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

\+ **W.P.(C) Nos. 7777/2009, 8147/2009, 8610/2009, 8614/2009, 9228/2009, 11139/2009, 10801/2009, 6952/2009, 1727/2010**

RESERVED ON: MAY 13, 2011

% PRONOUNCED On: AUGUST 12, 2011

\+ **W.P. (C) No.7777 of 2009**

Delhi Abhibhavak Mahasangh And Ors. . . . Petitioners

VERSUS

Govt. of NCT of Delhi and Ors. . . .Respondents

\+ **W.P. (C) No.8147 of 2009**

The Action Committee of Unaided Pvt. Schools and Ors. …Petitioners

VERSUS

Director of Education and Ors. …Respondents

\+ **W.P. (C) No.8610 of 2009**

Association of Public Schools Regd. and Anr. ...Petitioners

VERSUS

Director of Education and Anr. …Respondents

\+ **W.P. (C) No.8614 of 2009**

Forum for Promotion of Quality Education for All & Anr. …Petitioners

VERSUS

Director of Education and Anr. …Respondents

\+ **W.P. (C) No.9228 of 2009**

The Forum for Minority School …Petitioner

VERSUS

Director of Education and Anr. ...Respondents

\+ **W.P. (C) No.11139 of 2009**

Convent of Jesus and Mary …Petitioner

VERSUS

Director of Education An. …Respondents

\+ **W.P. (C) No.10801 of 2009**

The Summer Field Schools Parents Association
…Petitioner

VERSUS

The Summer Field School and Ors. …Respondents

\+ **W.P. (C) No.6952 of 2009**

The Society of Catholic School of the Archdiocese of Delhi
…Petitioner

VERSUS

Director of Education & Anr. …Respondents

\+ **W.P. (C) No.1727 of 2010**

St. Mary's School, Dwarka Parents' Association
…Petitioner

VERSUS

The Government of N.C.T. and Ors. …Respondents

Counsel for the petitioner: Mr. Ashok Agarwal with Mr. Vikas K. Chadha and Ms. Kusum Sharma, Advocates in W.P. (C) No.7777/2009.
Mr. M.S. Syali, Sr. Advocate with Mr. Mukul Talwar and Mr. Sradhananda Mohapatra, Advocates in W.P. (C) No.8614 of 2009.
Ms. Rekha Palli with Ms. Punam Singh for Air Force Bal Bharti School, Air Force Junior School and Air Force Nursery School.
Dr. A.M. Singhvi, Sr. Advocate and Mr. Rakesh Kumar Khanna, Sr. Advocate with Mr. P.D. Gupta, Mr. Kamal Gupta, Mr. Abhishek Gupta and Ms. Tripti Gupta Advocates in W.P.(C) 8147/2009.
Mr. S.D. Salwan with Mr. Mukul Talwar and Mr. Sradhananda Mohapatra, Advocates in W.P. (C) 8614/2009.
Mr. Sanat Kumar, Advocate in W.P. (C) 8610/2009.
Mr. Romy Chacko with Mr. A. Qayamuddin, Advocates in WP (C) 6952, 9228, 11139/2009.
Mr. J.S. Chhabra, Adv. for Doon Public School in W.P. (C) 7777/2009.
Mr. Alok Shankar, Advocate in W.P. (C) 1727/2010.

Counsel for the respondent: Ms. Avnish Ahlawat with Ms. Latika Chaudhary and Mr. Nitesh Kumar Singh, Advocates for the Director of Education.
Mr. Sudhir Nandrajog, Sr. Advocate with Mr. Gaurang Kanth, Advocate and Mr. Rahul Kumar, Advocate for the respondent No.5/CAG.
Mr. C.S. Sundaram, Sr. Advocate and Mr. Rakesh Kumar Khanna, Sr. Advocate with Ms. Seema Rao and Mr. Pramod Gupta, Advocates in W.P.(C) 7777/2009.
Mr. P.G. Gupta with Mr. Kamal Gupta, Mr. Abhishek Gupta and Ms. Tripti Gupta, Advocate for R-1.
Mr. Sanjay K. Maria, Advocate for R-3 in W.P.(C) 1727/2010.
Mr. M. Qayam-ud-din, Adv. for R-6 in W.P. (C) 7777/2009.
Mr. Ravinder Agarwal with Mr. Girish Pande, Advocates for R-4/UOI.

CORAM :-
HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J.

1. Controversy has been triggered, prompting filing of all these petitions, as a consequence of the decision of Government of NCT of Delhi in revising the school fee payable by the students studying in various private recognized Schools in Delhi. This decision is contained in order dated 11th February, 2009. Whereas, the parents' body representing the students studying in these schools feel that enhancing the fee is unreasonable and without any proper procedure which was required to be followed as per the mandate of law and earlier judgment of this Court as well as the Supreme Court, the Management of these Schools feels otherwise. They are equally dissatisfied with the impugned order dated 11th February, 2009 with a reason just opposite, as according to them, its a meagre enhancement in the fee which fails to match

financial burden cast upon the schools as a result of the revision in the pay scale of the Teachers and other staff of the Schools consequent upon implementation of the recommendations of the VIth Pay Commission. This controversy remains the frontal one though in the process few other important as well as peripheral and incident issues have also been raised in different writ petitions which would be taken note of while examining the aforesaid central issue.

2. First step in this direction was taken by the parents through the Association viz. Delhi Abhibhawak Sangh by filing Writ Petition (C) 7777/2009. Therefore, this writ petition was taken as lead matter, and we shall proceed to take note of the facts from this writ petition. However, wherever it is felt desirable to take note of some additional facts from other writ petitions, we would be mentioning those facts at the appropriate place.

Facts and issues raised in WP (C) No.7777 of 2009:

3. The petitioners in this case are Delhi Abhibhavak Mahasangh, Social Jurist and Faith Academy Parents

Association. For the sake of brevity, we would refer to these petitioners in this writ petition as DAM. It is not the first time that the DAM has knocked the doors of this Court on this issue by means of present writ petition filed as a Public Interest Litigation. Rudiments of this problem can be traced back to the year 1997 when WP(C) No.2723 of 1997 was filed by DAM in the representative capacity on behalf of parents/students. DAM claims that it is the parent body, fighting for the parents/students. Occasion to file the aforesaid writ petition was also the hike in fee and other charges announced by various unaided recognized private schools in Delhi ranging from 40% to 400%. This hike was triggered as a result of implementation of 5th Pay Commission's recommendations warranting upward revision in the pay of school teachers and other staff. In that writ petition, notices were issued on 08.09.1997. Within two days thereafter, i.e. on 10.09.1997, the Delhi Government issued an order fixing the maximum limits of registration fee, admission fee, caution money, etc and also directing the schools to utilize their accumulated reserves first to meet the salary

increases. That order provided that if the reserves were not found sufficient, the fee could be increased to the extent required after consultation with the representatives of parents teacher associations. Promulgation that Governmental order provoked many schools to file the petitions challenging the validity thereof. All these writ petitions were decided by a Division Bench of this Court on 30.10.1998 giving several directions to the Government of NCT as well as schools. We take note of the main directions given in the said order, which is reported as ***Delhi Abibhavak Mahasangh v. Union of India and others*** **[AIR 1999 Delhi 124]**. In the said judgment, the Court, *inter alia*, directed as under:

> "(i) It is the obligation of the Administrator and or Director of Education to prevent commercialization and exploitation in private unaided schools including schools run by minorities.
>
> (ii) The tuition fee and other charges are required to be fixed in a validly constituted meeting giving opportunity to the representatives of Parent Teachers Association and Nominee of Director of Education of place their viewpoints.
>
> (iii) No permission from Director of Education is necessary before or after fixing tuition fee. In case, however, such fixing is found to be irrational and arbitrary there are ample powers under the Act and Rules to issue directions to school to rectify it before resorting to harsh measures. The question of

commercialization of education and exploitation of parents by individual schools can be authoritatively determined on thorough examination of accounts and other records of each school.

(iv) The Act and the Rules prohibit transfer of funds from the school to the society or from one school to another.

(v) The tuition fee cannot be fixed to recover capital expenditure to be incurred on the properties of the society.

(vi) The inspection of the schools, audit of the accounts and compliance of the provisions of the Act and the Rules by private recognized unaided schools could have prevented the present state of affairs.

(vii) The authorities/Director of Education has failed in its obligation to get the accounts of private recognized unaided schools audited from time to time.

(viii) The schools/societies can take voluntary donations not connected with the admission of the ward.

(ix) On the peculiar facts of these petitions there is no per se illegality in issue of the impugned circular dated 10th September 1997.

(x) An independent statutory Committee, by amendment of law, if necessary, deserves to be constituted to go into factual matters and adjudicate disputes which may arise in future in the matter of fixation of tuition fee and other charges.

(xi) The Government should consider extending Act and Rules with or without modifications to all schools from Nursery onward."

4. In addition to the aforesaid directions, the Court was also pleased to appoint a Committee headed by Ms. Justice Santosh Duggal (a former Judge of this Court) for the

period covered by Delhi Government's order dated 10.09.1997 upto the start of academic session in the year 1999, to look into the cases of individual schools and determine, on examination of record and accounts, etc. as to whether increase of tuition fee charges on facts would be justified or not? The precise terms on which the aforesaid Committee was constituted and task assigned to it can be traced in Paras 66-67 of the said judgment which reads as under;

> "66. Having bestowed our thoughtful consideration to the submission of counsel for the parties and afore noticed detail facts and circumstances, we are of the view that an independent Committee deserves to be appointed for the period covered by impugned order dated 10th September, 1997 up to start of academic session in the year 1999, to look into the cases of the individual schools and determine, on examination of record and accounts etc. Whether increase of tuition fee and other charges, on facts would be justified or not. Eliminating the element of commercialization and in light of this decision the Committee would determine fee and other charges payable by students of individual schools. We do not think that it would be desirable at present to permit any further increase than what has already been permitted by order dated 11th December, 1997. We would, therefore, extend the aforequoted order dated 11th December, 1997 till decision of cases of individual schools by Committee appointed by this judgment.
>
> 67. We, accordingly, appoint a Committee comprising of Ms. Justice Santosh Duggal, a retired Judge of this court as Chairperson with power to nominate two persons - one with the knowledge of Accounts and Second from field of education in consultation with Chief Secretary of NCT of Delhi to decide matters of fee and other charges

livable by individual schools in terms of this decision……..."

5. The Committee started its work in right earnestness. However, the grievance of the DAM is that it could not complete the work entrusted to it because of non-cooperation of many schools. The Committee submitted its Report in 31.07.1999 to the Government. In this Report, the Committee had made various factual observations on the devices being used by the schools to exploit the parents and command unwarranted hefty fees and other charges. Out of 142 schools examined by it, the Committee found that only in respect to two schools, fee hike in 1997-98 was justified whereas qua remaining 140 schools it opined that fee hike was not justified or partially justified. The petitioners also state that in the Report the Committee found that 82 schools had violated the interim orders dated 11.12.1997 passed by this Court in WP (C) No.3723 of 1997. It also found that 22 schools out of 27 schools who had collected money under the head of tuition fee more than 40% in 1997-98 and had further hiked their tuition fee in the year 1998-99. Armed

by these findings, a contempt petition, viz., Cont. Case (C) No.333 of 1999, was filed against as many as 82 erring schools by DAM which is still pending in the Court.

6. The aforesaid Report of Duggal Committee led to the Government issuing an order on 15.12.1999 prescribing, among other things, the manner of calculating the amount of tuition fee and other charges under the specified heads only.

7. Since the Division Bench of this Court by the said judgment had repelled the challenge led by the schools while issuing the aforesaid directions, the directions of this Court was challenged by various schools in the Supreme Court. These schools also challenged the aforesaid orders dated 15.12.1999 issued by the Government of NCT of Delhi. The Supreme Court decided all the appeals/petitions vide judgment dated 27.04.2004 dismissing these appeals. The said judgment is reported as ***Modern School v. Union of India (UOI) and Ors.*** **(2004) 5 SCC 583.**

8. According to DAM even when the appeals of these schools were dismissed and judgment of this Court attained

finality, the Government of NCT of Delhi miserably failed to take any action against the erring schools to ensure that they roll back the hike in fees and other charges to a level that is just, reasonable and devoid of an element of commercialization. These unaided recognized private schools kept on increasing fee every year which was done again, on the commencement of Academic Year 2008-09, i.e. from 01.04.2008.

9. Notwithstanding the aforesaid increase, in the mid-session of this academic year, further increase in fee ranging between 60% to 100% was done by these schools that too with retrospective effect, i.e., from 01.01.2006. This move on the part of the schools was the result of implementation of 6th Pay Commission's recommendations. This time, however, the Government of NCT of Delhi took immediate step and issued Notification dated 17.10.2008 whereby a Committee under the Chairmanship of Shri S.L. Bansal (a retired I.A.S. Officer) was constituted. The brief of this Committee was to examine the implications of the 6th Pay Commission's recommendations for the recognized

unaided schools in Delhi and submit its recommendations on the terms of reference spelt out below:

> "(i) To hear the views of all the stakeholders.
>
> (ii) To work out at least five categories of schools on the basis of existing data.
>
> (iii) To recommend necessary measures to meet the present requirement.
>
> (iv) To suggest suitable measures to meet the past liability of arrears.
>
> (v) To suggest appropriate mechanism to deal with the recommendations, like two years child-care leave, etc.
>
> (vi) To suggest other related measures."

10. The Committee was directed to give its Report within 30 days. Since very short time was available at the disposal of the Committee, it sprung into action immediately and invited various representations from both the sides. Even Mr. Ashok Aggarwal, learned counsel was invited on behalf of the DAM and Social Jurist (petitioners in this writ petition). The Committee submitted its Report in January, 2009. Based on the recommendations and observations contained in this Report, the Government of NCT of Delhi issued the impugned orders dated 11.02.2009. By these

orders, the Government of NCT of Delhi permitted the unaided recognized private schools of Delhi to hike the tuition fee and development fee with retrospective effect, i.e., from 01.01.2006. The relevant Clauses of the orders dated 11.02.2009 reads as under:

> "2. All schools must, first of all, explore the possibility of utilizing the existing reserves to meet any shortfall in payment of salaries and allowances, as a consequence of increase in the salaries and allowances of the employees.
>
> 3. If any school still feels it necessary to hike the Tuition Fee, it shall present its case, along with detailed financial statements indicating income and expenditure on each account, to the Parent Teacher Association to justify the need for any hike. Any increase in Tuition Fee shall be effected only after fulfilling this requirement and further subject to the cap prescribed in Paragraph 4 below.
>
> 4. All schools have been placed in 5 categories based on their monthly Tuition Fee in present. Increase in the Tuition Fee, as mentioned below, is permitted with effect from 1st September, 2008 for those schools who need to raise additional funding for additional requirement on account of the implementation of the 6th Central Pay Commission recommendations:-

Category	Existing Tuition Fee (per month)	Proposed increase in Tuition Fee (maximum limit) (per month)
1	Upto Rs.500/- P.M.	Rs.100/- p.m.
2	Rs.501/- to	Rs.200/-

	Rs.1000/-	p.m.
3	Rs.1001/- to Rs.1500/-	Rs.300/- p.m.
4	Rs.1501/- to Rs.2000/-	Rs.400/- p.m.
5	Above Rs.2000/-	Rs.500/- p.m.

