

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

Pronounced on: 27th July, 2016

+ **W.P.(C) No.4109/2013**

JUSTICE FOR ALL

..... Petitioner

Through: Mr.Ashok Agarwal,
Mr.Khagesh B. Jha, Advocates for
petitioner.

Mr. Sunil Gupta, Sr. Advocate with
Mr.S.D.Salwan, Mr. Vedanta Varma,
Mr.Vibhor Kush, Ms.Anisha Mitra &
Mr.Akhil Kumar Gola, Advs. for
R-2/Review Petitioner in Review Petition
No.129/2016.

Mr. Amit Sibal, Sr. Advocate with
Mr.Kamal Gupta, Mr. Vinay P. Tripathi
and Mr. Namit Suri, Advocate for the
Review Petitioner/Trans Yamuna
School's Federation in Review Petition
No.186/2016.

Versus

GOVT OF NCT OF DELHI & ORS.

..... Respondents

Through: Mr.Santosh Kumar Tripathi,
ASC for GNCTD/R-1.

Mr.Vikas Mahajan, CGSC with
Mr.S.S.Rai, Adv. for R-3/UOI.

Mr.Arun Birbal and Mr.Sanjay Singh,
Advocates for DDA.

**CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE JAYANT NATH**

J U D G M E N T

Ms.G. ROHINI, CHIEF JUSTICE:

Review Petition No.129/2016 & CM No.9383/2016 (delay); CM No.9384/2016 (impleadment); CM No.9385/2016 (leave to file review) & CM No.9386/2016 (stay)

Review Petition No.186/2016 & CM No. 13529/2016 (impleadment); CM No.13530/2016 (leave to file review); CM No. 13531/2016 (stay) and CM No. 13533/2016 (delay)

1. These two review petitions are filed seeking review of the order dated 19.01.2016 in W.P.(C) No.4109/2013.

2. The petitioners in both the review petitions claim to be the societies registered under the Societies Registration Act, working for promoting the right kind of education for children in all schools with prescribed minimum standards. Since they were not parties to the writ petition, these petitions came to be filed along with petitions seeking leave to file the review.

3. The averments in both the review petitions and the grounds of review are verbatim same.

4. We have heard Shri Sunil Gupta, the learned Senior Advocate who appeared for the petitioner in Review Petition No.129/2016 and Shri Amit Sibal, the learned Senior Advocate who appeared for the petitioner in Review Petition No.186/2016. We have also heard the learned counsel appearing for the Government of NCT of Delhi and the learned counsel appearing for the writ petitioner.

5. W.P.(C) No.4109/2013 was a Public Interest Litigation filed by "Justice For All" seeking a direction that no private un-aided school in Delhi which has been allotted land by the Delhi Development Authority (DDA) shall enhance the fee without prior sanction of the Director of Education.

6. Placing reliance upon *Modern School vs. Union of India & Ors.*; **(2004) 5 SCC 583**, it was pleaded in the writ petition that though as per Master Plan-2021, an allottee of land for the purpose of establishing an educational institution is under an obligation not to increase the tuition fees without prior sanction from the Director of Education (DoE), the un-aided educational institutions in Delhi failed to comply with the same and have been indulging in profiteering and commercialization of school education by enhancing the fees without taking the prior permission of DoE.

7. In the counter affidavit filed on behalf of Respondent No.3/Land and Development Department, Ministry of Urban Development, it was stated that the Land and Development Office allotted plots to schools, colleges, universities at pre-determined concessional rates and that one of the conditions in the allotment letter is that the percentage of free-ship from the tuition fees shall be governed by the Rules made by the DoE, Delhi Administration. It was also stated that appropriate action for cancellation of allotment would be taken against those schools which failed to comply with the said condition and show cause notices were already issued to nine such schools.

8. Reiterating the stand taken in the counter affidavit of the Land and Development Department, it is further stated by the Director of Education in his counter affidavit that in terms of the directions of the Supreme

Court in *Modern School v. Union of India* (supra), Circular dated 16.04.2010 has been issued regulating the fee hike in the recognized un-aided schools.

