention, he relied upon CM No.16832/2013 moved by the Administrator in W.P.(C) 2463/2013 wherein he had requested eight weeks from 18th December, 2013 to look into the policy relating to admissions in private unaided schools.

ARGUMENTS ON BEHALF OF LIEUTENANT GOVERNOR OF DELHI AND DIRECTORATE OF EDUCATION

29. On the other hand, Mr. P.P. Malhotra, learned senior counsel for respondents submitted that Section 3 of the DSE Act, 1973 and Rule 43 of the DSE Rules, 1973 gave wide powers to the Administrator to regulate education in all schools in Delhi. Since considerable emphasis

was laid on Section 3 of the DSE Act, 1973 and Rule 43 of the DSE Rules, 1973, the said Section and Rule are reproduced hereinbelow:-

A) Section 3 of DSE Act, 1973

> *"3. Power of Administrator to Regulate Education in Schools-*
>
> *(1) The Administrator may regulate education in all the schools in Delhi in accordance with the provisions of this Act and the rules made thereunder....."*

B) Rule 43 of DSE Rules, 1973

> *"43. Power to issue Instructions-*
>
> *The Administrator, if he is of opinion that in the interest of school education in Delhi it is necessary so to do, issue such instructions in relation to any matter, not covered by these rules, as he may deem fit."*

30. Mr. Malhotra stated that the expression 'regulate' in Section 3(1) of the DSE Act, 1973 has a wide meaning. In support of his submission, he relied upon the judgment of the Supreme Court in ***D.K. Trivedi & Sons & Ors. vs. State of Gujarat & Ors., 1986 (Supp.) SCC 20*** wherein the Court has accepted the Shorter Oxford Dictionary meaning of word 'regulate' is to control, govern or direct by rule and regulations; to subject to guidance or restrictions; to adapt to circumstances or surroundings.

31. He pointed out that similarly in ***Jiyajeerao Cotton Mills Ltd. & Anr. vs. Madhya Pradesh Electricity Board & Anr., (1989) Supp.(2) SCC 52,*** the Supreme Court has observed that the word 'regulate' has different shades of meaning and must take its colour from the context in which it is used having regard to the purpose and object of the relevant provisions and the Court while interpreting the expression must necessarily keep in view the mischief sought to be remedied.

32. According to Mr. Malhotra, Rule 145 of the DSE Rules, 1973 was inapplicable to the present case as children between three and six years of age are required to be admitted without any screening procedure i.e. admission test etc., by virtue of Section 13 of the RTE Act, 2009. He submitted that since admission to children between three and six years of age was not covered by Rule 145 or any other provision, the Administrator has wide powers to issue directions under Rule 43 of the DSE Rules, 1973.

33. He submitted that right to education of children between the age of three and six years is a fundamental right under Articles 21 and 45 of the Constitution and the State is bound to ensure that the said right is available to all children, particularly in the light of Sections 11 and 35 of the RTE Act, 2009. The said Sections are reproduced hereinbelow:-

> *"11. Appropriate Government to provide for pre-school education - With a view to prepare children above the age of three years for elementary education and to provide early childhood care and education for all children until*

they complete the age of six years, the appropriate government may make necessary arrangement for providing free pre-school education for such children

xxxx xxxx xxxx xxxx

35.(1) The Central Government may issue such guidelines to the appropriate Government or, as the case may be, the local authority, as it deems fit for the purposes of implementation of the provisions of this Act.

(2) The appropriate Government may issue guidelines and give such directions, as it deems fit, to the local authority or the School Management Committee regarding implementation of the provisions of this Act.

(3) The local authority may issue guidelines and give such directions, as it deems fit, to the School Management Committee regarding implementation of the provisions of this Act."

34. Though Mr. Malhotra admitted that the proviso to Section 12(1)(c) of the RTE Act, 2009 made reservation of at least twenty five per cent of the seats for children belonging to economically weaker section, yet he submitted that it did not take away the fundamental right of every child or the duty of the Government to give education to a child in a neighbourhood school. According to him, the proviso to Section 12(1)(c) only restricted the reimbursement by the local authorities to the extent of twenty five percent economically weaker section.

35. He submitted that it was the duty of the appropriate Government under Section 8 of the RTE Act, 2009 to ensure availability of neighbourhood schools as specified in Section 6 of the RTE Act, 2009. He stated that in view of Sections 8 and 11 of the RTE Act, 2009 and Section 3 and Rule 43 of the DSE Act and Rules, 1973, the Lieutenant Governor was fully competent to issue the impugned office orders.

36. According to him, the reliance placed by the petitioners on the judgment of the Supreme Court in ***T.M.A. Pai Foundation*** case (supra) was misplaced as the said judgment had been passed in the context of professional institutions. In support of his submission, he relied upon the judgment of the Supreme Court in ***Society for Unaided Private Schools of Rajasthan vs. Union of India, (2012) 6 SCC 1***, wherein it has been held as under:-

> *"47. The above judgments in T.M.A. Pai Foundation and P.A. Inamdar were not concerned with interpretation of Article 21-A and the 2009 Act. It is true that the above two judgments have held that all citizens have a right to establish and administer educational institutions under Article 19(1)(g), however, the question as to whether the provisions of the 2009 Act constituted a restriction on that right and if so whether that restriction was a reasonable restriction under Article 19(6) was not in issue.*
>
> *xxxx xxxx xxxx xxxx*
>
> *53. On reading T.M.A. Pai Foundation and P.A. Inamdar in the proper perspective, it becomes clear that the said principles have been applied in the context of professional/higher education where merit and excellence*

have to be given due weightage and which tests do not apply in cases where a child seeks admission to Class I and when the impugned Section 12(1)(c) seeks to remove the financial obstacle. Thus, if one reads the 2009 Act including Section 12(1)(c) in its application to unaided non-minority school(s), the same is saved as reasonable restriction under Article 19(6).

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58. The right established by Article 30(1) is a fundamental right declared in terms absolute unlike the freedoms guaranteed by Article 19 which is subject to reasonable restrictions. Article 30(1) is intended to be a real right for the protection of the minorities in the matter of setting up educational institutions of their own choice. However, regulations may lawfully be imposed either by legislative or executive action as a condition of receiving grant or of recognition. However, such regulation must satisfy the test of reasonableness and that such regulation should make the educational institution an effective vehicle of education for the minority community or for the persons who resort to it. Applying the above test in Sidhrajbhai Sabbai v. State of Gujarat, this Court held the rule authorising reservation of seats and the threat of withdrawal of recognition under the impugned rule to be violative of Article 30(1).''

37. Mr. Malhotra stated that an affidavit filed by the Government in a court of law only reflects the understanding of the individual officer and is not binding on the Government. In support of his submissions, he relied upon the judgment of the Supreme Court in ***Sanjeev Coke Manufacturing Company vs. M/s. Bharat Coking Coal Limited and Another, (1983) 1 SCC 147*** wherein it has been held, *'' Shri Ashoke*

Sen drew pointed attention to the earlier affidavits filed on behalf of Bharat Coking Coal Limited and commented severely on the alleged contradictory reasons given therein for the exclusion of certain coke oven plants from the Coking Coal Mines (Nationalisation) Act. But, in the ultimate analysis, we are not really to concern ourselves with the hollowness or the self-condemnatory nature of the statements made in the affidavits filed by the respondents to justify and sustain the legislation. The deponents of the affidavits filed into court may speak for the parties on whose behalf they swear to the statements. They do not speak for the Parliament. No one may speak for the Parliament and Parliament is never before the court. After Parliament has said what it intends to say, only the court may say what the Parliament meant to say. None else. Once a statute leaves Parliament House, the Court is the only authentic voice which may echo (interpret) the Parliament. This the court will do with reference to the language of the statute and other permissible aids. The executive Government may place before the court their understanding of what Parliament has said or intended to say or what they think was Parliament's object and all the facts and circumstances which in their view led to the legislation. When they do so, they do not speak for Parliament. No Act of Parliament may be struck down because of the understanding or misunderstanding of parliamentary intention by the executive Government or because their (the Government's) spokesmen do not bring out relevant circumstances but indulge in empty and self-defeating affidavits. They do not and they

cannot bind Parliament. Validity of legislation is not to be judged merely by affidavits filed on behalf of the State, but by all the relevant circumstances which the court may ultimately find and more especially by what may be gathered from what the legislature has itself said. We have mentioned the facts as found by us and we do not think that there has been any infringement of the right guaranteed by Article 14.