5. There shall not be any further increase in the Tuition Fee beyond the limit prescribed in para 4 hereinabove, till March 2010.

6. The Parents shall be allowed to deposit the arrears on account of the above Tuition Fee effective from 1st September, 2008 by 31st March, 2009.

7. The arrears for meeting the requirement of salary etc. from 1st January, 2006 to 31st August 2008 as per 6th Central Pay Commission recommendations will be paid by the parents subject to the limitation prescribed below:-

Category	Existing Tuition Fee (per month)	Arrears (1st installment (i)	Arrears (2nd installment (ii)	Total (i) + (ii)
1	Upto Rs.500/- P.M.	Rs.1000/-	Rs.1000/-	Rs.2000/-
2	Rs.501/- to Rs.1000/-	Rs.1250/-	Rs.1250/-	Rs.2500/-
3	Rs.1001/- to Rs.1500/-	Rs.1500/-	Rs.1500/-	Rs.3000/-
4	Rs.1501/- to Rs.2000/-	Rs.1750/-	Rs.1750/-	Rs.3500/-
5	Above Rs. 2000/-	Rs.2250/-	Rs.2250/-	Rs.4500/-

> The first installment may be deposited by 31st March, 2009 and the second by 30th September, 2009. Schools, however, are at liberty to prescribe late dates."

11. The DAM felt aggrieved, as according to it , not only the increase in fees permitted by the aforesaid order was abnormally higher and unreasonable, it was contrary to the spirit behind the aforesaid judgments of this Court and the Supreme Court as well. The petitioners requested the Government of NCT of Delhi to supply the complete Report of Bansal Committee which request was not heeded to. Without wasting further time, the petitioners approached this Court by means of present petition, which was filed on 19the March, 2009 questioning the validity of the aforesaid orders on various grounds.

12. Notice in this petition was issued on 25.03.2009. The Government had also constituted the Grievance Committee by the impugned order, while issuing notice, this Court further ordered that in the meantime if the Grievance Committee received any specific complaints, the same would be investigated and report would be submitted to this Court. The Government of NCT of Delhi

was also directed to place on record the Report of the Bansal Committee.

13. While cognizance of this petition was taken, counter attack was spearheaded by various schools including associations of these schools like the Forum of Minorities' School and Action Committee of Unaided Private Schools, Association of Public Schools (registered), Forum for Promotion of Quality Education for All, etc. Petitions from all these bodies started pouring in. They also challenged orders dated 11.02.2009 issued by the Delhi Government taking diametrically opposite stand. According to them, not only hike in fee allowed by the aforesaid orders was insufficient, but the Government did not even have the right to fix such fee and impinge upon the autonomy of these schools. They also moved application for the stay of the operation of the said order and particularly the constitution of the Grievance Committee.

14. These Miscellaneous Applications were heard together and disposed of vide orders dated 28.05.2009. Since this order gives a glimpse of the nature of challenge resorting to by both the sides and the interim measures which were

directed while disposing of the Miscellaneous Applications, we would like to reproduce the said order *in extenso*:

> "The matter regarding hike in the fees and other charges, which can be fixed by the private unaided schools, has been engaging judicial attention from time to time. It is not necessary to refer to the judgment of this Court as well as of the Supreme Court on this aspect. At this stage, suffice is to state that a fresh controversy has triggered after the Government of India issued Notification dated 29.02.2008 giving effect to the recommendations of VIth Central Pay Commission, making them applicable with effect from 01.01.2006. These recommendations were accepted in respect of employees of the Government schools in Delhi as well and Circular dated 12.09.2008 was issued revising their pay-scales. Section 10 of Delhi School Act, 1973 stipulates that the scales of pay and allowances, medical facilities, pension, gratuity, provident funds and other prescribed benefits of the employees of recognized private schools shall not be less than those of the employees of the corresponding status in school run by the appropriate authority. Because of this provision, it becomes the obligation of the private unaided schools as well to revise the pay scales of the teachers and other staff employed by them so as to bring them at par with the pay scales and allowances enjoyed by their counterparts in the Government schools. In view thereof, respondent No. 1 gave directions on 15.10.2008 to all unaided recognized schools in Delhi to implement the Vth Central Pay Commission's recommendations. While these private unaided schools carried out those orders, at the same time they demanded hike in the school fee to be charged from the students to enable to bear the additional burden created

because of upward revision of the pay scales. In order to determine as to how much hike is warranted, Government of NCT of Delhi constituted a Committee under the Chairmanship of Mr. S.L. Bansal, IAS (Retd.). The Committee submitted its report making various recommendations. Without discussing the finer aspects of the said report, we may only mention that this Report became the basis of the orders dated 11.02.2009, which was issued by the Govt. of NCT Delhi. As per these orders, all schools have been placed in five categories, based on their present monthly tuition fee and they have been permitted to increase the tuition fee with effect from 01.09.2008 in the following manner:

Category	Existing Tuition Fee (per month)	Proposed Increase in Tuition Fee (maximum limit per
1.	Upto Rs.500/-	Rs.100/-
2.	Rs. 501/- to Rs.1000/-	Rs.200/-
3.	Rs.1001/- to Rs.1,500/-	Rs.300/-
4.	Rs. 1,501/- to Rs.2000/-	Rs.400/-
5.	Above Rs.2000/-	Rs.500/-

Para 5 of this Order mandates that there shall not be further increase in the tuition fee beyond the aforesaid limit till March, 2010. Para 7 of the said order also provides the manner in which arrears are to be paid by the parents.

This Order also provides for Redressal of grievances by a Grievance Redressal Committee, which has been constituted with the Director (Education) as the Chairperson,

two other members and one Chartered Accountant. Any school or parent(s) aggrieved from this order could approach the said Grievance Redressal Committee within 30 days from the issuance of that order. In such an eventuality, schools are required to present the accounts before the Committee on the basis of which Committee was to resolve each grievance brought before it.

Consequent thereto the respondent No. 1, i.e., Directorate of Education issued a public notice, which appeared in the newspapers on 16.04.2009. The aforesaid Order dated 11.02.2009 as well as public notice have led to filing of these writ petitions.

W.P.(C) No. 7777/2009 is filed by Delhi Abhibhavak Mahasangh and others, in public interest, and purports to represent parents of the children studying in schools in Delhi. The main contention in this petition is that fee hike as permitted vide orders dated 11.02.2009 is not justified. This fee hike has been challenged on various grounds. In nutshell, the submission is that there should not have been increase to the extent permitted by the aforesaid orders and that the hike, if required, could be only on case to case basis, wherever found justified in respect of a particular school. Thus, the petitioners in this petition, feel aggrieved by the hike in fee.

Other writ petitions are filed by various schools/association of schools, etc. They are also aggrieved by the Order dated 11.02.2009 and the public notice issued by the respondent No.1. Their submission is that hike in fee, as allowed, is not sufficient to take care of the impact of the pay revision and implementation of VIth CPC's Report. They want hike in fee almost to the extent of 50%.

These two opposite views canvassed by the parties would be gone into and considered at the time of final hearing of the writ petitions.

The learned counsel appearing for the schools have pointed out that some of the clauses in the public notice may adversely affect them and the position would be irreversible even if they ultimately succeed in the writ petitions filed by them. Submissions made today specifically relate to Para 6 of the public notice, which reads as under:

> "(6) It has also been directed that the Report Card of any child should not be withheld at any cost. Further, no school management shall force any child to leave the school."

It is their submission that the aforesaid Para is contrary to Rule 167 of the Delhi Education Rules which permits the school to strike off the name of a child who does not pay the school fee. Various apprehensions are expressed in case this para is allowed to operate. Mr. Ashok Agarwal, leaned counsel appearing for the petitioner in W.P.(C) No. 7777/2009 on the other hand submits that for non-payment of enhanced fee, the schools cannot be allowed to take coercive step and force the child to leave the school and, therefore, this para of public notice is perfectly justified. His submission was that the interest of the child should be paramount and in the dispute between schools and parents over the hike of fee, their studies cannot be affected, more so when Right to Education is treated as a fundamental right.

We have given our due consideration to the respective submissions. In view of the narration of the facts and issues involved, as mentioned above, the outcome of these writ petitions may result in any of the following

situations:

a) Fee as increased vide orders dated 11.02.2009 is found to be justified and is maintained; or

b) Accepting of the plea of the schools and permitting them to charge higher fee than allowed vide orders dated 11.02.2009; or

c) Plea of the parents as advanced in their writ petition No. 7777/2009 is found to be justified and is maintained.

In the first and second eventualities mentioned above, the parents will have to pay at least the fee as per orders dated 11.02.2009. However, they may even have to pay higher fee if the schools succeed. In the 3rd eventuality, the fee payable by them can be lesser than what is stipulated in orders dated 11.02.2009. In this scenario, when orders dated 11.02.2009 are issued by the Government after considering the recommendations of Ms. S.L. Bansal Committee, we are of the opinion that the schools should be allowed to charge the fee as per the rates mentioned in orders dated 11.02.2009. This would be subject to the final outcome of these writ petitions.

Next question that arises for consideration is as to what should be the consequences for non-payment of the fee in terms of orders dated 11.02.2009. As per Para 6 of public notice, the report card of such a child is not to be withheld. We find nothing wrong with this provision. Insofar as the second part of para 6 is concerned whereby school managements are not permitted to force any child to leave the school, in case enhanced fee is not paid, we are of the opinion that this provision needs some modifications and

according to us, the following arrangements, during the pendency of these writ petitions, would be fair and equitable and shall take care of interest of all the sides:

a) The parents would pay the fee at the rates specified in orders dated 11.02.2009 with effect from the issuance of this order. This is subject to the condition that in case it is ultimately found that the fee payable was less than what is actually paid, the schools shall refund excess amount paid by those students along with interest @ 9% per annum. The school management shall file an affidavit of undertaking in the Court to abide by the condition. Parents shall also pay arrears for the period with effect from 01.09.2008 as provided in para 6.

b) In case there is a default in payment of fee in terms of (a) above, schools shall be at liberty to take recourse of Rule 167 of the Delhi Education Rules.

c) Insofar as arrears in terms of Para 7 are concerned, the school managements shall not neither force the child to leave school nor take any coercive steps against any child for non-payment thereof.

d) In respect of those students, who are leaving the schools after completing their education or even pre-maturely of their own, the school managements shall be permitted to recover the arrears of fee as well. After giving adjustment of security or other deposits lying with schools.

> However, this is subject to the condition that in case it is ultimately found that fee payable was less than what is actually paid, schools shall refund excess amount paid by those students, along with interest @ 9% per annum. The school managements shall file an affidavit of undertaking in this Court to abide by this condition of refund.
>
> Ms. Avnish Ahlawat, learned counsel appearing on behalf of the respondents, clarifies that the development fee as stipulated in Para 14 of the orders dated 11.02.2009 is payable with prospective effect, i.e., 01.09.2008 wherever it is payable in terms of this para.
>
> With the aforesaid observations, CMs stand disposed of."

15. In the writ petition filed by the DAM, five grievances are made, which can be briefly recapitulated as under:

    1) Decision to increase the fees is not based on any rationale or legal basis;

    2) The Report of S.L. Bansal Committee is not made public which should be done immediately (since the Report of the said Committee was supplied to the parties was made public, this grievance is taken care of);

3) Direction is sought for to constitute permanent Tribunal so that Duggal Committee task be completed and such Tribunal is able to take care of these situations in future as well.

4) The hiked fee which has been and is being paid by the parents/students should be refunded;

5) The Government should ensure auditing of accounts as per Section 18(6) of Delhi School Education Act (hereinafter referred to as 'the Act') read with Rule 170, Delhi Education Rules on regular basis.

Arguments: DAM

16. In support of the aforesaid prayers made in this writ petition, Mr. Ashok Aggarwal, learned counsel appearing for the Delhi Abhibhawak Mahasangh (hereinafter referred to as 'DAM') extensively referred to the various observations and directions of this Court in ***Modern School (supra)***. He also sought to nourish his argument by taking support from another Supreme Court case entitled ***Action Committee Unaided Pvt. Schools &***

Ors. Vs. Director of Education & Ors. **[2009 (11) SCALE 77]**. Based on the directions contained in these judgments as well as provisions of the Act and Rules, his submission was:

(i) There could not be a general order of increase in fee on uniformity basis by all the schools, as fee or charge could be raised depending upon the financial health and finds at the disposal of each school, after due examination thereof, which was not done. He specifically referred to Section 17(3) of the Act n this behalf.

(ii) There was no nexus between increase in fee and the underlying object specifically underlined by this Court in DAM-1, viz.:

(a) Reasonable fee structure;

(b) No commercialization.

(iii) Even the Bansal Committee had rejected the provision in Part 9.1 of its Report and fee hike was suggested on the basis of actual requirement, subject to maximum of ₹500/- and it was categorically mentioned that fee

hike was not the only source for the schools who were to tap other sources like other profitable activities as well as development fee already generated. However, while passing the impugned order, the Government did not look into these pivotal recommendations of the Bansal Committee.

(iv) Effect of 6th Pay Commission's recommendation was wrongly given inasmuch as,

(a) More school teachers were shown than the actual teaching ;

(b) Creating false financial burden; and

(c) Three months' salary reserve was created and burden thereof could not be shifted to students by hiking fee.