9. After referring to the decision of the Supreme Court in *Modern School v. Union of India* (supra) wherein the applicability of Section 17(3) of the Delhi School Education Act, 1973 (for short 'DSE Act') to un-aided schools and regulation of quantum of fees charged by them was extensively considered and the liability of private un-aided schools situated in the land allotted by DDA at concessional rates was decided, this Court disposed of W.P.(C) No.4109/2013 holding as under:

"17. Thus it is clear that the schools cannot indulge in profiteering and commercialization of school education. Quantum of fees to be charged by unaided schools is subject to regulation by DoE in terms of the power conferred under Section 17(3) of DSE Act, 1973 and he is competent to interfere if hike in fee by a particular school is found to be excessive and perceived as indulging in profiteering. So far as the unaided schools which are allotted land by DDA are concerned, in the light of the decision of the Supreme Court in *Modern School vs. Union of India & Ors.* (supra), we are clear in our mind that they are bound to comply with the stipulation in the letter of allotment. Para 28 of the majority judgment in *Modern School vs. Union of India & Ors.* (supra) upholds the binding nature of the stipulation in the letter of allotment issued by the DDA that the school shall not increase the rate of tuition fees without the prior sanction of DoE.

18. For the aforesaid reasons, we consider it appropriate to dispose of the writ petition with a direction that the respondent No.1/DoE shall ensure the compliance of term, if any, in the letter of allotment regarding the increase of the fees by all the recognized unaided schools which are allotted land by DDA. The respondent No.2/DDA shall also take

appropriate steps in accordance with law in case of violation of such stipulation in the letter of allotment by the unaided schools."

10. The said order is sought to be reviewed in these two review petitions.

11. It is contended by Shri Sunil Gupta, learned Senior Counsel appearing for the petitioner in Review Petition No.129/2016 that this court failed to notice that Para 27(c) of ***Modern School v. Union of India & Ors.*** (supra) is *per incuriam* and not capable of being read as a binding direction since the three issues framed and considered by the Supreme Court in the said decision had nothing to do with the terms of the allotment letter or the lease deed pertaining to the land allotted to various societies/trusts for running private unaided schools. It is also contended that there was neither an issue with regard to terms of the allotment letter pertaining to a school plot and its applicability in respect of schools whose lease deed did not contain the terms of the allotment letter nor it was the subject matter of deliberation, submission or consideration in ***Modern School v. Union of India & Ors.*** (supra).

12. Placing reliance upon ***Municipal Corporation of Delhi v. Gurnam Kaur; (1989) 1 SCC 101*** and ***State of U.P. and Anr. v. Synthetics and Chemicals Ltd. and Anr.; (1991) 4 SCC 139***, it is vehemently contended by Shri Sunil Gupta that the directions in Para 27(c) and Para 28 of ***Modern School v. Union of India & Ors.*** (supra) as to compliance with the terms of allotment of land being without any issue, argument, discussion or consideration of the purport of the Rules 42 and 43 of Delhi Development Authority (Disposal of Developed Nazul Land) Rules, 1981, are *per incuriam* and not binding. It is also contended that since the order under review came to be passed without taking note of the

actual judicial ratio on the question of "approval" by DoE in the light of the provisions of Section 17(2) and (3) of the Delhi School Education Act and particularly the judgments of the Co-ordinate Bench of this Court in *Delhi Abhibhavak Mahasangh v. Union of India & Ors.*; AIR 1999 Delhi 124 and *Delhi Abhibhavak Mahasangh & Ors. v. GNCTD & Ors.* (W.P.(C) No.7777/2009 and batch dated 12.08.2011), it is a fit matter for review and the entire issue needs re-consideration.