38. Mr. Malhotra also relied upon the judgment of the Supreme Court in ***Union of India vs. Elphinstone Spinning and Weaving Co. Ltd. and Others, (2001) 4 SCC 139*** wherein it has been held as under:-

> *9. .....The aforesaid principle, however, is subject to one exception that if a citizen is able to establish that the legislation has invaded its fundamental rights then the State must justify that the law is saved. It is also a cardinal rule of construction that if on one construction being given the statute will become ultra vires the powers of the legislature whereas on another construction which may be open, the statute remains effective and operative, then the court will prefer the latter, on the ground that the legislature is presumed not to have intended an excess of jurisdiction. In Sanjeev Coke Mfg. Co. v. Bharat Coking Coal Ltd. the Constitution Bench speaking through Chinnappa Reddy, J., had observed, in the context of interpretation of the provisions of the Coking Coal Mines (Nationalisation) Act, 1972 that the court is not concerned with the statements made in the affidavits filed by the parties to justify and sustain the legislation. The deponents of the affidavits filed in the court may speak for the parties on whose behalf they*

swear to the statements. They do not speak for Parliament. No one may speak for Parliament and Parliament is never before the court. After Parliament has said what it intends to say, only the court may say what Parliament meant to say. None else. Once a statute leaves Parliament House, the court is the only authentic voice which may echo Parliament. This the court will do with reference to the language of the statute and other permissible aids. The executive Government may place before the court their understanding of what Parliament has said or intended to say or what they think was Parliament's object and all the facts and circumstances which in their view led to the legislation. When they do so, they do not speak for Parliament. No Act of Parliament may be struck down because of the understanding or misunderstanding of parliamentary intention by the executive Government or because their spokesmen do not bring out relevant circumstances but indulge in empty and self-defeating affidavits. They do not and they cannot bind Parliament. Validity of legislation is not to be judged merely by affidavits filed on behalf of the State, but by all the relevant circumstances which the court may ultimately find and more especially by what may be gathered from what the legislature has itself said.....

10. In Doypack Systems (P) Ltd. v. Union of India the Court had observed that when the constitutionality of a legislation is being assailed before a court it is the collective will of Parliament with which the court is concerned. No officer of the department can speak for Parliament. The interpreter of the statute must take note of the well-known historical facts. In conventional language the interpreter must put

> *himself in the armchair of those who were passing the Act i.e. the Members of Parliament. It is the collective will of Parliament with which we are concerned. The aforesaid observation had been made in the context of an argument sought for by the petitioner for production of certain documents to ascertain the question whether the shares vested in the Government or not."*

39. According to him, the Division Bench's judgment in ***Social Jurist, A Civil Rights Group vs. Govt. of NCT of Delhi & Anr. W.P.(C) 8533/2010*** was based solely on a concession given in the affidavits by the Central and State Governments and, therefore, it had no precedential value.

40. Mr. Malhotra submitted that non-mentioning of the source of power in the impugned office orders was not fatal and would not vitiate the exercise of power by the concerned Authority. He stated that the test in such cases would be whether the Government had the power to issue such a notification or not. In support of his submission, he relied upon the following judgments of the Supreme Court: ***Union of India and Another Vs. Tulsiram Patel (1985) 3 SCC 398; N. Mani Vs. Sangeetha Theatre and Others (2004) 12 SCC 278;*** and ***Joint Action Committee of Air Line Pilots' Association of India (ALPAI) and Others. Vs. Director General of Civil Aviation and Others (2011) 5 SCC 435.***

41. He further submitted that the right to establish an educational institution under Article 19(1)(g) of the Constitution did not carry with

it the right of recognition/affiliation, as these two rights are independent and separate. According to him, if an institution availed of recognition from any appropriate Government/Statutory Body, then the guidelines issued by such authority would be binding on the said institution and the same could not be challenged as violative of Article 19(1)(g).

42. He contended that whenever an institution obtained recognition, it had to abide by the relevant rules and orders which were issued. He stated that in the present case the petitioners are recognized institutions and, therefore, they have to abide by the DSE Act, 1973 and the DSE Rules, 1973 and directions issued therewith. He pointed out that the Rule 50 of the DSE Rules, 1973 placed a condition precedent for recognition, that the school shall fulfil the real need of the locality.

43. Mr. Malhotra pointed out that the Supreme Court in ***Mohini Jain (Miss) vs. State of Karnataka and Others, (1992) 3 SCC 666*** and in ***Unni Krishnan, J.P. and Others vs. State of Andhra Pradesh and Others, (1993) 1 SCC 645***, has held that right to education is a fundamental right. He contended that the Supreme Court has observed that 'right to life' was a compendious expression for all those rights which the Court must enforce because they were basic to dignified enjoyment of life. He stated that the right to life under Article 21 of the Constitution and the dignity of an individual cannot be assured unless it is accompanied by right to education. He contended that though

Parliament by inserting Article 21-A in the Constitution in 2002 had made education a fundamental right to children in the age group of six to fourteen years, yet the right to education of children in the age group three to six years continued to be a fundamental right under Article 21 read with Article 45 of the Constitution.

44. Mr. Malhotra submitted that the impugned office orders had been issued to give effect to the right to education of children belonging to tender age as they could not be expected to travel long distances to their schools as the same would not only affect their health, but would also put additional burden on them, which would ultimately affect their studies. He contended that right to study in a safe school is a part of fundamental right of the children. Mr. Malhotra exhorted the Court to declare that the fundamental right to education of children belonging to tender age also included the right to study in a neighbourhood school as the same would not only make the right to education effective and meaningful, but at the same time it would also protect the right to health of children.

45. Mr. Malhotra submitted that the right under Article 19(1)(g) of private unaided schools had to be considered in the light of fundamental rights of children to get education, right to health and corresponding obligation of State to provide education to each child by virtue of Article 21 read with Article 45 and protection of health under Article 39(e) and (f) of the Constitution.

46. According to him, it was a settled legal position that whenever there were two competing fundamental rights, it was the right which would serve larger public interest and greater public good which alone would be enforced through the process of Court. In support of his submissions, he relied upon the judgments of the Supreme Court in ***Mr. 'X' vs. Hospital 'Z', (1998) 8 SCC 296; Sanjeev Coke Manufacturing Company vs. M/s. Bharat Coking Coal Limited and Another,*** (supra)***;*** and ***N.K. Bajpai vs. Union of India and Another, (2012) 4 SCC 653***.

47. Consequently, according to Mr. Malhotra, the impugned office orders issued by the Lieutenant Governor aimed to enforce the fundamental right of children to get education in a neighbourhood school which was a higher right than the right of the school to screen or admit only children belonging to the privileged class.

48. He pointed out that the right to administer private unaided schools under Article 19(1)(g) of the Constitution was not an absolute right, but subject to reasonable restrictions in accordance with Article 19(6).

49. Mr. Malhotra pointed out that the Supreme Court in ***State of Karnataka and Anr. vs. Associated Management of (Government Recognised–Unaided–English Medium) Primary and Secondary Schools and Others*** in ***Civil Appeal Nos. 5166-5190 of 2013*** had held that the State may exercise regulatory power either by making a law or by issuing an executive order.

50. Mr. Malhotra contended that imparting of education cannot be treated as a business. He pointed out that the Supreme Court in ***T.M.A. Pai Foundation*** (supra) had held that imparting of education was a charity. He stated that under the impugned office orders, the management quota had been given a go-bye for enforcing and protecting the right of the children which was far more precious than the right of an institution to administer/manage its school.

51. In any event, according to him, the removal of management quota had not resulted in any financial loss to the schools.

52. Mr. Malhotra lastly submitted that the scope of judicial review while examining a policy of the Government was only to check whether it violated the fundamental rights of the citizens or was opposed to the provisions of the Constitution or opposed to any statutory provision or was manifestly arbitrary. According to him, Courts cannot interfere with policy either on the ground that it was erroneous or on the ground that a better, fairer or wiser alternative was available. In support of his submission, he relied upon the judgments of the Supreme Court in ***M.P. Oil Extraction & Anr. vs. State of M.P. & Ors., (1997) 7 SCC 592, Bhavesh D. Parish & Ors. vs. U.O.I. & Anr., (2000) 5 SCC 471, Ugar Sugar Works Ltd. vs. Delhi Administration & Ors., (2001) 3 SCC 635, Balco Employees Union (Regd.) vs. Union of India & Ors., (2002) 2 SCC 333, Union of India vs. Shankar Lal Soni and Another, (2010) 12 SCC 563, Bajaj***

Hindustan Limited vs. Sir Shadi Lal Enterprises Ltd and Another (2011) 1 SCC 640 and ***Re. Special Reference No.1 of 2012, (2012) 10 SCC 1.***

PETITIONER'S REJOINDER ARGUMENTS

53. In rejoinder, Mr. Rakesh Khanna, learned senior counsel for the petitioner in W.P.(C) 177/2014 reiterated that the impugned office orders are diametrically opposite to the stand taken by both the State and the Union Governments in their own affidavits filed in this Court and in the Supreme Court in earlier proceedings. He submitted that the affidavit filed on behalf of Government before the Court reflects the stand of the Government and does not convey an individual opinion of the officer who signs the affidavit. Therefore, according to him, the argument advanced by the learned senior counsel for the respondents was untenable in law.