17. Mr. Ajay Goel, learned counsel who appeared for the applicant/impleader, Health Care Foundation in CM 8462/2009 in WP(C) No.7777/2009 supplemented the aforesaid submissions of Mr. Aggarwal. His main attack was on the deliberations of Bansal Committee and he

emphasized that this Committee has worked without any accounts expert; there was no adequate representation of parents; in all six meetings were held, and only in the sixth meeting all members were present; meetings were held in the premises of schools thereby choosing wrong venue, as schools were interested parties; only 99 responded out 1100 schools and only 43 requested for fee hike and thus, there was no representative character before the Committee; in the data that was asked for profitability before or after Sixth Pay Commission was not called for which was most relevant; for previous year's financial position was not taken into consideration on the presumption that the schools were working on 'no profit, no gain basis', which was clearly wrong and no control was exercised by the Director of Education. Suggestions are given by the applicant in this CM which are as under:

> "1. The accounting and other records of such recognized schools, for all these years, may be independently audited to work out the non-compliance of law by them to derive undue benefit by such schools from overcharging the fee and other funds. Such schools should be made to pay back to the students, the value of such benefit illegally enjoyed by them, if any.

2. To order setting up of an independent Regulatory Body which may be named as "Delhi Education Regulatory Commission", which can regulate issues related with the Delhi School Education Act, 1973 & the Delhi School Education Rules, 1973 having jurisdiction over all the schools including aided schools, un-aided schools, other recognized schools, Govt. schools. The role of Directorate of Education may be restricted to administration of Govt. schools and Directorate may be made answerable before the regulatory body as Manager of Govt. Schools like Manager of any other school. The regulatory body may include Educationists, Advocates, Chartered Accountants and other professionals also.

3. To order the report of the Committee as void *an initio* because of constitution of Committee against the directions of notification, almost non-representation of parents/students in the Committee, holding of meetings by the Committee in the premises of parties who are otherwise interested in the matter.

4. To ask for the explanation from the Directorate of Education, who was supposed to keep a check on the financial and other aspects of recognized schools, for all these years, for not able to ensure compliance with the law and rules."

Arguments: Schools

18. On behalf of schools, arguments were addressed by various counsels, viz.,

(i) Mr. C.S. Sundaram, Sr. Advocate for the Action Committee of Un-aided Private Schools & Ors. in WP (C) No.8147/2009.

(ii) Mr. Rakesh Khanna, Sr. Advocate appeared in WP(C) No.8147/2009 and WP (C) No.7777/2009.

(iii) Mr. S.D. Salwan and Mr. Mukul Talwar, learned counsel appeared in WP (C) No.8614/2009 for Forum for Promotion of Quality Education for All.

(iv) Ms. Rekha Palli, learned counsel appeared for the applicant in CM No.9664 in WP(C) No.7777/2009.

(v) Mr. Romy Chacko, learned counsel appeared in WP (C) No.9228/2009 & WP (C) No.11139/2009 for the Forum of Minority Schools.

(vi) Mr. Sanat Kumar, learned counsel appeared in WP (C) No.8610/2009 for Association of Public Schools (Regd.)

19. Action Committee Unaided Private Schools (Redg.) boasts of membership of about 250 recognized unaided private schools. In its writ petition, in addition to the orders dated 11.02.2009, it has also challenged the constitutional validity of Section 17(3) of the Act to the extent that the

same does not permit the petitioners to determine their own fee structure. It is their submission that on the recommendation of 6th Pay Commission, the Government had issued vide Circular dated 12.09.2008. All private schools were also obliged to give the same pay scale as amended by the Section 10 of 1973 Act. Therefore, on 15.10.2008, the Director of Education issued Circular under Section 10(1) of the Act directing all the schools to implement the said recommendations. Their submission is that when these schools are obliged to pay the same pay scales to their teachers and staff as are paid to the Government teachers, it is their right to revise, enhance and fix the fee and other charges payable by the students as well. However, vide Notification dated 11.02.2009, the Government of NCT of Delhi while allowing the increase in existing fee by a particular amount has also restrained the private schools from increasing fee without seeking approval of PTA and they were also restrained from increasing fee till March, 2010. They are also peeved at the constitution of Grievance Redressal Committee. In nutshell, their grievance is that schools should be allowed

to have the play in the joints without any shackles. Therefore, they have challenged the vires of Section 17 (3) of the 1973 Act as well as orders dated 11.02.2009 with a prayer for issuing appropriate direction that schools are entitled to determine and charge the fee which is payable by the students admitted by these schools.

20. Mr. Sundaram, learned Senior counsel in support of these prayers submitted that by issuing the Circular dated 11.02.2009 ostensibly under the provisions of Section 17(3) of the 1973 Act, the respondent No.1 has usurped the right of a private recognized unaided educational institutions to determine their own fee structure. The respondents have virtually taken up the task of determining the quantum of fee that can be charged by private recognized unaided educational institutions without leaving any discretion or autonomy to them. The same is not only illegal but also runs counter to the scheme of the Constitution of India as interpreted by the Supreme Court. The Delhi Government by issuing the impugned circular/notification dated 11.02.2009 placing reliance on Section 17(3) of 1973 Act has infringed the said right. On

facts also, the fee hike that has been permitted by the Delhi Government in impugned circular/notification dated 11.02.2009 is far less than required to meet the financial liability of the private unaided recognized schools on account of implementation of the recommendations of the 6th Central Pay Commission. Mr. Sundaram also relied upon the same very judgment in DMA-1 and specifically referred to direction no. (iii) in para 65 thereof:

> "65. In view of the aforesaid discussion, our conclusion may be summarized as under:
>
> i) **********
>
> ii) **********
>
> (iii) **No permission from Director of Education is necessary before or after fixing tuition fee.** In case, however, such fixation is found to be irrational and arbitrary, there are ample powers under the Act and the Rules to issue directions to schools to rectify it before resorting to harsh measures. The question of commercialization of education and exploitation of parents by individual schools can be authoritatively determined on through examination of accounts and other records of each school."
>
> (emphasis supplied)

21. He argued that freedom given to private schools was specifically approved by the Supreme Court as well

Modern School (supra). The court while concurring with the judgment of this Court was please to further observe as under:

> "14. At the outset, before analyzing the provisions of 1973 Act, we may state that it is now well settled by catena of decisions of this Court that in the matter of determination of the fee structure the unaided educational institutions exercises a great autonomy as, they, like any other citizen carrying on an occupation are entitled to a reasonable surplus for development of education and expansion of the institution. Such institutions, it has been held, have to plan their investment and expenditure so as to generate profit. What is, however, prohibited is commercialization of education. Hence, we have to strike a balance between autonomy of such institutions and measures to be taken to prevent commercialization of education. However, in none of the earlier cases, this Court has defined the concept of reasonable surplus, profit, income and yield, which are the terms used in the various provisions of 1973 Act.
>
> 15……. The institutions should be permitted to make reasonable profits after providing for investment and expenditure. However, capitation fee and profiteering was held to be forbidden. Subject to the above two prohibitory parameters, this Court in ***TMA Pai Foundation's case*** held that fees to be charged by the unaided educational institutions cannot be regulated. Therefore, the issue before us is as to what constitutes reasonable surplus in the context of the provisions of the 1973 Act.
>
> xxx xxx xxx
>
> 26. To sum up, the interpretation we have placed on the provisions of the said 1973 Act is only to bring in transparency, accountability, expenditure

> management and utilization of savings for capital expenditure/investment **without infringement of the autonomy of the institute in the matter of fee fixation**. It is also to prevent commercialization of education to the extent possible."
>
> (emphasis supplied)

22. He, thus, submitted that it was specifically held that "**No permission from Director of Education is necessary before or after fixing tuition fee**." Thus, the right to determine their fee structure vests with the schools and not the Government.

23. Mr. Sundaram also referred to the judgment of the Supreme Court in the case of ***T.M.A. Pai Foundation Vs. State of Karnataka*** **(2002) 8 SCC 481** wherein the Court considered a large number of issues touching upon the right to establish educational institutions and matters relating to the autonomy of private unaided educational institutions with regard to admission of students and fee to be charged. His submission was that from the observations of the Supreme Court in the ***T.M.A. Pai Foundation (supra)***, it was clear that right to establish an educational institution is a fundamental right which

comprises the right to establish and administer. The same includes the right to admit students, to set up a reasonable fee structure, etc. A private unaided educational institution has the right to determine the fees to be charged by it subject to the condition that profiteering would not be permitted. The following portions of the said judgment was referred to in support of this argument:

> "1. Is there a fundamental right to set up educational institutions and if so, under which provision?
>
> 18. With regard to the establishment of educational institutions, three Articles of the Constitution come into play. Article 19(1)(g) gives the right to all the citizens to practice any profession or to carry on any occupation, trade or business; this right is subject to restrictions that may be placed under Article 19(6). Article 26 gives the right to every religious denomination to establish and maintain an institution for religious purposes, which would include an educational institution. Article 19(1)(g) and Article 26, therefore, confer rights on all citizens and religious denominations to establish and maintain educational institutions. There was no serious dispute that the majority community as well as linguistic and religious minorities would have a right under Article 19(1)(g) and 26 to establish educational institutions. In addition, Article 30(1), in no uncertain terms, gives the right to the religious and linguistic minorities to establish and administer educational institutions of their choice.
>
> xxx xxx xxx

> 45. In view of the discussion hereinabove, we hold that the decision in ***Unni Krishnan's*** case, insofar as it framed the scheme relating to the grant of admission and the fixing of the fee, was not correct, and to that extent, the said decision and the consequent direction given to UGC, AICTE, Medical Council of India, Central and State Government, etc., are overruled."

24. Mr. Sundaram also pointed out that in the case of ***T.M.A. Pai (supra)***, question No. (3) framed by the Hon'ble Constitution Bench was as under:

> "3. In case of private institutions (unaided), can there be government regulations and, if so, to what extent?"

While considering the question No. (3), the Court was pleased to observe as under:

> "50. The right to establish and administer broadly comprises of 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.
>
> xxx xxx xxx

54. The right to establish an educational institution can be regulated; but such regulatory measures must, in general, be to ensure the maintenance of proper academic standards, atmosphere and infrastructure (including qualified staff) and the prevention of mal-administration by those in charge of management. The fixing of a rigid fee structure, dictating the formation and composition of a government body, compulsory nomination of teachers and staff for appointment or nominating students for admissions would be unacceptable restrictions.

55. The Constitution recognizes the right of the individual or religious denomination, or a religious or linguistic minority to establish an educational institution. If aid or financial assistance is not sought, then such institution will be a private unaided institution. Although, in ***Unni Krishnan's*** case, the Court emphasized the important role played by private unaided institutions and the need for private funding, in the scheme that was framed, restrictions were placed on some of the important ingredients relating to the functioning of an educational institution. There can be no doubt that in seeking affiliation or recognition, the Board or the university or the affiliating or recognizing authority can lay down conditions consistent with the requirement to ensure the excellence of education. It can, for instance, indicate the quality of the teachers by prescribing the minimum qualifications that they must possess, and the courses of study and curricula. It can, for the same reasons, also stipulate the existence of infrastructure sufficient for its growth, as a pre-requisite. 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.

56. An educational institution is established for the purpose of imparting education of the type made available by the institution. Different courses of study are usually taught by teachers who have to be recruited as per qualifications that may be prescribed. It is no secret that better working conditions will attract better teachers. More amenities will ensure that better students seek admission to that institution. One cannot lose sight of the fact that providing good amenities to the students in the form of competent teaching faculty and other infrastructure costs money. It has, therefore, to be left to the institution, if it chooses not to seek any aid from the government, to determine the scale of fee that it can charge from the students. One also cannot lose sight of the fact that we live in a competitive world today, where professional education is in demand. We have been given to understand that a large number of professional and other institutions have been started by private parties who do not seek any governmental aid. In a sense a prospective students has various options open to him/her where, therefore, normally economic forces have a role to play. The decision on the fee to be charged must necessarily be left to the private educational

> institution that does not seek or is not dependent upon any funds from the government.
>
> xxx xxx xxx
>
> 62. There is a need for private enterprise in non-professional college education as well. At present, insufficient number of undergraduate colleges are being and have been established, one of the inhibiting factors being that there is a lack of autonomy due to government regulations. It will not be wrong to presume that the numbers of professional colleges are growing at a faster rate than the number of undergraduate and non-professional colleges. While it is desirable that there should be a sufficient number of professional colleges, it should also be possible for private unaided undergraduate colleges that are non-technical in nature to have maximum autonomy similar to a school.
>
> xxx xxx xxx
>
> 66. In the case of private unaided educational institution, the authority granting recognition or affiliation can certainly lay down conditions for the grant of recognition or affiliation; these conditions must pertain broadly to academic and educational matters and welfare of students and teachers - but how the private unaided institutions are to run is a matter of administration to be taken care of by the Management of those institutions."

25. Mr. Sundaram also submitted that following the judgment in ***T.M.A. Pai Foundation (supra)***, the Supreme Court in the case of ***Modern Dental College and Research Centre Vs. State of M.P.*** **(2009) 7 SCC 751** was pleased to hold as under:

> "27. In our view, it cannot be left to the unilateral decision of the State Government to say that the private institutions have failed to meet with the triple tests mentioned in Inamdar's case (supra), because that will be giving unbridled, absolute and unchecked power to the State Government. In our prima facie opinion, the M.P. Niji Vyavsayik Shikshan Sanstha (Pravesh Ka Viniyaman Avam Shulk Ka Nirdharan) Adhiniyam, 2007 (for short 'the Act of 2007'), appears to handover the entire selection process to the State Government or the agencies appointed by the State Government for under-graduate, graduate and post-graduate medical/dental colleges and fee fixation. This, in our prima facie opinion, is contrary to, and inconsistent with the observations (quoted above) made by the 11 Judge Bench decision of this Court in T.M.A. Pai's case (supra), and hence the 2007 Act would become unconstitutional if it is read literally. We have therefore to read down the 2007 Act and Rules to make them constitutional……."

Again, according to the learned Senior Counsel, in the case of ***Kathuria Public School Vs. Director of Education and Anr.*****123 (2005) DLT 89 (DB)**, this Court relying upon the case of ***T.M.A. Pai Foundation (supra)*** was pleased to declare Section 8(2) and 8(4) of 1973 Act requiring private unaided recognized schools to take prior approval of the Director of Education in the matter of disciplinary action as *ultra vires* and unconstitutional.

26. Based on these judgments, his plea was that it is clear that right to establish an educational institution is a fundamental right which comprises the right to establish and administer. The same includes the right to admit students, to set up a reasonable fee structure, etc. A private unaided educational institution has the right to determine the fees to be charged by it subject to the condition that profiteering would not be permitted. Nor can the state prescribe a rigid fee structure or dictate the formation and composition of a governing body, compulsory nomination of teachers and staff for appointment, etc.