13. Shri Amit Sibal, the learned Senior Counsel appearing for the petitioner in Review Petition No.186/2016 contended that the Supreme Court in *Modern School v. Union of India & Ors.* (supra) has not set aside the judgment of this Court in *Delhi Abhibhavak Mahasangh v. Union of India & Ors.* (supra). It is also contended that in *Action Committee & Ors. v. DOE & Ors.*; (2009) 10 SCC 1, the Supreme Court has in fact reiterated and quoted with approval what was held by the Division Bench of this Court in *Delhi Abhibhavak Mahasangh v. Union of India & Ors.* (supra). Placing much reliance upon another Division Bench judgment of this Court in *Delhi Abhibhavak Mahasangh & Ors. v. GNCTD & Ors.* (W.P.(C) No.7777/2009 and batch dated 12.08.2011) (supra), it is also contended by the learned Senior Counsel that the ratio laid down therein after considering the decisions of the Supreme Court in *Modern School v. Union of India & Ors.* (supra), *TMA Pai Foundation v. State of Karnataka*, (2002) 8 SCC 481 and *Delhi Abhibhavak Mahasangh v. Union of India & Ors.* (supra) is the authority on the issue relating to fee fixation by the private un-aided schools and this Court should not have taken a contrary view.

14. It may, at the outset, be pointed out that though the petitioners in the present review petitions who claim to be espousing the cause of the managements of the unaided schools in Delhi were not parties to the writ

petition, the society by name "Action Committee Un-aided Recognized Private Schools" was a party respondent to W.P.(C) No.4109/2013 and we had taken note of its contention that the Clause in the letter of allotment of DDA that the school shall not increase the rate of tuition fees without prior sanction of DoE is unenforceable in the light of the law laid down in *TMA Pai v. State of Karnataka & Ors.*; (supra) and *Delhi Abhibhavak Mahasangh & Ors. v. GNCTD & Ors.* (W.P.(C) No.7777/2009 and batch dated 12.08.2011) (supra).

15. In Para 15 of the order under review, we held that the reliance placed upon the decision of the Division Bench of this Court in *Delhi Abhibhavak Mahasangh & Ors. v. GNCTD & Ors.* (supra) is misplaced since the issue regarding the liability of private unaided schools who are allotted the land at concessional rate by DDA was not the subject matter of the said batch of petitions. Before arriving at the conclusion in Paras 17 and 18 of the order under revision, we had extensively referred to the relevant portions from the judgment of the Division Bench in *Delhi Abhibhavak Mahasangh & Ors. v. GNCTD & Ors.* (supra).

16. Hence, the contention in the review petitions that W.P.(C) No.4109/2013 was disposed of by the order under review without taking note of the binding judicial ratio in the earlier decisions of this Court is incorrect and without any substance.

17. The contention in the review petitions that the directions of the Supreme Court in Paras 27 and 28 of *Modern School v. Union of India & Ors.* (supra) are not binding since the same were not based on any discussion or consideration of the relevant statutes and thus shall be treated as *sub silentio* and *per incuriam* is equally untenable.

18. The directions of the Supreme Court in Paras 27 and 28 of *Modern School v. Union of India & Ors.* (supra) are as under:

“27. In addition to the directions given by the Director of Education vide order DE.15/Act/Duggal.Com/203/99/23989- 24938 dated 15th December, 1999, we give further directions as mentioned hereinbelow: -

(a) Every recognized unaided school covered by the Act shall maintain the accounts on the principles of accounting applicable to non-business organization/not- for-profit organization;

In this connection, we *inter alia* direct every such school to prepare their financial statement consisting of Balance-sheet, Profit & Loss Account, and Receipt & Payment Account.

(b) Every school is required to file a statement of fees every year before the ensuing academic session under section 17(3) of the said Act with the Director. Such statement will indicate estimated income of the school derived from fees, estimated current operational expenses towards salaries and allowances payable to employees in terms of rule 177(1). Such estimate will also indicate provision for donation, gratuity, reserve fund and other items under rule 177(2) and savings thereafter, if any, in terms of the proviso to rule 177(1);

(c) It shall be the duty of the Director of Education to ascertain whether terms of allotment of land by the Government to the schools have been complied with. We are shown a sample letter of allotment issued by the Delhi Development Authority issued to some of the schools which are recognized unaided schools. We reproduce herein clauses 16 & 17 of the sample letter of allotment:--

"16. The school shall not increase the rates of tuition fee without the prior sanction of the Directorate of Education, Delhi Admn. and shall follow the provisions of Delhi School Education Act/Rules, 1973 and other instructions issued from time to time.