54. Mr. Khanna contended that the deletion of management quota was arbitrary, illegal, without jurisdiction and violative of fundamental rights of the petitioners, especially in the absence of any evidence with regard to its mis-utilisation. In support of his submission, Mr. Khanna relied upon the judgment of the Supreme Court in ***Christian Medical College, Vellore and Others Vs. Union of India and Others, (2014) 2 SCC 305*** wherein it has been held, "*In our judgment, such a stand is contrary to the very essence of Articles 25, 26, 29(1) and 30 of the Constitution. In view of the rights guaranteed under Article 19(1)(g) of*

the Constitution, the provisions of Article 30 should have been redundant, but for the definite object that the Framers of the Constitution had in mind that religious and linguistic minorities should have the fundamental right to preserve their traditions and religious beliefs by establishing and administering educational institutions of their choice. There is no material on record to even suggest that the Christian Medical College, Vellore, or its counterpart in Ludhiana, St. John's College, Bangalore, or the linguistic minority institutions and other privately-run institutions, aided and unaided, have indulged in any malpractice in matters of admission of students or that they had failed the triple test referred to in P.A. Inamdar case. On the other hand, according to surveys held by independent entities, CMC, Vellore and St. John's Medical College, Bangalore, have been placed among the top medical colleges in the country and have produced some of the most brilliant and dedicated doctors in the country believing in the philosophy of the institutions based on Christ's ministry of healing and caring for the sick and maimed."

55. Mr. Vedanta Verma, learned counsel for the petitioner in W.P.(C) 202/2014 in rejoinder stated that the neighbourhood / locality concept had been considered and rejected by the Ganguly Expert Committee. In support of his contention, he relied upon the following paragraphs of the Ganguly Expert Committee Reports:-

A) First Report

*"**4.1 Neighbourhood Schools***

xxx xxx xxx

The committee gave considerable thought to the neighbourhood concept and came to the conclusion that it could be adopted as one of the criteria with some flexibility to provide for the uneven distribution of schools in different localities of Delhi. Further, in the absence of a systematic school mapping in the capital, it is not advisable to establish a very restrictive pattern in terms of distance. So a small beginning can be made in this regard with admission at the nursery class and the committee would like to suggest that a road map for common school system may be developed for implementation over a period of ten years in the entire spectrum of ten years of schooling. It was also decided that, to begin with, there should be at least a 10 km radius as the outer limit with a staggered weightage point scale. The area closest to the school would get maximum weightage and as the distance from the school increases the weightage would decrease. Though no weightage would be given for children who come from beyond 10 km, their registration forms, however, would be accepted by the school for consideration.

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4.7 School Specific Criteria

The framework for admission process should have an inbuilt mechanism for flexibility to enable each school to adapt it according to its context and local requirements. Without such a provision the admission procedure may end up as a strait jacket, becoming self-defeating and counter productive. Schools, as responsible partners with

parents over an extended period of 12-14 years, should have the freedom to specify their own philosophy, value systems, specific needs and then decide on certain parameters for admission. However schools have to fix such parameters and declare them on their website and notice Board and print them in their prospectus and registration form. It will enable parents to fill in the relevant details in the registration forms under this category besides making the process completely transparent. This will also help the parents to make an appropriate choice of school for their children.

It would be advisable for schools to identify one or more criteria under this section and demarcate weightage for each. An illustrative list of examples has been provided in the section dealing with 'admission procedure'. Schools may add to this list or change the criteria according to their needs and requirement. They may also allocate weightage for children of underprivileged section, as mentioned in the preceding section.

There is a wide variety of schools set up in Delhi, each with its own specific characteristics, obligations and client groups. Thus some schools cater to those from the armed forces and have the mandate to provide admission to that category of children. It will not be fair to make these schools change their admission priorities completely since they have specific obligations. These schools can give all the weightage under school specific criteria to children of parents who they have been mandated to serve in the first place. So in the case of this category of schools the weightage need not be further broken down under more than one parameter as has been recommended for other schools.

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B) Final Report

*"**3.7 Neighbourhood as the sole criterion for deciding the admission***

.....The committee had stated in its earlier report that the neighbourhood criterion could be adopted as one of the criteria with some flexibility to provide for the uneven distribution of schools in different localities in Delhi. Further, in the absence of a systematic school mapping in the capital, it is not advisable to establish a very rigid pattern in terms of distance. So the committee had stated that a beginning could be made in this regard and in due course of time a road map for the evolution of a common school system may be developed.

Therefore, in the present circumstances it would not be fair to have neighbourhood as the sole criterion to decide admission. The changing social pattern and increased mobility away from crowded areas to the suburbs on newly developing colonies must also be kept in view. Above all, if the admission process rests on only one criterion, in schools that receive a large number of applications, discriminating between registered children and making a selection would become difficult.

Moreover, in the absence of an effective discriminating yardstick, draw of lots would become necessary at the initial stage itself. The committee has already stated that it is not healthy to resort to lottery system involving a very large number of children. On account of the above reasons it is healthy to have an admission process that involves multiple criteria.

3.9 Neighbourhood

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Though the general context of the goals of education should suggest a movement towards the common school system, the committee feels that the weightage points for neighbourhood criterion can not be increased by a big margin. The reason is that Delhi, as a city, reflects the culture of homogeneous social groups and it is not healthy to give unduly high weightage for neighbourhood which might discourage intermingling of children from different social and economic backgrounds. It would go against the principle of diversity and heterogeneity. At the same time, taking into consideration the positive response to neighbourhood policy from majority of stakeholders, it would be appropriate to slightly increase the weightage to this criterion.

Another aspect that engaged the attention of the committee was the distance differentials under this parameter. There is a need to increase the upper distance limit from 10 km to 15 km in order to provide for greater opportunities to children residing in underserved areas of Delhi. The decision to consider applications from 'non- Delhi areas' (Gurgaon, Faridabad, Ghaziabad etc.) for the purpose of admission may be left to the discretion of each school. Immediate neighbourhood would be defined as areas within 3 km radius, and children coming from these areas would get the maximum weightage point of 30.

It is also suggested that children coming from areas that are beyond 15 km may also be considered but no additional points are given. Thus the neighbourhood criterion would be fine tuned with some inbuilt flexibility and some scope for exercising discretion in the hands of the schools."

56. It is pertinent to mention that neither any pleadings were filed nor any argument was advanced by the Social Jurist, though it had been impleaded as a respondent in the present proceedings on the first date of hearing itself.

COURT'S REASONING

PRIVATE UNAIDED SCHOOL MANAGEMENTS HAVE A FUNDAMENTAL RIGHT UNDER ARTICLES 19(1)(g) TO ESTABLISH, RUN AND ADMINISTER THEIR SCHOOLS, INCLUDING THE RIGHT TO ADMIT STUDENTS.

57. Having heard the learned counsel for parties, this Court is of the view that private unaided school managements have a fundamental right under Articles 19(1)(g) of the Constitution to run and administer their schools. In ***T.M.A. Pai Foundation*** (supra) the eleven judge Bench has held that the establishment and running of an educational institution falls within the four expressions used in Article 19(1)(g) of the Constitution, in particular the expression "occupation".

58. The right to admit students amongst others was held by the Supreme Court in ***T.M.A. Pai Foundation*** (supra) to be a facet of the right to establish and administer schools, conferred upon private unaided non-minority educational institutions. The Supreme Court held that conferring maximum autonomy upon private unaided schools would be in the interest of general public as it would ensure that more such institutions are established. This Court also takes judicial notice

that parents of the wards choose a school primarily based on its goodwill and reputation.