27. After submitting that the aforesaid was the correct legal position, Mr. Sundaram proceeded to argue that not only Section 17(3) of the 1973 Act was *ultra vires*, as this provision took away the aforesaid rights of these schools, various clauses of orders dated 11.02.2009 were also illegal and unconstitutional. His attack on the orders dated 11.02.2009 can be summarized as under:

    (i) That the Notification dated 11.02.2009 seeks to lay down a mechanism for approval of the accounts of

the private schools before the PTA. Such a concept is alien to the provisions of the 1973 Act. Clause 3 of the order dated 11.02.2009 requiring the Managing Committee of a private unaided recognized school to present its case before the PTA of the school cannot be sourced to any provision of the 1973 Act and the Rules framed thereunder and thus, is *ultra vires* the provisions of the 1973 Act and Rules itself. Under the current provisions, a Managing Committee of a private unaided recognized school is required to submit its full statement of fee to be levied during the ensuing academic session to the Director of Education under Section 17 (3) of the 1973 Act. In case it seeks to increase the fee during the academic session, it is required to seek the prior approval of the Director of Education. No such role of the PTA has been envisaged under the 1973 Act and the Rules.

(ii) Clause 4 of the order dated 11.02.2009 casts an upward limit on the fee that may be increased by the Managing Committee of a private unaided recognized

school on the basis of different slabs/categories linked to the range of fee currently being charged by the schools is arbitrary, illegal and is not based on any scientific criteria apart from being an affront upon the autonomy of the schools in the matte of determination of fee. Each school has its own liabilities arising out of the implementation of the recommendations of the 5th Central Pay Commission and the same cannot be determined in a straight jacket formula and in such a uniform manner as has been done by the respondents. The impact of the Pay Commission's recommendations depends upon several factors such as number of teachers, their date of appointment, student-teacher ratio, facilities being extended to students, inflation, grant of increments (3% annually), employment of teachers due to regular teachers going on child care leave, transport allowance linked with DA, etc. None of these factors have been taken into account by the respondents.

(iii) Clause 5 of the order dated 11.02.2009 whereby the private unaided recognized schools have been restrained from increasing the tuition fee beyond the levels specified in Clause 4 of the said order till Mach, 2010 is illegal being contrary to the provisions of Section 17 (3) of the 1973 Act. It is submitted that Section 17 (3) of the 1973 Act, a Managing Committee of a private unaided recognized schools is required to submit its full statement of fee to be levied during the ensuing academic session to the Director of Education. In case, it seeks to increase the fee during the academic session, it is required to seek the prior approval of the Director of Education. The order dated 11.02.2009 itself states that the same has been issued in the wake of the implementation of the recommendations of the 5th Central Pay Commission. Hence, the same can be stated to be an order permitting the schools to increase the tuition fee under Section 17 (3) of the 1973 Act "during the academic session" after the school has already submitted its full statement of fee

to be levied during the ensuring academic session to the Director of Education. Thus, Clause 5 of the order dated 11.02.2009 so far as the same prevents the schools from raising its fee till March, 2010 is illegal since the same takes away the rights of the schools conferred under Section 17 (3) of the 1973 Act.

(iv) Clause 10 of the Order dated 11.02.2009 envisages the establishment of a Grievance Redressal Committee with regard to determination or increase of fees. The same is arbitrary, illegal and *ultra vires* the provisions of the 1973 Act and Rules and impinges upon the autonomy of the schools. There is no such provision under the 1973 Act or the Rules. Section 17 (3) of 1973 Act requires permission of the Director Education only when fee is sought to be increased during midst of an academic session. For the ensuing academic session, the management of a school is only required to submit to the Director of Education its full statement of fee to be levied during the ensuing academic session. By the impugned

provision, the respondents have created a right in favour of parents whereby a n extra-judicial body has been created to entertain their grievances against a fee hike which under law is to be determined solely by the managing committee of a private unaided institution without any interference from any quarter. Further, 1973 Act recognizes only the Director of Education for the purposes of consideration of annual statement of fee that is submitted by the schools under Section 17 (3) of 1973 Act. The Grievance Redressal Committee is a superimposition over and above the Director of Education which is not recognized under 1973 Act.

(v) Clauses 11, 12, 13, 14 and 15 of the order dated 11.02.2009 whereby the respondents have suggested to the schools to utilize interest on deposits, development fee, etc. to meet the shortfall in meeting the liabilities arising out of the implementation of the recommendations of the VIth Pay Commission are contrary to the provisions of 1973 Act and several judicial pronouncements made

in this regard. Schools have a right under Rule 177 (1) to utilize the surplus for establishment of new schools under the management of the same society, award of scholarships, etc. The Delhi Government cannot dictate to a private unaided recognized school to utilize its surplus in a particular manner, i.e. to meet the liabilities arising out of the VIth Central Pay Commission. The provisions of 1973 Act and Rules (Rules 172 to 178) specifically provide that income derived from collections for specific purposes shall be spent only for such purpose. Hence, the order dated 11.02.2009 in effect is asking the schools to do what they are prohibited under law to do. In this regard, it is also submitted by him that deposits and interest on deposits are statutory requirement to be maintained as a condition precedent for recognition and continuance of such recognition. The Rules do not permit utilization of any fund for any purposes other than for which they were raised/collected. Hence, the directions of the respondents in breach of the Rules framed under 1973 Act. I was pointed out

that in fact para 23 of the said order, the respondents themselves have directed that the fee/funds collected from students are to be utilized strictly in accordance with Rules 176 and 177.

28. In conclusion, Mr. Sundaram emphasized that figures made available under the provisions of Right to Information Act show that salaries of teachers in Government run schools have gone up by 40% to 76% upon the implementation of the Pay Commission's recommendations. The impact of the implementation of Pay Commission recommendations upon private unaided schools is also the same. Payment of salaries of teachers in private unaided schools constitutes 80% of the total financial liabilities of the schools and the same is met only by the fee recovered from students. Salaries of teachers upon the implementation of the Pay Commission's recommendations in schools have increased by 50-60%. However, the fee hike has been restricted by the respondents to 20%, which is woefully inadequate to meet the exigencies.

29. Mr. Rakesh Khanna, who appeared for private respondents in WP (C) Nos. 8147/2009 and 7777/2009 also submitted, almost on the same lines as Mr. Sundaram did, contending that Section 17 (3) of 1973 Act was *ultra vires*. In addition, he made detailed arguments about the Duggal Committee. In this behalf, his submission was that after the constitution of Duggal Committee and submission of its report, much water had flown. The issue in the present cases arose as a result of implementation of the recommendations of 6th Central Pay Commission and DAM was not entitled to turn the clock back by starting all over again from the stage of the Duggal Committee. This plea of the DAM, he argued, was barred by constructive *res judicata*. He referred to the judgments this Court in the case of ***Delhi Abhibhavak Mahasangh Vs. Union of India & Ors.*** **[AIR 2002 Delhi 275]** and that of Supreme Court in the case of ***Direct Recruit Class II Engineering Officers' Association Vs. State of Maharashtra and Others*** **(1990) 2 SCC 715:**

> "37. The petitioner J.H. Bhatia was appointed Deputy Engineer as a direct recruit in 1959 and was

> promoted as Executive Engineer in 1969. According to his case, he was governed by the 1941 Rules and was, therefore, entitled to a higher position in the list of seniority. It has been contended by him that he was entitled to the benefit of either the 1941 Rules or the provision relating to quota in 1960 Rules and in either event he would have been eligible for promotion to the rank of Executive Engineer three years earlier, that is, in 1966. On account of this delay in his promotion he seriously suffered by the further delay in his next promotion as Superintending Engineer by a considerable period. With reference to the criticism against the 1941 Rules in the judgment of Patwardharis case the petitioner urged that the same should be treated as passing remarks, fit to be ignored. Alternatively he has adopted the arguments addressed on behalf of the appellants challenging the correctness of the decision in Patwardharis case."

30. He, thus, argued that the question of fee hike should be looked into by examining the financial burden which is created by the recommendations of 6th Pay Commission. He referred to pre-revised and revised pay scale of various staff and teachers on the implementation of 6th Pay Commission and sought to demonstrate that the impact was 38 to 66% increase in salaries to different schools and the fee was not allowed to be raised commensurate to the said hike in salaries.

31. Mr. Romy Chacko and Mr. M. Qayam-ud-din, learned counsel who appeared for the Forum of Minorities Schools

and Faith Academy Schools (which is also a minority school) respectively carried the arguments further by contending that the impugned actions of the Government impinging upon their minority's rights thereby violating the protection granted by these minority institutions under Article 30 of the Constitution of India. Their arguments were that Article 30 includes a right of administration and as per Chapter XI of Delhi Education Rules, 1973 and other provisions of the 1973 Act, the Notification dated 11.02.2009 cannot be slapped/imposed on the minority unaided recognized schools, as it amounts to interference in the administration of the Minority Institution as guaranteed under Article 30 of the Constitution. Article 30 *vis-à-vis* 'right of minority' is clearly interpreted by the Supreme Court ***T.M.A. Pai (supra)*** wherein the Constitution Bench (comprising of 11 Judges) has held that the fee of the minority unaided recognized schools cannot be regulated by the State. In the said case, 11 questions were framed and answered. Out of those 11 questions, question No. 5(C) was framed as under:

> "Q.5(c) Whether the statutory Provisions which regulate the facets of administration like control over educational agencies, control over governing bodies, conditions of affiliation including recognition/withdrawal thereof, and appointment of state employees, teachers and Principals including their service conditions and regulation of fees, etc. would interfere with the right of administration of minorities?"

32. The Court has answered the question and *inter alia* has held as under:

> "A. So far as the statutory provisions regulating the facets administration is concerned, in case of an unaided minority educational institution, the regulatory measure of control should be minimal and the conditions of recognition as well as conditions of affiliation to an University or Board have to be complied with,……. Regulations can be framed governing service conditions for teaching and other staff for whom aid is provided by the State without interfering with overall administrative control of Management over the staff,……..**Fees to be charged by unaided institutions cannot be regulated** but no institution should charge capitation, etc."

33. The said position remains intact as it is reaffirmed by the Supreme Court in ***Unaided Pvt. Schools and Ors. (supra)*** and it is further*, inter alia,* held by majority view as under:

> "that any direction issued by the High Court, by the rule making authority or any statutory authority must be in conformity with the decision of this Court in T.M.A. Pai Foundation (supra) as clarified

by the decision of this Court in P.A. Inamdar (supra)."

(As per Hon'ble Mr. Justice S.B. Sinha)

34. The aforesaid view was agreed to by Hon'ble Mr. Justice Cyriac Joseph, in the following manner:

> "2. Though I agree with the view of S.B. Sinha, J. that any direction issued by the High Court or by the rule making authority or any statutory authority must be in conformity with the decision of this Court in the case of ***T.M.A. Pai Foundation*** as clarified by the decision of this Court in the case of ***P.A. Inamdar***, in my view, the judgment of S.H. Kapadia, J. does not question or contradict such a legal proposition. On the contrary, it is in recognition of the above legal proposition……."

35. They submit that as per the latest legal settled preposition of law, in the instant case, the Rule making authority (Delhi Government or Union of India) or any statutory authority (DOE Delhi) including this Court has to follow the ratio laid down by the Supreme Court in ***T.M.A. Pai (supra)***, as explained hereinabove while answering the question No.5 (c) reproduced above. Thus, the effect is this legal settled position of law, pursuant to the judgment dated 07.08.2009 of the Supreme Court, the "**Fees to be charged by unaided minority institutions cannot be**

regulated". That in view of the aforesaid settled legal position, the view taken in ***Modern School (supra)*** cannot prevail upon and thus the fee of the minority institutions cannot be regulated, as the Supreme Court has categorically held in the aforesaid judgment dated 07.08.2009 while interpreting the effect of ***T.M.A. Pai (supra)***:

> "It also goes without saying that the judicial discipline mandates the Bench comprising of two or three Judges to follow the Constitution Bench decisions having regard to Article 141 of the Constitution of India. (See State of West Bengal v. Ashish Kumar Roy and Ors. (2005) 10 SCC 110]."

Arguments: Government of NCT of Delhi

36. On behalf of Government/Official respondents, matter was argued by Ms. Avnish Ahlawat, Advocate. In endeavour to get steer cleared and placating onslaught, Ms. Ahlawat sought to justify the issuance of orders dated 11.02.2009. Interestingly while doing so, she also took shelter behind the same directions given by this Court in DAM-1 was well as judgments of the Supreme Court in ***Modern School (supra)*** and ***T.A.M. Pai (supra)***. Referring to various

observations in those judgments coupled with provisions of the 1973 Act and Rules, her attempt was to demonstrate that the Government was duly and sufficiently armed with necessary powers to not only issue orders dated 11.02.2009, but also to constitute the Grievance Redressal Committee to ensure that the fee is hiked reasonably and it commensurate with financial impact levied by the implementation of VIth Pay Commission. Since reliance is placed on the same judgments and same material and the difference is only in perception, the detailed submissions made by the learned counsel for the Government in this behalf can be taken note of while discussions the scope and ratio of the aforesaid judgments.

Legal Provisions:

37. At this stage, it would be apt to reproduce the relevant statutory provisions contained in 1973 Act and the Rules which have bearing on the subject matter:

"**Sections:**

2. (a) **"Administrator"** means the Administrator of the Union Territory of Delhi appointed by the President under article 239 of the Constitution;

xxx xxx xxx

e) **"appropriate authority"** means :-

(i) in the case of a school recognized or to be recognized by an authority designated or sponsored by the Central Government, that authority;

(ii) in the case of a school recognized or to be recognized by the Delhi Administration, the Administrator or any other officer authorized by him in this behalf;

(iii) in the case: of a school recognized or to be recognized Municipal Corporation of Delhi, that Corporation;

(iv) in the case of any other school, the Administrator or any other officer authorized by him in this behalf;

xxx xxx xxx

g) "Director" means; the Director of Education, Delhi, and includes any other officer authorized by him to perform all or any of the functions of the Director under the act;

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.

(2) The Administrator may establish and maintain any school in Delhi 0] may permit any person or local authority to establish and maintain any school

ill Delhi, subject to compliance with the provisions of this Act and the rules made thereunder.

(3) On and from the commencement of this Act and subject to the provisions of clause (1) of Article 30 of the Constitution, the establishment of a new school or the opening of a higher class or the closing down of an existing class in any existing school in Delhi shall be subject to the provisions of this Act and the rules made thereunder and any school or higher class established or opened otherwise than in accordance with the provisions of this Act shall not be recognized by the appropriate authority.