17. The Delhi Public School Society shall ensure that percentage of free ship from the tuition fee as laid down under rules by the Delhi Administration, from time to time strictly complied. They will ensure admission to the student belonging to weaker sections to the extent of 25% and grant free ship to them."

28. We are directing the Director of Education to look into letters of allotment issued by the Government and ascertain whether they have been complied-with by the schools. This exercise shall be complied with within a period of three months from the date of communication of this judgment to the Director of Education. If in a given case, the Director finds non-compliance of the above terms, the Director shall take appropriate steps in this regard." (*emphasis supplied*)

19. Following the directions in Paras 27(c) and 28 of *Modern School v. Union of India & Ors.* (supra), W.P.(C) No.4109/2013 was disposed of by us by the order under review.

20. We are unable to appreciate the contention of the review petitioners that the said directions in *Modern School v. Union of India & Ors.* (supra) are not binding since the judgment in *Modern School v. Union of India & Ors.* (supra) is *sub silentio* and *per incuriam*. The law is well settled that the law declared by the Supreme Court shall be binding on all courts within the territory of India. In *Fuzlunbi v. K.Khader Vali & Anr.*; **(1980) 4 SCC 125**, the three Judge Bench headed by Justice V.R. Krishna Iyer made it clear that no Judge in India, except a larger Bench of the Supreme Court without a departure from judicial discipline can whittle down, wish away or be unbound by the ratio thereof. Para 10 of the said decision may be usefully reproduced hereunder:

"10. Glanville Williams in his LEARNING THE LAW (10th Edn., pp. 70-72) gives one of the reasons persuading judges

to distinguish precedents as "that the earlier decision is altogether unpalatable to the court in the later case, so that the latter court wishes to interpret it as narrowly as possible". The same learned Author notes that some judges may

in extreme and unusual circumstances, be apt to seize on almost any factual difference between this previous case and the case before him in order to arrive at a different decision. Some precedents are continually left on the shelf in this way, as a wag observed, they become very "distinguished". The limit of the process is reached when a judge says that the precedent is an authority only "on its actual facts".

We need hardly say that these devices are not permissible for the High Courts when decisions of the Supreme Court are cited before them not merely because of the jurisprudence of precedents, but because of the imperatives of Article 141."

(emphasis supplied)

21. Another three Judge Bench of the Supreme Court in ***Director of Settlements, A.P. & Ors. v. M.R. Apparao & Anr.; (2002) 4 SCC 638*** explained the binding nature of the judgments of Supreme Court on all courts within the territory of India as under:

"7. So far as the first question is concerned, Article 141 of the Constitution unequivocally indicates that the law declared by the Supreme Court shall be binding on all courts within the territory of India. The aforesaid Article empowers the Supreme Court to declare the law. It is, therefore, an essential function of the Court to interpret a legislation. The statements of the Court on matters other than law like facts may have no binding force as the facts of two cases may not be similar. But what is binding is the ratio of the decision and not any finding of facts. It is the principle found out upon a reading of a judgment as a whole, in the light of the questions before the Court that forms the ratio and not any particular word or sentence. To determine whether a decision has "declared law" it cannot be said to be a law when a point is disposed of on concession and what is binding is the principle underlying a decision. A judgment of the Court has