59. The importance of schools has been aptly expressed by Victor Hugo when he said, *"He who opens a School door, closes a prison."* James A. Garfield has also wisely said, *"Next in importance to freedom and justice is popular education, without which neither freedom nor justice can be permanently maintained."*

60. The relevant portion of ***T.M.A. Pai Foundation*** (supra) is reproduced hereinbelow:-

> *"20. Article 19(1)(g) employs four expressions, viz., profession, occupation, trade and business. Their fields may overlap, but each of them does have a content of its own. Education is per se regarded as an activity that is charitable in nature [See The State of Bombay v. R.M.D. Chamarbaugwala,. Education has so far not been regarded as a trade or business where profit is the motive. Even if there is any doubt about whether education is a profession or not, it does appear that education will fall within the meaning of the expression "occupation".....*
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> *xxxx xxxx xxxx xxxx*
>
> *25. 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 Article 19(1)(g).*

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38. The scheme in Unni Krishnan's case has the effect of nationalizing education in respect of important features, viz., the right of a private unaided institution to give admission and to fix the fee. By framing this scheme, which has led to the State Governments legislating in conformity with the scheme the private institutions are undistinguishable from the government institutions; curtailing all the essential features of the right of administration of a private unaided educational institution can neither be called fair or reasonable.....

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40. Any system of student selection would be unreasonable if it deprives the private unaided institution of the right of rational selection, which it devised for itself, subject to the minimum qualification that may be prescribed and to some system of computing the equivalence between different kinds of qualifications, like a common entrance test. Such a system of selection can involve both written and oral tests for selection, based on principle of fairness.

41. Surrendering the total process of selection to the state is unreasonable, as was sought to be done in the Unni Krishnan scheme.....

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Private unaided non-minority educational institutions

48. Private education is one of the most dynamic and fastest growing segments of post-secondary education at the turn of the twenty-first century.....

xxxx xxxx xxxx xxxx

50. The right to establish and administer broadly comprises the following rights:-

(a) to admit students:
(b) to set up a reasonable fee structure:
(c) to constitute a governing body;
(d) to appoint staff (teaching and non-teaching); and
(e) to take action if there is dereliction of duty on the part of any employees."

xxxx xxxx xxxx xxxx

55. .....But the essence of a private educational institution is the autonomy that the institution must have in its management and administration. There, necessarily, has to be a difference in the administration of private unaided institutions and the government-aided institutions. Whereas in the latter case, the Government will have greater say in the administration, including admissions and fixing of fees, in the case of private unaided institutions, maximum autonomy in the day-to-day administration has to be with the private unaided institutions. Bureaucratic or governmental interference in the administration of such an institution will undermine its independence. While an educational institution is not a business, in order to examine the degree of independence that can be given to a recognized educational institution, like any private entity that does not seek aid or assistance from the Government, and that exists by virtue of the funds generated by it, including its loans or borrowings, it is important to note that the essential ingredients of the management of the private institution include the recruiting students and staff, and the quantum of fee that is to be charged.

xxxx xxxx xxxx xxxx

60. Education is taught at different levels, from primary to professional. It is, therefore, obvious that government

regulations for all levels or types of educational institutions cannot be identical; so also, the extent of control or regulation could be greater vis-à-vis aided institutions.

61. In the case of unaided private schools, maximum autonomy has to be with the management with regard to administration, including the right of appointment, disciplinary powers, admission of students and the fees to be charged. At the school level, it is not possible to grant admissions on the basis of merit. It is no secret that the examination results at all levels of unaided private schools, notwithstanding the stringent regulations of the governmental authorities, are far superior to the results of the government-maintained schools. There is no compulsion on students to attend private schools. The rush for admission is occasioned by the standards maintained in such schools, and recognition of the fact that State-run schools do not provide the same standards of education. The State says that it has no funds to establish institutions at the same level of excellence as private schools. But by curtailing the income of such private schools, it disables those schools from affording the best facilities because of a lack of funds. If this lowering of standards from excellence to a level of mediocrity is to be avoided, the State has to provide the difference which, therefore, brings us back in a vicious circle to the original problem viz. the lack of State funds. The solution would appear to lie in the States not using their scanty resources to prop up institutions that are able to otherwise maintain themselves out of the fees charged, but in improving the facilities and infrastructure of State-run schools and in subsidizing the fees payable by the students there. It is in the interest of the general public that more good quality schools are established; autonomy and non-regulation of the school administration in the right of appointment, admission of

the students and the fee to be charged will ensure that more such institutions are established.....

xxxx xxxx xxxx xxxx

65. .....The private educational institutions have a personality of their own, and in order to maintain their atmosphere and traditions, it is but necessary that they must have the right to choose and select the students who can be admitted to their courses of studies. It is for this reason that in St. Stephen's College case this Court upheld the scheme whereby a cut-off percentage was fixed for admission, after which the students were interviewed and thereafter selected. While an educational institution cannot grant admission on its whims and fancies, and must follow some identifiable or reasonable methodology of admitting the students, any scheme, rule or regulation that does not give the institution the right to reject candidates who might otherwise be qualified according to, say, their performance in an entrance test, would be an unreasonable restriction under Article 19(6), though appropriate guidelines/modalities can be prescribed for holding the entrance test in a fair manner. Even when students are required to be selected on the basis of merit, the ultimate decision to grant admission to the students who have otherwise qualified for the grant of admission must be left with the educational institution concerned. However, when the institution rejects such students, such rejection must not be whimsical or for extraneous reasons."

(emphasis supplied)

AUTONOMY HAS ALSO BEEN RECOGNISED AND CONFERRED UPON SCHOOLS BY SECTION 16(3) OF DSE ACT, 1973 AND RULE 145 OF DSE RULES, 1973

61. In fact, the concept of autonomy has not only been recognized but also conferred upon private unaided schools by virtue of Section 16(3) of the DSE Act, 1973 and Rule 145 of the DSE Rules, 1973. Section 16(3) of the DSE Act, 1973 states that admission to a recognized school or in a class thereof shall be regulated by the rules made in this behalf. Section 2(u) of the DSE Act, 1973 defines a "school", to include a pre-primary school. Rule 145(1), of the DSE Rules, 1973 reads as under:-

> *"**145. Admission to recognised unaided schools**—(1) The head of every recognised unaided school shall regulate admissions to a recognised unaided school or to any class thereof either on the basis of admission test or on the basis of result in a particular class or school."*

62. Consequently, Rule 145 of the DSE Rules, 1973 empowers the head of every unaided school to regulate admissions in the schools or any class thereof.

SCOPE OF REASONABLE RESTRICTIONS PRESCRIBED IN ARTICLE 19(6)

63. However, the aforesaid right to administer, which includes the right to admit students is subject to reasonable restrictions as prescribed in Article 19(6) of the Constitution. The relevant portion of the said Article is reproduced hereinbelow:-

> *"(6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any **law** imposing, in the interest of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause....."*
>
> (emphasis supplied)

64. Consequently, the right to establish an educational institution can be regulated, but such regulatory measure must, in general, be to ensure the maintenance of proper academic standards, atmosphere, infrastructure and prevention of mal-administration by those in charge of the management. In ***Dayanand Anglo Vedic (DAV) College Trust and Management Society Vs. State of Maharashtra and Another, (2013) 4 SCC 14***, the Supreme Court has held as under:-

> *"32. .....This is subject to reasonable regulations for the benefit of the institution. The State Government and universities can issue directions from time to time for the maintenance of the standard and excellence of such institution which is necessary in the national interest."*
>
> (emphasis supplied)

RESTRICTION UNDER ARTICLE 19(6) CAN ONLY BE BY WAY OF A LAW AND NOT BY WAY OF AN OFFICE ORDER WITHOUT ANY AUTHORITY OF LAW

65. It is an equally well settled proposition of law that no citizen can be deprived of his fundamental right guaranteed under Article 19(1) of the Constitution in pursuance to an executive action without any

authority of law. If any executive action operates to the prejudice of any person, it must be supported by legislative authority, i.e., a specific statutory provision or rule of law must authorise such an action. Executive instruction in the form of an administrative order unsupported by any statutory provision is not a justifiable restriction on fundamental rights.