(4) Recognition of schools- (1) The appropriate authority may application made to it in the prescribed form and in the prescribed manner, recognize any private school:

Provided that no school shall be recognized unless-
~'

a) it has adequate funds to ensure its financial stability and 1 payment of salary and allowances to its employees;

xxx xxx xxx

5. Scheme of management- (1) Notwithstanding anything contained in any other law for the time being in force or in any instrument having effect by virtue of any such law, the managing committee of every recognized school shall make, in accordance with the rules made under this Act and with the previous approval of the appropriate authority, a scheme of management for such school:

Provided that in the case of a recognized private school which does not " receive any aid, the scheme of management shall apply with such variations and modifications as may be prescribed:

Provided further that so much of this sub-section as relates to the previous approval of the appropriate authority, shall not apply to a scheme of management for an unaided minority school.

(2) a scheme may be made, in like manner, to add, to vary or modify any scheme made under sub-section (1).

xxx xxx xxx

17. Fees and other charges- (1) No aided school shall levy fee or collect any other charge or receive any other payment except those specified by the Director.

(2) Every aided school having different rates of fees or other charges or different funds shall obtain prior approval of the prescribed authority before levying such fees or collecting such charges or creating such funds.

(3) The manager of every recognized school, shall before the commencement of each academic session, file with the Director a full statement of the fees to be levied by such school during the ensuing academic session, and except with the prior approval of the Director, no such school shall charge, during that academic session, any fee in excess of the fee specified by its manager in the said statement.

xxx xxx xxx

23. Delegation of powers- (1) The Administrator may delegate all or any of his powers, duties and functions under this Act to the Director or any other officer.

(2) Every person to whom any power is delegated under sub-section (1), may exercise that power in the same manner and with the same effect as if such power had been conferred on him directly by this Act and not by way of delegation."

xxx xxx xxx

28. Power to make rules- (1) …….

(2) …….

(r) fees and other charges which may be collected by an aided school;

(v) educational purposes for which the income derived by way of fees by recognized unaided schools shall be spent;

(w) manner of accounting and operation of school funds and other funds of a recognized private school;

Rules:

168. Receipt to be granted for collection of fees and contributions – (1) A printed receipt, in the form specified by the Director, shall be granted to a student for ever fee or contribution collected by the school.

(2) The head of every aided school shall authorize one or more of the employees of the school to collect fees and contributions from the students and the receipt referred to in sub-rule (1) shall be given and signed by the person so authorized.

(3) Every employee collecting any fee or contribution from a student shall, immediately after such collection, enter the particulars of such collection in the attendance register of the class.

172. Trust or society not to collect fees, etc. schools to grant receipts for fees, etc., collected by it – (1) No fee, contribution or other charge shall be collected from any student by the trust or society running any recognized school; whether aided or not.

(2) Every fee, contribution or other charge collected from any student by a recognized school, whether aided or not, shall be collected in its own name and a proper receipt shall be granted by the school for every collection made by it.

173. School fund how to be maintained – (1) Every School Fund shall be kept deposited in a nationalized bank or a scheduled bank or any post office in the name of the school.

(2) Such part of the School Fund as may be approved by the Administrator, or any officer authorized by him in this behalf, may be kept in the form the Government securities.

(3) The Administrator may allow such part of the School Fund as he may specify in the case of each school, (depending upon the size and needs of the school) to be kept as cash in hand.

(4) Every Recognized Unaided School Fund shall be kept deposited in a nationalized bank or a scheduled bank or in a post office in the name of the school, and such part of the said Fund as may be specified by the Administrator or any officer authorized by him in this behalf shall be kept in the form of Government securities and as cash in hand respectively:

Provided that in the case of an unaided minority school, the proposition of such Fund which may be kept in the form of Government securities or as cash in hand shall be determined by the managing committee of such school.

175. Accounts of the school how to be maintained – The accounts with regard to the School Fund or the Recognized Unaided School Fund, as the case may be, shall be so maintained as to exhibit, clearly the income accruing to the school by way of fees, fines, income from building rent, interest, development fees, collections for

specific purposes, endowments, gifts, donations, contributions to Pupils' Fund and other miscellaneous receipts, and also, in the case of aided schools, the aid received from the Administrator.

176. Collections for specific purposes to be spent for that purpose – Income derived from collections for specific purposes shall be spent only for such purpose.

177. Fees realized by unaided recognized schools how to be utilized- (1) Income derived by an unaided recognized schools by way of fees shall be utilized in the first instance, for meeting the pay, allowances and other benefits admissible to the employees of the school:

Provided that savings, if any from the fees collected by such school may be utilized by its managing committee for meeting capital or contingent expenditure of the school, or for one or more of the following educational purposes, namely :-

(a) award of scholarships to students;

(b) establishment of any other recognized school, or

(c) assisting any other school or educational institution, not being a college, under the management of the same society or trust by which the first mentioned school is run.

"(2) The savings referred to in sub-rule (1) shall be arrived at after providing for the following, namely:-

(a) pension, gratuity and other specified retirement and other benefits admissible to the employees of the school;

(b) the needed expansion of the school or any expenditure of a developmental nature;

(c) the expansion of the school building or for the expansion or construction of any building or establishment of hostel or expansion of hostel accommodation;

(d) co-curricular activities of the students;

(e) reasonable reserve fund, not being less than ten per cent, of such savings.

180. Unaided recognized schools to submit returns – (1) Every unaided recognized private school shall submit returns and documents in accordance with Appendix II.

(2) Every return or documents referred to in sub-rule (1), shall be submitted to the Director by the 31st day of July of each year.

(3) The account and other records maintained by an unaided private school shall be subject to examination by the auditors and inspecting officers authorized by the Director in this behalf and also by any officers authorized by the Comptroller and Auditor General of India.:

Our Discussion/Deliberations:

38. The factual matrix taken note of above would clearly reveal that it is a repeat situation of 1998 when similar fee hike pursuant to implementation of 5th Pay Commission had come under hammer from both quarters – parents on the one side and the schools on the other side. That situation was dealt with on judicial side by the judgment of this Court in the case of DAM-1 and in this scenario,

naturally, discussion should start from that judgment to find out the legal principles enunciated therein. Of course, that judgment was the subject matter of challenge before the Supreme Court which was decided in the case of ***Modern School (supra)*** and matter culminated in the decision rendered in ***Action Committee Unaided Pvt. Schools & Ors. (supra)***. Thus in the process, those and other judgments cited will also be pondered over by us.

39. A minute and in-depth analysis of the DAM-1 would bring forth the following pertinent aspect:

(i) Section 17 of the Act which deals with fee and charges gives different treatment to aided schools on the one hand and unaided recognized schools on the other hand. Whereas sub-sections (1) and (2) of Section 17 do not allow the aided schools to collect any other charge or receive any other payment except those specified by the Director, this embargo was not applicable to those recognized private schools, which are unaided. The only duty cast by sub-section (3) of Section 17 of the Act is that such schools ARE required, before the commencement of

each academic session, to file with the Director a full statement of the fees to be levied by such schools during the ensuing academic session and thereafter not to charge any fee in excess of the fee specified in that statement during the academic session, without prior approval of the Director. **Thus, the Court held that there was no requirement that the unaided schools seek approval or subsequent approval of Director of Education for enhancement of tuition fee and other charges.**

Rationale is simple. These unaided private schools are required to generate their own funds and to meet the cost of education, and therefore, need to be given free hand, as the main source can only be the funds collected from students which is the concept of 'self-financing education institution', and 'cost based educational institution'.

(ii) At the same time, it is also to be borne in mind that under the garb of increasing fee, these schools do not indulge in commercialization. This was conceded by the schools themselves, viz., **commercialization**

and exploitation was not permissible. No doubt, it was recognized that the cost of education may vary from institution to institution and in this respect, many variable factors may have to be taken into account, **educational institutions were supposed to run on 'no profit, no loss basis'.**

(iii) Thus, while giving leverage to the schools to fix the fees and charges payable by the students coupled with the duty that increase is not such which is exploitative in nature and travels into the arena of commercialization, the Court further held that the **Government is equipped with necessary powers to take regulatory measures and check commercialization**. The Court referred to Rules 172 to 177 and in particular Rule 177 which prescribes the method and manner in which fees realized by unaided recognized schools are to be utilized. The Court also took into consideration provisions of Section 4 of the 1973 Act dealing with grant of recognition by the Government, Section 3 of the Act which empowers the administration to

regulate education in all the schools in Delhi in accordance with the provisions of this Act and the rules made thereunder as well as Section 24 of 1973 Act which deals with inspection of schools.

(iv) On the conjoint reading of these provisions, the Court was categorical that the **Government had a requisite power to resort to regulatory measures and control the activities of such institutions to ensure that these education institutions keep playing vital and pivotal role to spread education and not to make money**. In this behalf, the Court went to the extent of observing that **if it comes to its notice that fee and other charges are excessive, the Government can issue directions to the schools to reduce the same and if such direction is not complied with, other steps like withdrawal of recognition or takeover of the school can be taken**. However, before resorting to these extreme steps, the Government could issue directions to the schools to roll back if it was found that the fee and other

charges are only unreasonable and exorbitant and amount to commercialization. After referring to the principle laid down in various judgments of the Supreme Court on the interpretation of statute, the legal position contained in Section 17 of 1973 Act was some which reads as under:

> "42……**When these basic principles are kept in view as also the object of the Act there is no difficulty in concluding that despite the fact that Section 17(1) & (2) of the Act is not applicable to the private recognized unaided schools the government under the Act and the Rules has ample power to regulate fee and other charges to prevent commercialization and exploitation**, before considering to take the extreme step of withdrawal of recognition and other harsh steps.
>
> 43. The cardinal principle of law is that every law is designated to further ends of justice. The said purpose cannot be frustrated on mere technologies while interpreting a Statute. Its purpose and spirit as gathered from the intendment has to be borne in mind. These aspects are to be kept in mind for the correct interpretation of the Statute and the adjudication of rival submissions……...
>
> (emphasis supplied)"

xxx xxx xxx

> 44. **In view of the aforesaid legal positions we have no difficulty in rejecting the extreme proposition that Directorate of Education has no power to regulate the fee and other charges levied by private recognized unaided schools.**
>
> 45. ……..**We are also unable to accept the contention that diversion of funds as being objected by petitioners and the administration, would adversely affect the expansion of the education or that the opening of the new schools would be jeopardised**. In our view, higher amount of fee and charges cannot be levied on the ground of so called expansion requiring creation of funds. **If any amount is to be generated for such a purpose it has to be under a separate head and not compulsive and involuntary payment under the garb of increase in the fee and other charges. Further, nobody stops the Society of the Trust which may have set up the school to generate its own funds needed for expansion for opening of new schools.**
>
> (emphasis supplied)"

(v) While holding so, the Court specifically rejected the contention of these schools that the stipulation in the Circular issued by the Government to the effect that the first accumulated amount shall be exhausted to meet the additional burden as a result of revising the pay structure, was illegal. It was also held that such

stipulation did not amount to diversion of funds for some other purpose or that the expansion of education would be adversely affected and opening of new schools will be jeopardized. The Court also specifically rejected the contention that provisions of statute and Rules provided for a limited scope of regulating and interfering with the use of amounts collected by the schools. In the process, it was also held that the **Government can ensure that there is no transfer of amounts from the schools to the society in view of the provisions of Rules and if any new schools are to be opened by the society or educational institute exploited the collection of money had to be in the nature of voluntary donation and for the expansion of education for future generation, unreasonable demand cannot be made from the present students and their parents.**

(vi) The autonomy of the schools on the one hand and regulatory power of the Act on the other hand not to permit commercialization of education, is beautifully

summarized in para 48 of the judgment, which reads as under:

> "48. We have also no difficulty in accepting the proposition that the expenses may have to differ from school to school depending upon the nature of activities in the schools. **It is not being suggested that if for legitimate and reasonable activities to be provided to the students, higher expenses are to be incurred the burden of it cannot be placed on the students.** Our approach in no manner adversely affects the autonomy of unaided schools. We agree that autonomy of such schools has to be respected. But under the garb of autonomy the commercialization of education cannot be permitted. It cannot be said that because of the autonomy of limit on charging any sum from students can be fixed under any head despite the expenditure under that head.
>
> (emphasis supplied)"

(vii) In such scenario, the next question which automatically arose for consideration related to the manner and nature of regulation in a particular case. It is re-emphasized that the Court accepted the fact that different schools may have to increase the fee with different proposition depending upon the financial burden on those schools and the actual cost of education which these schools require to bear. It

was also emphasized that the quantum increase would depend upon the funds already available with these schools which were to be first utilized to meet the additional financial burden created as a result of revision in pay scale. The Court was, thus, conscious of the fact that there was need to increase the fee, but at the same time whether the parent bodies were justified in their grievance that on the pretext of revision in pay scale, the fee had been increased abnormally. This dichotomy noticed in Para 50 of the judgment is as under:

> "50. There can be no doubt that the substantial increase in the fee and charges leads to considerable amount of discontentment amongst a substantial number of parents as it affects their pockets in these days of high inflation. The argument of **high inflation is also applicable to schools who have to incur expenses**. It cannot be ignored that to meet the increased in the expenses, the schools have necessarily to generate funds by increasing the amount of fee and charges. The present problem has arisen on account of payments to be made as a result of acceptance of the Vth Pay Commission. The increased salaries to the school staff had to be paid. According to schools the fee and charges were increased to meet this additional burden. According to the Parents' Association, however, the schools had huge accumulated amounts wherefrom the additional burden on the schools

could easily be met and the schools were only using the recommendations of Vth Pay Commission as an excuse and under that garb the fee has been increased manifold.

(emphasis supplied)"

(viii) **The Court was of the view that in order to find out as to whether the fee increase was reasonable or not a close examination of facts and figures of each school is necessary.** However, the Court was neither fully equipped nor it was possible for the Court to function and undertake each individual school. In the opinion of the Court, **such an exercise was to be undertaken by the authorities or by an independent committee**. The Court further opined that the matter could be discussed by all concerned and fee increase even as per the impugned order, whereas the schools be given an opportunity to justify the levy of higher charges. In Para 65 of the judgment, the Court summarized the discussed in the following manner:

"65. In view of the aforesaid discussion our conclusions may be summaries as under:-

(i) It is the obligation of the Administrator and or Director of Education to prevent commercialization and exploitation in private unaided schools including schools run by minorities.

(ii) The tuition fee and other charges are required to be fixed in a validly constituted meeting giving opportunity to the representatives of Parent Teachers Association and Nominee of Director of Education of place their viewpoints.