to be read in the context of questions which arose for consideration in the case in which the judgment was delivered. An “obiter dictum” as distinguished from a ratio decidendi is an observation by the Court on a legal question suggested in a case before it but not arising in such manner as to require a decision. Such an obiter may not have a binding precedent as the observation was unnecessary for the decision pronounced, but even though an obiter may not have a binding effect as a precedent, but it cannot be denied that it is of considerable weight. The law which will be binding under Article 141 would, therefore, extend to all observations of points raised and decided by the Court in a given case. So far as constitutional matters are concerned, it is a practice of the Court not to make any pronouncement on points not directly raised for its decision. The decision in a judgment of the Supreme Court cannot be assailed on the ground that certain aspects were not considered or the relevant provisions were not brought to the notice of the Court (see *Ballabhadras Mathurdas Lakhani v. Municipal Committee, Malkapur* and AIR 1973 SC 794). When the Supreme Court decides a principle it would be the duty of the High Court or a subordinate court to follow the decision of the Supreme Court. A judgment of the High Court which refuses to follow the decision and directions of the Supreme Court or seeks to revive a decision of the High Court which had been set aside by the Supreme Court is a nullity. (See *Narinder Singh v. Surjit Singh* and *Kausalya Devi Bogra v. Land Acquisition Officer*.) We have to answer the first question bearing in mind the aforesaid guiding principles. We may refer to some of the decisions cited by Mr Rao in elaborating his arguments contending that the judgment of this Court dated 6-2-1986 cannot be held to be a law declared by the Court within the ambit of Article 141 of the Constitution. Mr Rao relied upon the judgment of this Court in the case of *M.S.M. Sharma v. Sri Krishna Sinha* wherein the power and privilege of the State Legislature and the fundamental right of freedom of speech and expression including the freedom of the press was the subject-matter of consideration. In the aforesaid judgment it has been observed by the Court that the decision in *Gunupati Keshavram Reddy v. Nafisul Hasan* relied upon by the counsel for the petitioner which entirely proceeded on a concession of the counsel

cannot be regarded as a considered opinion on the subject. There is no dispute with the aforesaid proposition of law."

22. The same principle has been reiterated in *South Central Railway Employees Co-operative Credit Society Employees Union v. B. Yashodabai & Ors.*; (2015) 2 SCC 727 as under:

"14. We are of the view that it was not open to the High Court to hold that the judgment delivered by this Court in *South Central Railway Employees Coop. Credit Society Employees' Union v. Registrar of Coop. Societies* was *per incuriam*.

15. If the view taken by the High Court is accepted, in our opinion, there would be total chaos in this country because in that case there would be no finality to any order passed by this Court. When a higher court has rendered a particular decision, the said decision must be followed by a subordinate or lower court unless it is distinguished or overruled or set aside. The High Court had considered several provisions which, in its opinion, had not been considered or argued before this Court when CA No. 4343 of 1988 was decided. If the litigants or lawyers are permitted to argue that something what was correct, but was not argued earlier before the higher court and on that ground if the courts below are permitted to take a different view in a matter, possibly the entire law in relation to the precedents and ratio decidendi will have to be rewritten and, in our opinion, that cannot be done. Moreover, by not following the law laid down by this Court, the High Court or the subordinate courts would also be violating the provisions of Article 141 of the Constitution of India."

23. In the light of the settled principle of law noticed above, it is not open to the review petitioners to contend that *Modern School v. Union of India & Ors.* (supra) is *per incuriam* and that the directions therein are not binding on this Court.

24. For the aforesaid reasons, the order under review cannot be held to have suffered from any error apparent on the face of the record. Hence, the review petitions are devoid of merit.

25. However, in view of the fact that the issues relating to the purport of the Delhi Development Authority (Disposal of Developed Nazul Land) Rules, 1981 and the applicability of the same to the lands allotted by the DDA and the related issues which may have bearing on enforcement of sub-section (3) of Section 17 of Delhi School Education Act, 1973 and the Rules made thereunder were neither urged in the writ petition decided by us nor any opinion was expressed by us, we make it clear that the order under review shall not preclude the aggrieved party including the applicants to challenge the action, if any, taken by the DoE for enforcement of terms of allotment of land with regard to increase of fees by raising all the grounds available under law.

26. The review petitions are accordingly disposed of.

CHIEF JUSTICE

JAYANT NATH, J

JULY 27, 2016
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