66. In ***State of Madhya Pradesh and Anr. vs. Thakur Bharat Singh, (1967) 2 SCR 454***, the Supreme Court has held, *"All executive action which operates to the prejudice of any person must have the authority of law to support it, and the terms of Art. 358 do not detract from the rule. Article 358 expressly authorises the State to take legislative or executive action provided such action was competent for the State to make or take.....We have adopted under our Constitution not the continental system but the British system under which the rule of law prevails. Every Act done by the Government or by its officers must, if it is to operate to the prejudice of any person, be supported by some legislative authority."*(emphasis supplied)

67. In ***Kharak Singh Vs. The State of U.P. & Ors., 1964 (1) SCR 332*** the Supreme Court has held, *"Though learned counsel for the respondent started by attempting such a justification by invoking s. 12 of the Indian Police Act he gave this up and conceded that the regulations contained in Ch. XX had no such statutory basis but were merely executive or departmental instructions framed for the guidance*

of the police officers. They would not therefore be "a law" which the State is entitled to make under the relevant clauses 2 to 6 of Art. 19 in order to regulate or curtail fundamental rights guaranteed by the several sub-clauses of Art. 19(1); nor would the same be "a procedure established by law" within Art. 21." (emphasis supplied)

68. Similarly in ***Bijoe Emmanuel and Ors. Vs. State of Kerala and Ors., (1986) 3 SCC 615***, the Apex Court has held, *".....The law is now well settled that any law which be made under clauses (2) to (6) of Art. 19 to regulate the exercise of the right to the freedoms guaranteed by Article 19(1)(a) to (e) and (g) must be 'a law' having statutory force and not a mere executive or departmental instruction....."*(emphasis supplied)

69. In ***Union of India Vs. Naveen Jindal and Anr., (2004) 2 SCC 510*** the Supreme Court has held as under:-

> *"28. .....The question, however, is as to whether the said executive instruction is "law" within the meaning of Article 13 of the Constitution of India. Article 13(3)(a) of the Constitution of India reads thus:*
>
> *"13. (3)(a) 'law' includes any ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;"*
>
> *29. A bare perusal of the said provision would clearly go to show that executive instructions would not fall within the aforementioned category. Such executive instructions may have the force of law for some other purposes; as for*

example those instructions which are issued as a supplement to the legislative power in terms of clause (1) of Article 77 of the Constitution of India. The necessity as regards determination of the said question has arisen as Parliament has not chosen to enact a statute which would confer at least a statutory right upon a citizen of India to fly the National Flag. An executive instruction issued by the appellant herein can any time be replaced by another set of executive instructions and thus deprive Indian citizens from flying National Flag. Furthermore, such a question will also arise in the event if it be held that right to fly the National Flag is a fundamental or a natural right within the meaning of Article 19 of the Constitution of India; as for the purpose of regulating the exercise of right of freedom guaranteed under Articles 19(1)(a) to (e) and (g) a law must be made.

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31. To the same effect are the decisions of this Court in State of M.P. v. Thakur Bharat Singh and Bijoe Emmanuel v. State of Kerala .

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33. In Punit Rai v. Dinesh Chaudhary, this Court held that a circular letter as regards determination of caste of a child born from a non-Scheduled Caste Hindu father and a Scheduled Caste mother shall not have the force of the statute, stating: (SCC pp. 222-23, para 42)

> *"42. The said circular letter has not been issued by the State in exercise of its power under Article 162 of the Constitution of India. It is not stated therein that the decision has been taken by the Cabinet or any authority authorized in this behalf in terms of Article 166(3) of the Constitution of India. It is trite that a circular letter being an administrative instruction is not a law within the meaning of Article 13 of the*

Constitution of India. (See Dwarka Nath Tewari v. State of Bihar).”

(emphasis supplied)

70. Consequently, this Court is of the opinion that Article 19(6) of the Constitution postulates and contemplates restriction on a fundamental right by way of a law and not by an administrative action in the form of an order or a circular or a notification without any authority of law.

NO MATERIAL TO SHOW THAT PRIVATE UNAIDED SCHOOLS WERE INDULGING IN ANY MALPRACTICE OR MISUSING THEIR RIGHT TO ADMIT STUDENTS IN PURSUANCE TO 2007 NOTIFICATION

71. Admittedly, the impugned office orders have not been issued in pursuance to any misuse or malpractice as admissions to nursery classes were being carried out by private unaided schools in accordance with an earlier notification issued by the Administration in pursuance to the Expert Ganguly Committee Reports appointed by this Court. No document or material has been placed on record to show that private unaided schools were indulging in any malpractice or misuse of their right to admit students in pursuance to 2007 Notification.

RIGHT TO IMPOSE CONDITIONS WHILE GRANTING RECOGNITION/AFFILIATION CANNOT BE USED TO DESTROY INSTITUTIONAL AUTONOMY

72. Undoubtedly, the right to establish an educational institution is independent and separate from the right to recognition or affiliation and the statutory authorities can impose conditions for grant of affiliation or recognition; yet this power to impose a condition cannot completely destroy the institutional autonomy and the very object of establishment of the educational institution. In ***T.M.A. Pai Foundation*** (supra) the Supreme Court has held as under:-

> *"36. ..... Affiliation and recognition has to be available to every institution that fulfils the conditions for grant of such affiliation and recognition. The private institutions are right in submitting that it is not open to the Court to insist that statutory authorities should impose the terms of the scheme as a condition for grant of affiliation or recognition; this completely destroys the institutional autonomy and the very objective of establishment of the institution."*
>
> (emphasis supplied)

73. Consequently, in the opinion of this Court, the Government by way of the impugned office orders cannot trample upon the autonomy conferred upon the management of the schools with regard to the right to administer, including the right to admit students, as long as the procedure stipulated is fair, transparent and non-exploitative.

TMA PAI FOUNDATION JUDGMENT (SUPRA) IS APPLICABLE TO NURSERY ADMISSIONS IN PRIVATE UNAIDED NON-MINORITY SCHOOLS. ARTICLE 21-A AND ARTICLE 15(5) OF THE CONSTITUTION HAVE NO APPLICATION TO THE PRESENT CASE.

74. In the opinion of this Court, the judgment of the Supreme Court in ***T.M.A. Pai Foundation*** (supra) is applicable to admission in nursery classes as it deals with education at all levels and it has been rendered on the premise that children have a fundamental right to education under Article 21 of the Constitution.

75. Paragraphs 2, 36, 40, 41, 45, 50, 52, 54, 55, 60, 61 and 65 and answers to Questions 9 and 11 of para 161 of ***T.M.A. Pai Foundation*** (supra) apart from generally dealing with unaided non-minority institutions, specifically deal with the right of private unaided schools in the matter of management and administration, including the right to admit students. Consequently, ***T.M.A. Pai Foundation*** (supra) judgment is not confined to minority or professional/higher educational institutions and is squarely applicable to the present cases.

76. It is pertinent to mention that the rights of minority and non-minority unaided schools are absolutely identical insofar as establishment and administration of educational institutions are concerned, especially the right to devise its own procedure for selection of students, subject to the same being fair, reasonable and rational. In ***P.A. Inamdar & Ors. vs. State of Maharashtra & Ors., (2005) 6 SCC 537,*** the Supreme Court has held:-

"125. As per our understanding, neither in the judgment of Pai Foundation[(2002) 8 SCC 481] nor in the Constitution Bench decision in Kerala Education Bill[1959 SCR 995 : AIR 1958 SC 956] which was approved by Pai Foundation [(2002) 8 SCC 481] is there anything which would allow the State to regulate or control admissions in the unaided professional educational institutions so as to compel them to give up a share of the available seats to the candidates chosen by the State, as if it was filling the seats available to be filled up at its discretion in such private institutions. This would amount to nationalisation of seats which has been specifically disapproved in Pai Foundation [(2002) 8 SCC 481] . Such imposition of quota of State seats or enforcing reservation policy of the State on available seats in unaided professional institutions are acts constituting serious encroachment on the right and autonomy of private professional educational institutions. Such appropriation of seats can also not be held to be a regulatory measure in the interest of the minority within the meaning of Article 30(1) or a reasonable restriction within the meaning of Article 19(6) of the Constitution.....

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137. Pai Foundation has held that minority unaided institutions can legitimately claim unfettered fundamental right to choose the students to be allowed admission and the procedure therefor subject to its being fair, transparent and non-exploitative. The same principle applies to non-minority unaided institutions..... The admission procedure so adopted by a private institution or group of institutions, if it fails to satisfy all or any of the triple tests, indicated hereinabove, can be taken over by the State substituting its own procedure....."

(emphasis supplied)

77. Even the Supreme Court in ***Society for Unaided Private Schools of Rajasthan*** (supra), the judgment which the learned senior counsel for the respondents had relied upon, has confirmed that in ***T.M.A. Pai Foundation*** (supra) *and* ***P.A. Inamdar*** (supra) it has been held that all citizens have a right to establish and administer educational institutions under Article 19(1)(g) of the Constitution. In fact, the Supreme Court in ***Society for Unaided Private Schools of Rajasthan*** (supra) upheld the constitutional validity and legality of RTE Act, 2009 in particular its Section 12(1)(c) holding it to be an enactment to give effect to Article 21-A of the Constitution and a reasonable restriction on the non-minorities' right to establish and administer an unaided educational institution under Article 19(6) of the Constitution.

78. In the present case, we are concerned with the children below the age of six years, whereas Article 21-A and the RTE Act, 2009 except Section 12(1)(c), deal with and provide for free compulsory education to children between the age of six and fourteen years.