(iii) No permission from Director of Education is necessary before or after fixing tuition fee. In case, however, such fixing is found to be irrational and arbitrary there are ample powers under the Act and Rules to issue directions to school to rectify it before resorting to harsh measures. The question of commercialization of education and exploitation of parents by individual schools can be authoritatively determined on thorough examination of accounts and other records of each school.

(iv) The Act and the Rules prohibit transfer of funds from the school to the society or from one school to another.

(v) The tuition fee cannot be fixed to recover capital expenditure to be incurred on the properties of the society.

(vi) The inspection of the schools, audit of the accounts and compliance of the provisions of the Act and the Rules by private recognized unaided schools could have prevented the present state of affairs.

(vii) The authorities/Director of Education has failed in its obligation to get the accounts of private recognized unaided schools audited from time to time.

(viii) The schools/societies can take voluntary donations not connected with the admission of the ward.

(ix) On the peculiar facts of these petitions there is no per se illegality in issue of the impugned circular dated 10th September 1997.

(x) An independent statutory Committee, by amendment of law, if necessary, deserves to be constituted to go into factual matters and adjudicate disputes which may arise in future in the matter of fixation of tuition fee and other charges.

(xi) The Government should consider extending Act and Rules with or without modifications to all schools from Nursery onward.

Having bestowed our thoughtful consideration to the submission of counsel for the parties and afore noticed detail facts and circumstances, we are of the view that an independent Committee deserves to be appointed for the period covered by impugned order dated 10th September, 1997 up to start of academic session in the year 1999, to look into the cases of the individual schools and determine, on examination of record and accounts etc. Whether increase of tuition fee and other charges, on facts would be justified or not. Eliminating the element of commercialization and in light of this decision the Committee would determine fee and other charges payable by students of individual schools. We do not think that it would be desirable at present to permit any further increase than what has already been permitted by order dated 11th December, 1997. We would, therefore, extend the aforequoted order dated 11th December, 1997 till decision of cases of individual

schools by Committee appointed by this judgment."

(ix) As, according to the Court, the position in respect of each school warranted to be examined, a committee comprising of Ms. Santosh Duggal (a retired Judge of this Court) as Chairperson with power to nominate two persons in consultation with the Chief Secretary, Government of NCT of Delhi – one with the knowledge of accounts and second from the field of education, was constituted by the Court "to decide the matter of fee and other charges leviable by individual school in terms of the said decision."

40. Many schools and associations of unaided private schools challenged this decision before the Supreme Court. Singular and consolidated judgment in all these appeals was pronounced by the Supreme Court on 27.04.2004 in the case of ***Modern School (supra)***. It was a divided verdict of the Bench of majority Judgment was authored by Hon'ble Mr. Justice S.H. Kapadia (as His Lordship then was), the Hon'ble Chief Justice Mr. V.N. Khare concurring therewith. Hon'ble Mr. Justice S.B. Sinha gave dissenting

opinion. The majority view substantially upheld the aforesaid judgment of this Court. However, some significant discussed, analyzed, touched upon and emphasized in the said judgment need to be highlighted. Therefore, we proceed to take note thereof hereafter.

41. The majority judgment starts by spelling out the issue which were posed before the Court and were to be answered. The Court noted:

> "1. In this batch of civil appeals, following three points arise for determination:--
>
> **(a)** Whether the Director of Education has the authority to regulate the quantum of fees charged by un-aided schools under section 17(3) of Delhi School Education Act, 1973?
>
> **(b)** Whether the direction issued on 15th December, 1999 by the Director of Education under section 24(3) of the Delhi School Education Act, 1973 stating *inter alia* that no fees/funds collected from parents/students shall be transferred from the Recognized Un-aided Schools Fund to the society or trust or any other institution, is in conflict with rule 177 of Delhi School Education Rules, 1973?
>
> **(c)** Whether managements of Recognized unaided schools are entitled to set-up a Development Fund Account under the provisions of the Delhi School Education Act, 1973?"

42. Insofar first question is concerned, the Court affirmed the views of the Division Bench of this Court with the guiding

principle, viz., "hence we have to strike a balance between autonomy of such institutions and measures to be taken in avoiding commercialization of education". A the saem time, the Court also observed that in none of the earlier cases, the Apex Court had defined the concept of "reasonable surplus, profit, income and yield, which are the terms used in various provisions in 1973 Act". For this reason, the Court proceeded to make in-depth analysis of the earlier judgments having aforesaid focus in mind. This analysis is contained in para 15 and 16 of the judgment which is worth a read:

> "15. As far back as 1957, it has been held by this Court in the case of ***State of Bombay v. R.M.D. Chamarbaugwala*** reported in [1957]1SCR874 that education is per se an activity that is charitable in nature. Imparting of education is a State function. The State, however, having regard to its financial constraints is not always in a position to perform its duties. The function of imparting education has been to a large extent taken over by the citizens themselves. In the case of ***Unni Krishnan, J.P. v. State of A.P. (supra)***, looking to the above ground realities, this Court formulated a self-financing mechanism/scheme under which institutions were entitled to admit 50% students of their choice as they were self-financed institutions, whereas rest of the seats were to be filled in by the State. For admission of students, a common entrance test was to be held. Provisions for free seats and payment seats were made therein. The

State and various statutory authorities including Medical Council of India, University Grants Commission etc. were directed to make end or amend regulations so as to bring them on par with the said Scheme. In the case of ***TMA Pai Foundation v. State of Karnataka*** reported in (2002)8SCC481a , the said scheme formulated by this Court in the case of ***Unni Krishnan*** (supra) was held to be an unreasonable restriction within the meaning of Article 19(6) of the Constitution as it resulted in revenue short-falls making it difficult for the educational institutions. Consequently, all orders and directions issued by the State in furtherance of the directions in Unni Krishnan's case (supra) were held to be unconstitutional. This Court observed in the said judgment that the right to establish and administer an institution included the right to admit students; right to set up a reasonable fee structure; right to constitute a governing body, right to appoint staff and right to take disciplinary action. ***TMA Pai Foundation's case*** for the first time brought into existence the concept of education as an "occupation", a term used in Article 19(1)(g) of the Constitution. It was held by majority that Articles 19(1)(g) and 26 confer rights on all citizens and religious denominations respectively to establish and maintain educational institutions. In addition, Article 30(1) gives the right to religious and linguistic minorities to establish and administer educational institution of their choice. However, right to establish an institution under Article 19(1)(g) is subject to reasonable restriction in terms of clause (6) thereof. Similarly, the right conferred on minorities, religious or linguistic, to establish and administer educational institution of their own choice under Article 30(1) is held to be subject to reasonable regulations which inter alia may be framed having regard to public interest and national interest. In the said judgment, it was observed vide para 56 that economic forces have a role to play in the matter of fee fixation. The institutions should be permitted to make reasonable profits after providing for investment and expenditure.

However, capitation fee and profiteering was held to be forbidden. Subject to the above two prohibitory parameters, this Court in *TMA Pai Foundation's case* held that fees to be charged by the unaided educational institutions cannot be regulated. Therefore, the issue before us is as to what constitutes reasonable surplus in the context of the provisions of the 1973 Act. This issue was not there before this Court in the ***TMA Pai Foundation's case***.

16. The judgment in ***TMA Pai Foundation's case*** was delivered on 31.10.2002. The Union of India, State Governments and educational institutions understood the majority judgment in that case in different perspectives. It led to litigations in several courts. Under the circumstances, a bench of five Judges was constituted in the case of ***Islamic Academy of Education v. State of Karnataka*** reported in AIR2003SC3724 so that doubts/anomalies, if any, could be clarified. One of the issues which arose for determination concerned determination of the fee structure in private unaided professional educational institutions. It was submitted on behalf of the managements that such institutions had been given complete autonomy not only as regards admission of students but also as regards determination of their own fee structure. It was submitted that these institutions were entitled to fix their own fee structure which could include a reasonable revenue surplus for the purpose of development of education and expansion of the institution. It was submitted that so long as there was no profiteering, there could be no interference by the Government. As against this, on behalf of Union of India, State Governments and some of the students, it was submitted, that the right to set-up and administer an educational institution is not an absolute right and it is subject to reasonable restrictions. It was submitted that such a right is subject to public and national interests. It was contended that imparting education was a State function but due to resource crunch, the States were not in a position to establish sufficient number

of educational institutions and consequently the States were permitting private educational institutions to perform State functions. It was submitted that the Government had a statutory right to fix the fees to ensure that there was no profiteering. Both sides relied upon various passages from the majority judgment in TMA Pai Foundation's case. **In view of rival submissions, four questions were formulated. We are concerned with first question, namely, whether the educational institutions are entitled to fix their own fee structure. It was held that there could be no rigid fee structure. Each institute must have freedom to fix its own fee structure, after taking into account the need to generate funds to run the institution and to provide facilities necessary for the benefit of the students. They must be able to generate surplus which must be used for betterment and growth of that educational institution. The fee structure must be fixed keeping in mind the infrastructure and facilities available, investment made, salaries paid to teachers and staff, future plans for expansion and/or betterment of institution subject to two restrictions, namely, non-profiteering and non- charging of capitation fees.** It was held that surplus/profit can be generated but they shall be used for the benefit of that educational institution. It was held that profits/surplus cannot be diverted for any other use or purposes and cannot be used for personal gains or for other business or enterprise. The Court noticed that there were various statutes/regulations which governed the fixation of fee and, therefore, this Court directed the respective State Governments to set up committee headed by a retired High Court Judge to be nominated by the Chief Justice of that State to approve the fee structure or to propose some other fee which could be charged by the institute.

(emphasis supplied)"

43. The Court, thus, analyzed the judgments of ***TMA Pai Foundation (supra)*** and ***Islamic Academy of Education (supra)*** by observing that it was held therein that fee to be charged by unaided educational institutions cannot be regulated except that capitation fee and profiteering were forbidden. There could not be any rigid fee structure and each institution must have freedom to fix its own fee structure, after taking into account the need to generate funds to run the institution and to provide facilities necessary for the benefit of the students. In the process, such educational institutions were even empowered to generate surplus funds, which must be used for betterment and growth of the educational institutes with clear embargo that these profits/surplus funds cannot be diverted for any other use or purpose and cannot be used for personal gain or any business or enterprise.

44. For fixing the fee structure, following considerations are to be kept in mind:

    (a) The infrastructure and facilities available;

(b) Investment made, salaries paid to teachers and staff;

(c) Future plans for expansion and/or betterment of institution subject to two restrictions, viz., non-profiteering and non-charging of capitation fees.

45. The majority view thereafter applied the aforesaid principles in the context of 1973 Act and Rules framed thereunder. It was emphasized that Rule 175 indicates the accrual of income and Rule 177 indicates utilization of that income and answered to the first question by holding that the Director of Education was authorized to regulate fee and other charges to prevent commercialization of educational institutes in the following terms:

> "17…….Therefore, reading section 18(4) with rules 172, 173, 174, 175 and 177 on one hand and section 17(3) on the other hand, it is clear that under the Act, the **Director is authorized to regulate the fees and other charges to prevent commercialization of education.** Under section 17(3), the school has to furnish a full statement of fees in advance before the commencement of the academic session. Reading section 17(3) with section 18(3)&(4) of the Act and the rules quoted above, it is clear that the Director has the authority

to regulate the fees under section 17(3) of the Act."

(emphasis supplied)

46. While answering the second question, the Court held that it was not permissible for the schools to transfer the funds from recognized unaided school funds to the Society or Trust or any other institution. Repelling the contention of these private schools to the contrary, the Court gave the following rationale:

> "20. We do not find merit in the above arguments. Before analyzing the rules herein, it may be pointed out, that as of today, we have Generally Accepted Accounting Principles (GAAP). As stated above, commercialization of education has been a problem area for the last several years. One of the methods of eradicating commercialization of education in schools is to insist on every school following principles of accounting applicable to not-for-profit organizations/ non- business organizations. Under the Generally Accepted Accounting Principles, expense is different from expenditure. All operational expenses for the current accounting year like salary and allowances payable to employees, rent for the premises, payment of property taxes are current revenue expenses. These expenses entail benefits during the current accounting period. Expenditure, on the other hand, is for acquisition of an asset of an enduring nature which gives benefits spread over many accounting periods, like purchase of plant and machinery, building etc. Therefore, there is a difference between revenue expenses and capital expenditure. Lastly, we must keep in mind that accounting has a linkage with law. Accounting operates within legal

framework. Therefore, banking, insurance and electricity companies have their own form of balance-sheets unlike balance-sheets prescribed for companies under the Companies Act 1956. Therefore, we have to look at the accounts of non-business organizations like schools, hospitals etc. in the light of the statute in question."

47. Substantial skill and dexterity of accounting and economic principles, while analyzing the various provisions of Rules of 1973 Act, is reflected in the discussion that followed in Paras 21 to 23:

"21. In the light of the above observations, we are required to analyze rules 172, 175, 176 and 177 of 1973 rules. The above rules indicate the manner in which accounts are required to be maintained by the schools. Under section 18(3) of the said Act every Recognized school shall have a fund titled "Recognized Unaided School Fund". It is important to bear in mind that in every non-business organization, accounts are to be maintained on the basis of what is known as 'Fund Based System of Accounting'. Such system brings about transparency. Section 18(3) of the Act shows that schools have to maintain Fund Based System of Accounting. The said Fund. contemplated by Section 18(3), shall consist of income by way of fees, fine, rent, interest etc. Section 18(3) is to be read with rule 175. Reading the two together, it is clear that each item of income shall be accounted for separately under the common head, namely, Recognized Unaided School Fund. Further, rule 175 indicates accrual of income unlike rule 177 which deals with utilization of income. Rule 177 does not cover all the items of income mentioned in rule 175. Rule 177 only deals with one item of income for the school, namely, fees. Rule 177(1) shows that salaries, allowances and benefits to the

employees shall constitute deduction from the income in the first instance. That after such deduction, surplus if any, shall be appropriated towards, pension, gratuity, reserves and other items of appropriations enumerated in rule 177(2) and after such appropriation the balance (savings) shall be utilized to meet capital expenditure of the same school or to set up another school under the same management. Therefore, rule 177 deals with application of income and not with accrual of income. Therefore, rule 177 shows that salaries and allowances shall come out from the fees whereas capital expenditure will be a charge on the savings. Therefore, capital expenditure cannot constitute a component of the financial fees structure as is submitted on behalf of the schools. It also shows that salaries and allowances are revenue expenses incurred during the current year and, therefore, they have to come out of the fees for the current year whereas capital expenditure/capital investments have to come from the savings, if any, calculated in the manner indicated above. It is for this reason that under Section 17(3) of the Act, every school is required to file a statement of fees which they would like to charge during the ensuing academic year with the Director. In the light of the analysis mentioned above, we are directing the Director to analyze such statements under section 17(3) of the Act and to apply the above principles in each case. This direction is required to be given as we have gone through the balance- sheets and profit and loss accounts of two schools and prima facie, we find that schools are being run on profit basis and that their accounts are being maintained as if they are corporate bodies. Their accounts are not maintained on the principles of accounting applicable to non-business organizations/not-for-profit organizations.

22. As stated above, it was argued that clause 8 of the order of Director was in conflict with rule 177. We do not find any merit in this argument.

23. Rule 177(1) refers to income derived by unaided recognized school by way of fees and the manner in which it shall be applied/utilized. Accrual of income is indicated by rule 175, which states that income accruing to the school by way of fees, fine, rent, interest, development fees shall form part of Recognized Unaided School Fund Account. Therefore, each item of income has to be separately accounted for. This is not being done in the present case. Rule 177(1) further provides that income from fees shall be utilized in the first instance for paying salaries and other allowances to the employees and from the balance the school shall provide for pension, gratuity, expansion of the same school, capital expenditure for development of the same school, reserve fund etc. and the net savings alone shall be applied for establishment of any other recognized school under rule 177(1)(b). Under accounting principles, there is a difference between appropriation of surplus (income) on one hand and transfer of funds on the other hand. In the present case, rule 177(1) refers to appropriation of savings whereas clause 8 of the order of Director prohibits transfer of funds to any other institution or society. This view is further supported by rule 172 which states that no fee shall be collected from the student by any trust or society. That fees shall be collected from the student only for the school and not for the trust or the society. Therefore, one has to read rule 172 with rule 177. Under rule 175, fees collected from the school have to be credited to Recognized Unaided School Fund. Therefore, reading rules 172, 175 and 177, it is clear that appropriation of savings (income) is different from transfer of fund. Under clause 8, the management is restrained from transferring any amount from Recognized Unaided School Fund to the society or the trust or any other institution, whereas rule 177(1) refers to appropriation of savings (income) from revenue account for meeting capital expenditure of the school. In the circumstances, there is no conflict between rule 177 and clause 8."

48. On the third issue formulated by the Court and noted above, the majority opinion was that the management of the schools was entitled to create Development Fund Account. For creating such a Fund, it could collect development fees as well. Concomitantly, the Court addressed the question as to whether directions given by the Government that development fund fee should not exceed 10 – 15% of the total annual tuition fee, was appropriate and valid which was to be charged to supplement the resources for purchase, upgradation and replacement of furniture, fixtures and equipments. The Court was of the opinion that this direction was given with the purpose of introducing a proper accounting practice to be followed by non-business organizations/not-for-profit organizations which was a correct practice being introduced. The Court also held that taking into account the cost of inflation between 15-12-1999 and 31-12-2003 that the ceiling charge of development fee not exceeding 15% of the total annual tuition fees was appropriate.

49. After giving answers to the aforesaid three questions formulated by it in the aforesaid manner, the majority decision summed up the position as under:

> "26. To sum up, the interpretation we have placed on the provisions of the said 1973 Act is only to bring in transparency, accountability, expenditure management and utilization of savings for capital expenditure/investment without infringement of the autonomy of the institute in the matter of fee fixation. It is also to prevent commercialization of education to the extent possible.
>
> **CONCLUSION:**
>
> 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."

50. We would like to point out at this stage that after the judgment of the Supreme Court in ***Modern School (supra)***, Seven Judges Bench revisited the scope and ambit of ***Islamic Academy of Education (supra)*** as well as ***T.M.A. Pai Foundation (supra)*** in ***P.A. Inamdar & Ors. Vs. State of Maharashtra and Others*** [(2005) 6

SCC 537]. For clarifying three issues, matter was referred to the Seven Judges Bench in ***P.A. Inamdar (supra)*** which are as under:

> "(i) the fixation of 'quota' of admissions/students in respect of unaided professional institutions;
>
> (ii) the holding of examinations for admissions to such colleges, that is, who will hold the entrance tests; and
>
> (iii) **the fee structure."**

51. Emboldened by the view which the Seven Judges Bench had taken in ***P.A. Inamdar (supra)***, these private schools as well as Action Committee, Unaided Private Schools field Review Petition seeking review of the judgment rendered in ***Modern School (supra)***. This Review Petition has been decided by the Bench comprising of Hon'ble Mr. Justice S.B. Sinha, Hon'ble Mr. Justice S.H. Kapadia (as His Lordship then was) and Hon'ble Mr. Justice Cyriac Joseph. By majority of 2:1, the Review Petition has been dismissed. Justice Sinha who rendered the minority judgment stuck to his view. However, Hon'ble Mr. Justice Joseph agreed with Hon'ble Mr. Justice Kapadia, the author of majority view in ***Modern School***

(supra), in dismissing the review petition. The judgment is reported as ***Action Committee Unaided Pvt. Schools and Others Vs. Director Education and Others*** **[2009 (11) SCALE 7**. Reading of this judgment would disclose that the Review Petitions raised the following contentions:

> "(i) In view of the larger bench decision of this Court in P.A. Inamdar (supra), the directions issued by the Director of Education which have been upheld by this Court cannot be sustained as the schools and in particular the minority schools have a greater autonomy in laying down their own fee structure.
>
> (ii) Although collection of any amount for establishment of the school by a trust or a society is forbidden, the transfer of fund by one school to another school under the same management being permissible in terms of Rule 177 of the Rules, the directions prohibiting such transfer by the Director of Education in its order dated 15.12.1999 must be held to be illegal.
>
> (iii) The decision of T.M.A. Pai Foundation (supra) with regard to construction of Article 19(1)(g) of the Constitution of India should be considered in its correct perspective as there exists a distinction between `profit' and `profiteering'.
>
> (iv) The status of a minority institution being on a higher pedestal, as has been noticed in T.M.A. Pai Foundation (supra), the impugned directions could not have been issued by the Director of Education which would affect the autonomy of the minority institution."

From the aforesaid, it is clear that in Review Petition, thus, the Court considered as to whether ***T.M.A. Pai Foundation (supra)*** as clarified by ***P.A. Inamdar (supra)*** had made any difference to the conclusions, which were drawn by the Court in ***Modern School (supra)***.

52. Hon'ble Mr. Justice S.B. Sinha, who was in minority again, took view that even if reasonable restrictions could be imposed on citizen's fundamental right contained in Article 19(1)(g) of the Constitution of India, that could be done only by reason of a Legislative Act. However, the order dated 15.12.1999 issued by the Government giving various directions was not statutory orders. Furthermore, such a statutory order also could not have been issued under the directions of the High Court as the very premise on which such directions had been issued did not survive any longer in view of the decision in ***T.M.A. Pai Foundation (supra).*** The minority, thus, held that all the schools and particularly unaided schools may lay down their own fee criteria. Imposition of regulation, however, only is permissible for the purpose of exercising of control

over profiteering and not earning of a profit which would include reasonable return of the investment made.

53. On the other hand, Hon'ble Mr. Justice S.H. Kapadia (now Hon'ble the Chief Justice of India) traced out the history of this particular litigation right from filing of Public Interest Litigation in the High Court by DAM, then extracted the portion of the judgment of Division Bench rendered in 1998 including appointment of Duggal Committee, report of Duggal Committee, filing of SLPs by the schools, etc. against the Division Bench Judgment of this Court and also orders dated 15.12.1999 issued by the Director of Education in terms of the Report of Duggal Committee. Thereafter, decision in ***Modern School (supra)*** is taken note of on the three points argued before it. Thereafter, the judgment proceeds with the filing of Review Petitions and notes the argument of the Review Petitioner that the majority view holding the Director of Education (in short 'DoE') had power to regulate the fee structure of private unaided schools was not correct and no directions could have been issued by the Court contrary to the statutory Rules in the matter of fee fixation. It was also pointed out

that the review petitioners had argued that the directions issued vide orders dated 15.12.1999 by DoE were neither the subject matter before Delhi High Court, nor the subject matter of Special Leave Petition. The basic grievance of the review petitioners in this behalf was that Clause 8 of the orders dated 15.12.1999 issued by the DoE was causing administrative difficulties which needed clarification. Under Clause 8, DoE stipulated that "no amount whatsoever shall be transferred from the recognized unaided school fund of a school to the society or the trust or any other institution". It was argued by the review petitioners that a rider needed to be introduced in Clause 8 by mentioning "except under the management of the same society or trust" to subserve the object underlying the 1973 Act. Even the majority view found merit in this particular argument in the following words:

> "53 (20). There is merit in the argument advanced on behalf of the Action Committee/Management. The 1973 Act and the Rules framed thereunder cannot come in the way of the Management to establish more schools. So long as there is a reasonable fee structure in existence and so long as there is transfer of funds from one institution to the other under the same

management, there cannot be any objection from the Department of Education."

54. However, the contention that the order dated 15.12.1999 of DoE was never challenged and yet, the Court went on validity thereof was rejected. The majority decision also rejected the contention that whereas 1973 Act and Rules thereunder operates, regulation of education would be governed thereby and therefore, the Court cannot impose any other or further restrictions. On this aspect, it was observed that in ***T.M.A. Pai (supra)*** and ***Islamic Academy of Education (supra)***, the principles for fixing fee structure had been illustrated. However, they were not exhaustive. They did not deal with determination of surplus and appropriation of savings. In ***Modern School (supra)***, it was categorically recorded in the majority opinion that the above topics are not dealt with by the 1973 Rules and therefore, Clause 8 was found not to be beyond Rule 177 or in conflict thereto as alleged by the review petitioners. It was categorically ruled that additional directions given in the judgment of majority vide Para 27 do not go beyond Rule 177, but they are a

part of gap-filling exercise and discipline needed to be followed by the management. In this behalf, following discussion needs to be extracted:

> "55 (22)……The Additional Directions given in the Judgment of the Majority vide para 27 do not go beyond Rule 177 but they are a part of gap-filling exercise and discipline to be followed by the management. For example: every school shall prepare balance sheet and profit and loss account. Such conditions do not supplant Rule 177. If reasonable fee structure is the test then transparency and accountability are equally important. In fact, as can be seen from Reports of Duggal Committee and the earlier Committee, excessive fees stood charged in some cases despite the 1973 Rules because proper Accounting Discipline was not provided for in 1973 Rules. Therefore, the Further Directions given are merely gap-fillers. Ultimately, Rule 177 seeks transparency and accountability and the Further Directions (in para 27) merely brings about that transparency. Lastly, it may be noted that the matter has come up to the Apex Court from PIL. Hence there is no merit in the above plea.
>
> 56 (23). Subject to the above clarification, review petitions stand dismissed with no order as to costs."

55. Hon'ble Mr. Justice Cyriac Joseph while agreeing with Hon'ble Mr. Justice S.K. Kapadia recorded his note as under:

> "58. Though I agree with the view of S.B. Sinha, J. that any direction issued by the High Court or by the rule making authority or any statutory authority must be in conformity with the decision of this Court in the case of ***T.M.A. Pai Foundation*** as clarified by the decision of this Court in the case of ***P.A. Inamdar***, in my view, the judgment of S.H. Kapadia, J. does not question or contradict such a legal proposition. On the contrary, it is in recognition of the above legal proposition that modification suggested by the learned Counsel for the review petitioners in respect of Clause 8 of the order dated 15.12.1999 issued by the Director of Education has been accepted by S.H. Kapadia, J."

56. A conjoint reading of the judgments of the Supreme Court in ***Modern School (supra)*** as well as review petitions in the case of ***Action Committee Unaided Pvt. Schools & Ors. (supra)*** would clearly demonstrate that the three points formulated are answered as under:

1) DoE has the Authority to regulate the quantum of fee charged by unaided schools under Section 17(3) of the 1973 Act. It has to ensure that the schools are not indulging in profiteering.

2) The direction of DoE that no fees/funds collected from parents/students shall be transferred from the Recognized Un-aided Schools Fund to the society or trust or any other institution, was valid. However, it could be transferred under the same

society or trust, which aspect is clarified in the review petition.

3) Recognized unaided schools were entitled to set up Development Fund Account and could charge the students for the same, but that should not exceed 15% of the annual tuition fee.

57. Having distilled the legal principles laid down in the aforesaid judgments and taken note of the statutory provisions contained in 1973 Act and Rules framed thereunder, we proceed to answer the issues which arise for determination in these petitions. Various issues, which were raised in different petitions need to be recapitulated. These are:

(a) Whether the orders dated 11.02.2009 stipulating the increase in fee by the DoE, is legal and valid?

Incidental questions here would be:

(i) Whether it was not permissible for the DoE to pass a general order for increase in fee, as the fee could be raised only after examining the financial health and

funds at the disposal of different schools to ensure that the fee structure was reasonable and the schools were not indulging in commercialization?

(ii) Whether those orders of DoE impinge upon the autonomy of the recognized unaided private schools and it was the right of the schools to revise, enhance and fix the fee and the other charges payable by the students?

(iii) Whether the impugned notification dated 11.02.2009 was illegal on the ground that it had put a restriction on the private schools from increasing fee without seeking approval of PTA and further from increasing further fee till March, 2010?

(b) Whether constitution of Grievance Redressal Committee was illegal?

Incidental question here would be as to whether it was necessary to constitute a permanent Committee to go into the annual

accounts of different schools each year and on that basis allow the schools to increase fees, if it becomes necessary.

(c) Whether the provisions of Section 17(3) of the 1973 Act are *ultra vires*?

(d) Whether Clause 11 to 15 of Notification dated 11.02.2009 asking the schools to utilize interest on deposits, development fee, etc. to meet the shortfall in meeting the liabilities arising out of the implementation of the recommendations of the 5th Pay Commission are contrary to the provisions of 1973 Act?

(e) Whether the order dated 11.02.2009 of the Government impinge upon the rights of Minority Schools thereby violating the protection granted to these minority institutions under Article 30 of the Constitution of India?

58. Since most of these issues are interrelated and interdependent, we would like to discuss all these questions cumulatively and not separately as this course

of action would avoid repetition. However However, Since vires of Section 17(3) of 1973 Act are challenged we should first deal with this issues, Section 17(3) reads as under:

Whether Section 17(3) – *Ultra Vires*:

> "**17. Fees and other charges-** (1) No aided school shall levy fee or collect any other charge or receive any other payment except those specified by the Director.
>
> (2) Every aided school having different rates of fees or other charges or different funds shall obtain prior approval of the prescribed authority before levying such fees or collecting such charges or creating such funds.
>
> (3) The manager of every recognized school, shall before the commencement of each academic session, file with the Director a full statement of the fees to be levied by such school during the ensuing academic session, and except with the prior approval of the Director, no such school shall charge, during that academic session, any fee in excess of the fee specified by its manager in the said statement."