79. Recently, the Constitution Bench of Supreme Court in ***Pramati Educational & Cultural Trust (Registered) & Ors. vs. Union of India & Ors., (2014) 8 SCC 1***, while holding the constitutional validity of Article 21-A and clause (5) of Article 15 inserted by the Eighty-Sixth and the Ninety-Third Constitutional amendments has reiterated that the content of the right under Article 19(1)(g) to establish and administer private educational institutions as per the judgment of ***T.M.A. Pai***

Foundation (supra) includes the right to admit students of their choice and autonomy of administration. The Constitution Bench held that clause (5) of Article 15 had been inserted to enable the State to make a law only for advancement of socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes and to a very limited extent, affected the right under Article 19(1)(g) of the Constitution. The relevant portion of the said judgment is reproduced hereinbelow:-

> *"25. Thus, the content of the right under Article 19(1)(g) of the Constitution to establish and administer private educational institutions, as per the judgment of this Court in T.M.A. Pai Foundation, includes the right to admit students of their choice and autonomy of administration, but this Court has made it clear in T.M.A. Pai Foundation that this right and autonomy will not be affected if a small percentage of students belonging to weaker and backward sections of the society were granted freeships or scholarships, if not granted by the Government.....*
>
> *xxx xxx xxx*
>
> *28. ..... 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.....

29. .....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..... 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.....

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49. .....Hence, Mr Rohatgi and Mr Nariman are right in their submission that the constitutional obligation under Article 21-A of the Constitution is on the State to provide

free and compulsory education to all children of the age of 6 to 14 years and not on private unaided educational institutions.....We do not find anything in Article 21-A which conflicts with either the right of private unaided schools under Article 19(1)(g) or the right of minority schools under Article 30(1) of the Constitution, but the law made under Article 21-A may affect these rights under Articles 19(1)(g) and 30(1). The law made by the State to provide free and compulsory education to the children of the age of 6 to 14 years should not, therefore, be such as to abrogate the right of unaided private educational schools under Article 19(1)(g) of the Constitution.....

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53. .....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 [T.M.A. Pai Foundation v. State of Karnataka, (2002) 8 SCC 481] 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."

(emphasis supplied)

80. Since the impugned office orders have admittedly not been issued in pursuance of the power conferred under Article 21-A and Article 15(5) of the Constitution, the judgment in ***T.M.A.Pai***

Foundation (supra) is still good law and the petitioners are entitled to rely upon it.

EXCEPT PROVISO TO SECTION 12(1)(c), NONE OF THE OTHER PROVISIONS OF RTE ACT, 2009 APPLY TO THE NURSERY ADMISSION

81. Except the proviso to Section 12(1)(c) of the RTE Act, 2009, none of the other provisions of the said Act apply to the nursery admission. It is pertinent to mention that both Article 21-A of the Constitution and the RTE Act, 2009 specifically stipulate that the State shall provide free and compulsory education to all children in the age group of six to fourteen years, whereas nursery admission pertains to children below the age of six years.

82. In fact, this issue is no longer *res integra* as the Division Bench of this Court in ***Social Jurist, A Civil Rights Group*** (supra) has categorically held that the provisions of the RTE Act, 2009, including Section 13 thereof, do not apply to the seventy five per cent general category admissions made by private unaided schools and that the RTE Act, 2009 only applies to children of the age group of six to fourteen years. The Division Bench also held that the Central government may amend the RTE Act, 2009 for it to apply to the seventy five per cent general category admissions also. The argument of the respondents in the present matter, based on Section 11 of the RTE Act, 2009 also did not find favour with the D0ivision Bench. The relevant portion of the

Division Bench judgment in ***Social Jurist, A Civil Rights Group*** (supra) is reproduced hereinafter:-

> *"4. .....the following basic issues are hence for our consideration:-*
>
> *i. Whether Right to Education Act applies to pre-school including nursery schools and for education of children below six years of age? and;*
>
> *ii. Whether Right to Education Act applies to admission of children in respect of 75% of the seats apart from 25% of the seats for children covered under the definition given in Sections 2(d) and 2(e) of the Act?*
>
> *xxxx xxxx xxxx xxxx*
>
> *7. It would thus be seen that the stand taken by the Government of India is that the provisions of RTE Act, 2009, including Section 13 thereof, do not apply to the admission made to the pre-elementary (pre-primary and pre-school) classes by private unaided schools, except to the extent stipulated in the proviso to Section 12(1) of the said Act. On being asked as to what the stand of the Government of NCT in this regard is, the learned counsel representing the State Government categorically stated that the same is the stand taken by them.*
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> *xxxx xxxx xxxx xxxx*
>
> *14. In terms of Section 2(c), a 'child' is defined as a male or female child of the age of six to fourteen years. It is not in dispute that 'the Act' has been enacted in terms of Article 21A of the Constitution. That Article makes free and compulsory education a fundamental right to children of six years of age to fourteen years of age. The above Article does not deal with the fundamental rights for free and compulsory education to children of less than six*

years of age. Rather Article 45 of directive principles of State policy only provides that the State shall endeavour to provide early childhood care and education for all children until they complete the age of six years. Both Article 21A of the Constitution and Section 2(c) of the Act refer the age of the children between six years and fourteen years, be it a fundamental right or statutory right. A right to free and compulsory education though being statutory in nature under the Act, is traceable to fundamental rights under the Constitution.

xxxx xxxx xxxx xxxx

18. .....In stricto sensu, the Act is applicable only to elementary education from Class I to VIII to the children of the age of six years to fourteen years.

19. We may also refer to the provisions of Section 11 of the Act which states that:.....

xxxx xxxx xxxx xxxx

21. By the provisions of Section 11, a duty is cast upon the appropriate Government as defined under Section 2(a) of the Act to make necessary arrangements for providing free and pre-school education for such children. The section speaks only of necessary arrangement to be made by the appropriate Government and it does not speak of free and compulsory education in elementary schools.

xxxx xxxx xxxx xxxx

25. .....The above discussion leads to the following conclusions that the Act is applicable to elementary education for the children at the age of six years to fourteen years.

26. This takes us to the next question as to whether the private unaided non-minority schools shall have the duty of admitting children in Class-I and pre-school classes

only to the extent of 25% of the strength of that class in terms of proviso to Section 12(1)(c) or such schools also have the duty to admit the children in pre-elementary classes for the remaining 75% of the strength of the class, only in accordance with the provisions of RTE Act, 2009.....

27. Section 35 under Chapter VII of the Act relates to the power of the Central Government or of the appropriate Government or the local authority to issue guidelines. The said Section reads as under:.....

xxxx xxxx xxxx xxxx

29.....Thus, the schools specified in sub-clause (iv) of clause (n) of Section 2 are expressly excluded from the requirement of constitution of School Management Committees. It is only the unaided schools, not receiving any kind of grants to meet their expenses from the appropriate Government of the local authority which are referred in sub-clause (iv) of clause (n) of Section 2. Thus, it is not obligatory for the private unaided schools to form School Management Committees in terms of Section 21 of the Act. If that be so, the directions and guidelines under Section 35 of the Act cannot be issued to such schools.

30. Considering the provisions contained in Article 21-A of the Constitution and the scheme of the Right of children to Free and Compulsory Education Act, 2009, as discussed earlier by us, there is no escape from the conclusion that as far as the private unaided schools referred in Section 2(n)(iv) of the said Act are concerned, the provisions of the Act, except the admission to the extent of 25% of the strength of the class, to the children belonging to the weaker sections and disadvantaged group, do not apply to the admissions made to the pre-elementary (pre-school and pre-primary) classes of such

> *schools. Consequently, Section 13 of the Act which prohibits collection of capitation fee and adoption of any screening procedure also does not apply to the admissions made to the remaining 75% of the pre-elementary classes of unaided private schools."*
>
> (emphasis supplied)

83. From the aforesaid extract of the Division Bench in ***Social Jurist, A Civil Rights Group*** (supra) it would be apparent that the judgment is not based on any concession or consent or agreement.

84. Moreover, upon a perusal of the paper books, this Court is of the view that the impugned office orders are not only contrary but in conflict with the stand taken by the State and the Central Governments in LPA 196/2004, SLP (C) 24622/2007 and WP (C) 8533/2010. The judgments relied upon by Mr. Malhotra are irrelevant as they pertain to the understanding and intent behind the Acts passed by the Parliament and not to administrative office orders. In any event, no plea of disowning the affidavits filed on behalf of the respondents in various proceedings has been taken by the respondents in their counter affidavits.

85. Consequently, submission of the learned senior counsel for the respondents that Sections 8, 11, 13 and 35 of the RTE Act, 2009 are applicable to the nursery admission, is not only contrary to respondents' earlier stand but also untenable in law.

IMPUGNED OFFICE ORDERS ARE CONTRARY TO GUIDELINES ISSUED BY CENTRAL GOVERNMENT UNDER SECTION 35(1) OF RTE ACT, 2009

86. Even if the provisions of the RTE Act, 2009 were applicable to seventy five per cent general category nursery admissions, the guidelines/directions to be issued by the appropriate government under Section 35(2) of RTE Act, 2009 could not be contrary to those issued by the Central Government to the appropriate government under Section 35(1) of the RTE Act, 2009.

87. In fact, the Central Government had issued guidelines under Section 35(1) of the RTE Act, 2009 on 23rd November, 2010 and 10th December, 2010 clearly providing that for admission to seventy five per cent general category students, each school shall formulate its own policy in terms of the objectives of the school, on rational, reasonable and just basis. The relevant portion of the Central Government guidelines issued under Section 35 of the RTE Act, 2009 reads as under:-

> *"(ii) For admission to remaining 75% of the seats..... in respect of unaided schools....., each school should formulate a policy under which admissions are to take place. This policy should include criteria for categorization of applicants in terms of the objectives of the school on a rational, reasonable and just basis.....There shall be no testing and interviews for any child/parent falling within or outside the categories, and selection would be on a random basis. Admission should be made on this basis."*
>
> (emphasis supplied)

SECTION 3 OF DSE ACT, 1973 AND RULE 43 OF DSE RULES, 1973 CANNOT BE USED TO CONTRADICT OR OVERRULE A SPECIFIC PROVISION. FURTHER RULE 50 of DSE RULES, 1973 CANNOT BE INTERPRETED TO MEAN THAT THE SCHOOL HAS TO BE CONFINED TO THE LOCALITY IN WHICH IT IS SITUATED.

88. Even Section 3 of the DSE Act, 1973 and Rule 43 of the DSE Rules, 1973 give power to the Administrator/ Lieutenant Governor to regulate education and to issue instruction in the interest of school education, but in the opinion of this Court, the said power cannot be used to contradict or overrule a specific provision, like Section 16(3) of the DSE Act, 1973 or Rule 145 of the DSE Rules, 1973.

89. A perusal of Rules 131 and 132 of Rules, 1973 establishes beyond any doubt that the Directorate of Education can regulate admissions in aided schools only and not in unaided schools, much less take over the entire admission process in unaided schools.

90. This Court is also of the view that powers under Section 3 of the DSE Act, 1973 and Rule 43 of the DSE Rules, 1973 can only be used to prevent any possible misuse or malpractice in administration of the school. In fact, the Division Bench of this Court in ***Social Jurist, A Civil Rights Group vs. Govt. of NCT of Delhi & Anr., 198(2013) DLT 384*** has held as under:-

> *"35.....The Lieutenant Governor of Delhi in exercise of the powers conferred upon him by Section 3(1) of Delhi School Education Act and Rule 43 of Delhi School*

Education Rules, 1973 is competent to give such further directions or to make such modifications to the existing order as the Government may deem appropriate, to prevent any possible misuse or malpractice in making admission to pre-primary and pre-school classes by these private unaided schools.....”

(emphasis supplied)

91. Also, Rule 50 of the DSE Rules, 1973 only provides that the school should serve a real need of the locality. The said rule cannot be interpreted to mean that the school has to be confined to the locality and cannot admit students staying beyond the locality in which it is situated. To accept such a submission would amount to doing violence to the language used in Rule 50.

EXPRESSION “REGULATE” HAS BEEN DEALT WITH BY THE SUPREME COURT IN TMA PAI FOUNDATION JUDGMENT (SUPRA)

92. The expression “regulate” in the field of education has been interpreted by the Supreme Court in ***T.M.A. Pai Foundation*** (supra) to mean:-

“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 maladministration 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."

93. Consequently, the judgments interpreting the word "regulate" in general or in the context of other statutes relied upon by the learned senior counsel for the respondents are irrelevant.

94. In any event, even Rule 145 of DSE Rules, 1973 empowers the head of every recognized unaided school to regulate admission. As the expression "regulate" has been used both in Section 3 of DSE Act, 1973 and Rule 145 of DSE Rules, 1973 it has to be given the same meaning. If the learned senior counsel for the respondents' submission is accepted, it would amount to conferring a wide meaning to the expression "regulate" in Section 3 of DSE Act, 1973 and yet, at the same time diluting the identical expression used in Rule 145 of DSE Rules, 1973.

THE POINT SYSTEM INTRODUCED BY THE IMPUGNED OFFICE ORDERS IS NEITHER PROCEDURALLY PROPER NOR RATIONAL.

95. This Court would like to mention that neither any pleadings nor any document have been placed on record by the respondents to show that the impugned office orders were issued after carrying out any empirical study or mapping exercise with regard to availability of good quality schools in the neighbourhood of each colony.

96. While under the RTE Rules, 2010 framed by the Central Government and the Delhi Right of Children to Free and Compulsory Education Rules, 2011 framed by the State Government, the area or limit of neighbourhood is defined as one kilometre for children studying in classes 1 to 5 and three kilometres for children studying in classes 6 to 8, the initial limit of neighbourhood for seventy marks for nursery admission in the impugned office orders was six kilometres, which was later on changed to eight kilometres. It is not understood as to how a nursery school within eight kilometres radius can be considered to be a neighbourhood school for a tiny tot, when for a Class 5 student the limit of neighbourhood school is one kilometre!

97. In the opinion of this Court, by awarding as many as seventy out of ninety-five marks for neighbourhood, the impugned office orders place undue emphasis on location of residence of a child over which she/he has no control. Also, grant of uniform seventy marks to all children staying within the 8 kilometer radius operates unfairly because if there are more applicants than the seats available, the school has to hold a draw of lots. A student staying 500 meters away may not be successful in the draw, while a child staying seven and a half kilometer away may get admission!

98. This Court is of the view that if the power of curtailing the choice is conferred upon the State, it may in future stipulate that residents of a

locality would be entitled for medical treatment only in hospitals situated in their locality!

99. Even in the United States of America, the concept of neighbourhood school or distance does not apply to private unaided schools. It only applies to public schools.

100. Further by awarding five marks for siblings studying in the same school irrespective of the number of siblings a child may have, the impugned office orders place a single child in a disadvantageous position. After all, the parents who follow smaller family norms in the interest of the society cannot be placed at a disadvantageous position.

101. Also, the admitted position is that the mandatory advice of the Delhi School Education Advisory Board under Section 22 of the DSE Act, 1973 had not been obtained prior to the issuance of the impugned office orders.

CHILDREN THROUGH THEIR PARENTS HAVE A FUNDAMENTAL RIGHT TO CHOOSE A SCHOOL IN WHICH THEY WISH TO STUDY UNDER ARTICLE 19(1)(a) OF THE CONSTITUTION.

102. Children below the age of six years through their parents have a fundamental right to education and health under Article 21 and the right to choose a particular or specialized school in which they wish to study under Article 19(1)(a) of the Constitution.

103. Parental school choice in its broadest sense means giving parents the ability to send their children to the school of their choice. The

schools of choice often emphasize a particular subject or have a special philosophy of education. One school might emphasise Science or Art or Language or Sports. Another might offer a firm code of conduct or a rigorous traditional academic programme. Since colonial days, schools of choice have been part of the fabric of the city's education. The parents would certainly want their child's school to reflect the values of their family and community. For instance, Armed Forces personnel may like to get their wards admitted to Sainik or Air Force School. Similarly, Bengali or Gujarati parents may like to get their wards admitted in schools where primary education is imparted in their local language irrespective of the distance involved. In other words, they may want to choose a school that is a good fit for their child. After all, school choice can help give every child an excellent education and shape their future.

104. Even the United States Supreme Court in ***Meyer vs. State of Nebraska, 262 US 390: 67 Led. 1042*** has held as under:-

> "*The problem for our determination is whether the statute as construed and applied unreasonably infringes the liberty guaranteed to the plaintiff in error by the Fourteenth Amendment.:*
>
> *"No state shall deprive any person of life, liberty or property without due process of law."*
>
> *xxxx xxxx xxxx xxxx*
>
> *.....denotes nor merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful*

knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.....The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect.....

(4) The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted.....duty of the parent to give his children education suitable to their station in life.....His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the amendment.....the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages as well.....but this cannot be coerced by methods which conflict with the Constitution--a desirable end cannot be promoted by prohibited means."

(emphasis supplied)

105. In ***Pierce vs. Society of the Sister, 268 US 510: 69 Led. 1070,*** the United States Supreme Court once again held as under:-

"The inevitable practical result of enforcing the act under consideration would be destruction of appellees' primary schools and perhaps all other private primary schools for normal children within the state of Oregon.

xxxx xxxx xxxx xxxx

> *.....we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.....The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creatures of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."*
>
> (emphasis supplied)

106. Under the Indian Constitution, the right of choice of a befitting school by the child is protected under freedom of '*Speech and Expression'* and *'Life and Personal Liberty'* enshrined and guaranteed as fundament rights under Articles 19(1)(a), 19(1)(g), as well as Article 21 of the Constitution. The right under Article 19(1)(a) is subject to a set of narrower restrictions incorporated in Article 19(2). Articles 19(1)(a) and 19(2) of the Constitution are reproduced hereinbelow:-

> *"**19. Protection of Certain rights regarding freedom of speech, etc.:** (1) All citizens shall have the right -*
>
> *(a) to freedom of speech and expression*
>
> *xxxx xxxx xxxx xxxx*
>
> *(2) Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the sovereignty and*

> *integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.*
>
> (emphasis supplied)

107. Recently the Constitution Bench of Supreme Court in ***State of Karnataka & Anr. Vs. Associated Management of (Government Recognised - Unaided - English Medium) Primary & Secondary Schools & Ors., Civil Appeal Nos. - 5166-5190 of 2013*** decided on ***6th March, 2014*** has held that a student or a parent or a citizen has a right to choose a medium of education at a primary stage under Article 19(1)(a) of the Constitution.

108. Also, if parents are given freedom to choose the school that they prefer, good schools will attract more students and will expand, whereas the 'not so good schools' will lose the students and eventually close - thereby schools will maintain their standards and will endeavour to raise their educational attainments in order to attract more students.

COURTS CAN QUASH EVEN A POLICY DECISION

109. It is true that in policy matters, the Courts normally do not interfere. Yet it is settled law that if a policy is arbitrary or illegal or irrational or procedurally improper, then it is the bounden duty of the Court to quash it.

DSE ACT, 1973 NEEDS AN EXTENSIVE RELOOK & NUMBER OF GOOD QUALITY PUBLIC SCHOOLS HAVE TO BE INCREASED.

110. This Court is of the opinion that the primary cause of the nursery admission chaos is lack of adequate number of good quality public schools. Till the quality of all public schools improves, the disparity between demand and supply will remain. This Court is of the view that no office order or policy or notification or formula can resolve this disparity.

111. Further, this Court is of the view that the DSE Act, 1973 needs an extensive relook in view of coming into force of the RTE Act, 2009. By virtue of new the RTE Act, 2009, a paradigm shift in the field of education has taken place and other Acts, like DSE Act, 1973 need to be harmonized and 'backwardly integrated' with the new RTE Act, 2009. Even the Division Bench in ***Social Jurist, A Civil Right Group*** (supra) had observed, "*that to avail the benefit of the Right to Education Act to a child seeking for nursery school as well, necessary amendment should be considered by the State."*

112. Further, the practice of administering through circulars, notifications and office orders creates uncertainty. Consistency, certainty and incorporation of popular will can only be done by the Legislature revisiting the issue of nursery admission. This Court only hopes it happens at the earliest.

113. Before parting with the case, this Court would like to place on record its appreciation for the assistance rendered to it by all the counsel. Mr. Sunil Gupta, Mr. P.P. Malhotra, Mr. Neeraj Kishan Kaul and Mr. Rakesh Khanna, Senior Advocates as well as Mr. V.K. Tandon, Mr. Vedanta Varma and Mr. Kamal Gupta, Advocates, put in a lot of hard work and addressed arguments in a concise manner. This Court would be failing in its duty if it did not mention the valuable assistance rendered by Mr. Raju Ramchandran, Senior Advocate, who was unfortunately disengaged by the respondent while he was on his legs.

CONCLUSION

114. From the aforesaid discussion, it is apparent that private unaided recognized school managements have a fundamental right under Article 19(1)(g) of the Constitution to maximum autonomy in the day-to-day administration including the right to admit students. This right of private unaided schools has been recognized by an eleven judge Bench of the Supreme Court in ***T.M.A. Pai Foundation*** (supra). Subsequently, a Constitution Bench of the Supreme Court in ***P.A. Inamdar*** (supra) has held that even non-minority unaided institutions have the unfettered fundamental right to devise the procedure to admit students subject to the said procedure being fair, reasonable and transparent. Even, in 2014, another Constitution Bench of the Supreme Court in ***Pramati Educational & Cultural Trust (Registered) & Ors.*** (supra) reiterated that the content of the right under Article 19(1)(g) of

the Constitution to establish and administer private educational institutions, as per the judgment of this Court in T.M.A. Pai Foundation, includes the right to admit students of their choice and autonomy of administration.

115. The concept of autonomy has also been recognized and conferred upon schools by the DSE Act and Rules, 1973. Rule 145 of DSE Rules, 1973 states that the head of every recognised unaided school shall regulate admissions in its school. Consequently, the private unaided schools have maximum autonomy in day-to-day administration including the right to admit students.

116. Undoubtedly, the right to administer is subject to reasonable restrictions under Article 19(6) of the Constitution. It is a settled proposition of law that the right to administer does not include the right to mal-administer. In the present instance, there is no material to show that private unaided schools were indulging in any malpractice or were misusing their right to admit students in pursuance to the 2007 notification.

117. Also, the restrictions cannot be imposed by way of office orders and that too, without any authority of law. In ***State of Bihar and Ors. vs. Project Uchcha Vidya, Sikshak Sangh and Ors., (2006) 2 SCC 545*** the Supreme Court has held that the restriction under clause 6 of Article 19 of the Constitution can be imposed only by way of a law enacted by a Legislature and not by issuing a circular or a policy

decision. Admittedly, no law or restriction has, in the present instance, been placed upon the petitioners by virtue of Article 21-A and Article 15(5) of the Constitution. Consequently, the Government cannot impose a strait jacket formula of admission upon the schools under the guise of reasonable restriction and that too, without any authority of law.

118. The respondents' argument that the impugned office orders have been allegedly issued under Rule 43 is untenable in law. In any event, office orders cannot be contrary to Rule 145 of DSE Rules, 1973 and Guidelines issued by the Central Government under Section 35(1) of RTE Act, 2009.

119. The argument of the respondents that the impugned office orders have been issued by virtue of the power conferred under Sections 6, 8, 11, 13, 35 and 38 of RTE Act, 2009 is contrary to the Division Bench judgment in ***Social Jurist, A Civil Rights Group*** (supra) wherein it has been held that except for the Proviso to Section 12(1)(c), none of the other provisions of the RTE Act, 2009 apply to nursery admission.

120. Further, children below six years have a fundamental right to education and health as also a right to choose a school under Article 19(1)(a) of the Constitution in which they wish to study. RTE Act, 2009 prescribes duty upon the State to ensure availability of neighbourhood schools. It nowhere stipulates that children would have

to take admission only in a neighbourhood school or that children cannot take admissions in schools situated beyond their neighbourhood.

121. The power to choose a school has to primarily vest with the parents and not in the administration. In fact, the impugned office orders fail to consider the vitality as well as quality of the school and the specific needs of the individual families and students. School choice gives families freedom to choose any school that meets their needs regardless of its location. This Court is of the opinion that by increasing parental choice and by granting schools the autonomy to admit students, the accountability of private schools can be ensured.

122. Consequently, in the opinion of this Court, children should have the option to go to a neighbourhood school, but their choice cannot be restricted to a school situated in their locality. This Court is unable to appreciate that a student's educational fate can be relegated to his position on a map!

123. This Court is of the view that the neighbourhood concept was better taken care of by private unaided schools, both in terms of the guidelines laid down in the Ganguli Committee Report as well as under the earlier Admissions Order, 2007 inasmuch as graded/slab system was followed in all schools wherein the person living closest to the school was given the maximum marks and yet the right of every child living anywhere in Delhi to seek admission in a reputed school was not foreclosed.

124. Consequently, the impugned office orders being violative of the fundamental right of the school management to maximum autonomy in day-to-day administration including the right to admit students as well as the fundamental right of children through their parents to choose a school, besides being contrary to Supreme Court and Division Bench judgments are quashed qua private unaided schools with regard to seventy five per cent general nursery seats. With the aforesaid observations and directions, present writ petitions stand disposed of, but with no order as to costs.

MANMOHAN
(JUDGE)

NOVEMBER 28, 2014
rn/js/ng