59. We have already noted above that in the case of ***Modern School (supra)***, the Supreme Court has categorically held that this regulatory provision empowers the DoE as the Authority to regulate the quantum of fee charged by unaided schools and it is further held that the provision is

made to ensure that schools are not indulging in profiteering. It is minimum restrained, which is required and would be permissible as reasonable one. We would do nothing more than produce following discussions from ***Modern School (supra)***:

> "14. At the outset, before analyzing the provisions of 1973 Act, we may state that it is now well settled by catena of decisions of this Court that in the matter of determination of the fee structure the unaided educational institutions exercises a great autonomy as, they, like any other citizen carrying on an occupation are entitled to a reasonable surplus for development of education and expansion of the institution. Such institutions, it has been held, have to plan their investment and expenditure so as to generate profit. What is, however, prohibited is commercialization of education. Hence, we have to strike a balance between autonomy of such institutions and measures to be taken to prevent commercialization of education. However, in none of the earlier cases, this Court has defined the concept of reasonable surplus, profit, income and yield, which are the terms used in the various provisions of 1973 Act.
>
> 15. As far back as 1957, it has been held by this Court in the case of ***State of Bombay v. R.M.D. Chamarbaugwala*** reported in MANU/SC/0019/1957 : [1957]1SCR874 that education is per se an activity that is charitable in nature. Imparting of education is a State function. The State, however, having regard to its financial constraints is not always in a position to perform its duties. The function of imparting education has been to a large extent taken over by the citizens themselves. In the case of ***Unni Krishnan, J.P. v. State of A.P. (supra)***, looking to the above ground realities, this Court formulated a self-financing mechanism/scheme under which

institutions were entitled to admit 50% students of their choice as they were self-financed institutions, whereas rest of the seats were to be filled in by the State. For admission of students, a common entrance test was to be held. Provisions for free seats and payment seats were made therein. The State and various statutory authorities including Medical Council of India, University Grants Commission etc. were directed to make end or amend regulations so as to bring them on par with the said Scheme. In the case of ***TMA Pai Foundation v. State of Karnataka*** reported in MANU/SC/1050/2002 : (2002)8SCC481a , the said scheme formulated by this Court in the case of ***Unni Krishnan*** (supra) was held to be an unreasonable restriction within the meaning of Article 19(6) of the Constitution as it resulted in revenue short-falls making it difficult for the educational institutions. Consequently, all orders and directions issued by the State in furtherance of the directions in Unni Krishnan's case (supra) were held to be unconstitutional. This Court observed in the said judgment that the right to establish and administer an institution included the right to admit students; right to set up a reasonable fee structure; right to constitute a governing body, right to appoint staff and right to take disciplinary action. ***TMA Pai Foundation's case*** for the first time brought into existence the concept of education as an "occupation", a term used in Article 19(1)(g) of the Constitution. It was held by majority that Articles 19(1)(g) and 26 confer rights on all citizens and religious denominations respectively to establish and maintain educational institutions. In addition, Article 30(1) gives the right to religious and linguistic minorities to establish and administer educational institution of their choice. However, right to establish an institution under Article 19(1)(g) is subject to reasonable restriction in terms of clause (6) thereof. Similarly, the right conferred on minorities, religious or linguistic, to establish and administer educational institution of their own choice under Article 30(1) is held to be subject to reasonable regulations which inter alia may be framed having regard to public

interest and national interest. In the said judgment, it was observed vide para 56 that economic forces have a role to play in the matter of fee fixation. The institutions should be permitted to make reasonable profits after providing for investment and expenditure. However, capitation fee and profiteering was held to be forbidden. Subject to the above two prohibitory parameters, this Court in ***TMA Pai Foundation's case*** held that fees to be charged by the unaided educational institutions cannot be regulated. Therefore, the issue before us is as to what constitutes reasonable surplus in the context of the provisions of the 1973 Act. This issue was not there before this Court in the ***TMA Pai Foundation's case***.

16. The judgment in ***TMA Pai Foundation's case*** was delivered on 31.10.2002. The Union of India, State Governments and educational institutions understood the majority judgment in that case in different perspectives. It led to litigations in several courts. Under the circumstances, a bench of five Judges was constituted in the case of ***Islamic Academy of Education v. State of Karnataka*** reported in MANU/SC/0580/2003 : AIR2003SC3724 so that doubts/anomalies, if any, could be clarified. One of the issues which arose for determination concerned determination of the fee structure in private unaided professional educational institutions. It was submitted on behalf of the managements that such institutions had been given complete autonomy not only as regards admission of students but also as regards determination of their own fee structure. It was submitted that these institutions were entitled to fix their own fee structure which could include a reasonable revenue surplus for the purpose of development of education and expansion of the institution. It was submitted that so long as there was no profiteering, there could be no interference by the Government. As against this, on behalf of Union of India, State Governments and some of the students, it was submitted, that the right to set-up and administer an educational institution is not an absolute right and it is subject to reasonable

restrictions. It was submitted that such a right is subject to public and national interests. It was contended that imparting education was a State function but due to resource crunch, the States were not in a position to establish sufficient number of educational institutions and consequently the States were permitting private educational institutions to perform State functions. It was submitted that the Government had a statutory right to fix the fees to ensure that there was no profiteering. Both sides relied upon various passages from the majority judgment in TMA Pai Foundation's case. In view of rival submissions, four questions were formulated. We are concerned with first question, namely, whether the educational institutions are entitled to fix their own fee structure. It was held that there could be no rigid fee structure. Each institute must have freedom to fix its own fee structure, after taking into account the need to generate funds to run the institution and to provide facilities necessary for the benefit of the students. They must be able to generate surplus which must be used for betterment and growth of that educational institution. The fee structure must be fixed keeping in mind the infrastructure and facilities available, investment made, salaries paid to teachers and staff, future plans for expansion and/or betterment of institution subject to two restrictions, namely, non-profiteering and non- charging of capitation fees. It was held that surplus/profit can be generated but they shall be used for the benefit of that educational institution. It was held that profits/surplus cannot be diverted for any other use or purposes and cannot be used for personal gains or for other business or enterprise. The Court noticed that there were various statutes/regulations which governed the fixation of fee and, therefore, this Court directed the respective State Governments to set up committee headed by a retired High Court Judge to be nominated by the Chief Justice of that State to approve the fee structure or to propose some other fee which could be charged by the institute.

17. In the light of the judgment of this Court in the case of ***Islamic Academy of Education*** (supra) the provisions of 1973 Act and the rules framed thereunder may be seen. The object of the said Act is to provide better organization and development of school education in Delhi and for matters connected thereto. Section 18(3) of the Act states that in every recognized unaided school, there shall be a fund, to be called as Recognized Unaided School Fund consisting of income accruing to the school by way of fees, charges and contributions. Section 18(4)(a) states that income derived by unaided schools by way of fees shall be utilized only for the educational purposes as may be prescribed by the rules. Rule 172(1) states that no fee shall be collected from any student by the trust/society running any recognized school; whether aided or unaided. That under rule 172(2), every fee collected from any student by a recognized school, whether aided or not, shall be collected in the name of the school. Rule 173(4) inter alia states that every Recognized Unaided School Fund shall be deposited in a nationalized bank. Under rule 175, the accounts of Recognized Unaided School Fund shall clearly indicate the income accruing to the school by way of fees, fine, income from rent, income by way of interest, income by way of development fees etc. Rule 177 refers to utilization of fees realized by unaided recognized school. Therefore, rule 175 indicates accrual of income whereas rule 177 indicates utilization of that income. Therefore, reading section 18(4) with rules 172, 173, 174, 175 and 177 on one hand and section 17(3) on the other hand, it is clear that under the Act, the Director is authorized to regulate the fees and other charges to prevent commercialization of education. Under section 17(3), the school has to furnish a full statement of fees in advance before the commencement of the academic session. Reading section 17(3) with section 18(3)&(4) of the Act and the rules quoted above, it is clear that the Director has the authority to regulate the fees under section 17(3) of the Act."

60. It would also be pertinent to point out at this stage the judgment of the Madras High Court in the case of Supreme Court in the case of ***Tamil Nadu Nursery Matriculation Vs. The State Of Tamil Nadu*** (decided on 09.04.2010 in W.P.(C) No.627 of 2010) has upheld similar provision in the following manner:

> "15. Having noted the submissions advanced by the learned counsel appearing for the respective petitioners, and of the learned Additional Advocate General, we must note that the Apex Court was concerned with the fees in the Medical and Engineering colleges in the above referred to three matters, and the fees collected by the private schools were not the subject matter of those proceedings. Yet, the counsel for both the parties accept that the principles laid down in the above referred to three judgments will be useful for deciding the question of validity of the legislation in this matter. Guidelines for examining the validity of the legislation.
>
> Now, as can be seen in T.M.A.Pai's case itself, the Apex Court has observed that the Government can provide regulations to control the charging of capitation fee and profiteering. Question No.3 before the Court was as to whether there can be Government regulations, and if so, to what extent in case of private institutions? What the Apex Court has observed in paragraph-57 of the judgment is instructive for our purpose. □57. We, however, wish to emphasize one point, and that is that inasmuch as the occupation of education is, in a sense, regarded as charitable, the Government can provide regulations that will ensure excellence in education, while forbidding the charging of capitation fee and profiteering by the institution. Since the object of setting up an educational institution is by definition

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

16 Again in paragraph-69 of the judgment, while dealing with this issue, the Apex Court observed that an appropriate machinery can be devised by the State or University to ensure that no capitation fee is charged and that there is no profiteering, though a reasonable surplus for the furtherance of education is permissible. Although the Apex Court overruled the earlier judgment in Unnikrishnan vs. State of Andhra Pradesh reported in 1993 (1) SCC 645, which was to the extent of the scheme framed therein and the directions to impose the same, part of the judgment holding that primary education is a fundamental right was held to be valid. Similarly, the principle that there should not be capitation fee or profiteering was also held to be correct.

17. Thereafter, when we come to the judgment in Islamic Academy case, the first question framed by the Apex Court was whether the educational institutions are entitled to fix their own fee structure? It is pertinent to note that this judgment very much brought in a committee to regulate the fees structure, which was to operate until the Government/Appropriate Authorities consider framing of appropriate regulations. It is also material to note that in paragraph-20, the Apex Court has held that the direction to set up Committee in the States was passed under Article 142 of the Constitution and was to remain in force till appropriate legislation was enacted by Parliament.

> 18. The judgment in P.A. Inamdar□s case, though sought to review the one in Islamic Academy case, it left the mechanism of having the committees undisturbed. In paragraph-129 of the judgment, the Apex Court observed that the State regulation, though minimal, should be to maintain fairness in admission procedure and to check exploitation by charging exorbitant money or capitation fees. In paragraph-140 of the judgment, the Apex Court has held that the charge of capitation fee by unaided minority and non-minority institutions for professional courses is just not permissible. Similarly, profiteering is also not permissible. The Apex Court observed that it cannot shut its eyes to the hard realities of commercialization of education and evil practices being adopted by many institutions to earn large amounts for their private or selfish ends. On question no.3, which was with respect to Government regulation in the case of private institutions, the Apex Court clearly answered in paragraph-141 that every institution is free to devise its own fee structure, but the same can be regulated in the interest of preventing profiteering. No capitation fee can be charged. In paragraph-145 of the judgment, the Apex Court rejected the suggestion for post-audit or checks if the institutions adopt their own admission procedure and fee structure, since the Apex Court was of the view that admission procedure and fixation of fees should be regulated and controlled at the initial stage itself."

61. Special Leave Petition against the aforesaid judgment was dismissed by the Supreme Court. After all Section 17(3) of the Act gives freedom to the unaided recognized schools to fix the fee at the commencement of each academic session, file with the Director a full statement of the fees as levied during the ensuing academic session.

This would be necessary to the Government when we recommend the regulatory role of the Director to ensure that he fee charged is not unreasonable. Likewise, the only other restriction is that during the academic session, there should not be further increase without the prior approval of the Director. Again, this provision is made to check arbitrary increase in fee, time and again, after the academic session has commenced. There may be circumstances which may justify enhancement of fee even during the academic session. However, the schools are required to justify those circumstances for which prior approval is mandated. According to us, this provision is in tune with the legal principle stated by the Supreme Court in so many judgments, viz., autonomy to the schools to fix their fee on the one hand and conferring authority upon the DoE to regulate the quantum of fee with limited purpose to ensure that the schools are not indulging in profiteering. The provision, thus, strikes a balance between the rights of the schools on the one hand and duty cast upon the DoE on the other hand. The only thing what is required at that stage is to We, therefore, are of

the opinion that Section 17(3) does not suffer from any vires or arbitrariness and is not violative of Article 14 or 19(1)(g) of the Constitution of India.

62. With this, we revert back to the issues **<u>On Merits</u>**:

The clear legal position which emerges from the combined reading of the judgments of the Supreme Court, directly on the issue of revising tuition fee by Delhi schools under the Delhi Education Act, and already stated in detail above, demonstrates that the schools cannot indulge in commercialization of education which would mean that the fee structure has to be kept within bound so as to avoid profiteering. At the same time, "reasonable surplus" is permissible as fund in the form of such surplus may be required for development of various activities in the schools for the benefit of students themselves. The guiding principle, in the process, is "to strike a balance between autonomy of such institution and measures to be taken in avoiding commercialization of education". The autonomy of the schools can be ensured by giving first right to such schools to increase the fee. At the same time, quantum of fee to be charged by unaided schools is

subject to regulation by the DoE which power is specifically conferred upon the DoE by virtue of Section 17(3) of 1973 Act. This is specifically held by the Supreme Court in ***Modern School (supra)*** and ***Action Committee Unaided Private Schools and Anr. (supra)***. Normally, therefore, in the first instance, it is for the schools to fix their fee and/or increase the same which right is conferred upon the schools as recognized in ***TMA Pai (supra)***. The DoE can step in and interfere if hike in fee by a particular school is found to be excessive and perceived as "indulging in profiteering". It would be a procedure to be resorted to routinely. However, validity of the orders dated 11.02.2009 passed by the DoE is to be judged in a different hue altogether. Situation arose because of the implementation of pay structure recommended by the 6th Pay Commission, which was to be done mid-session *albeit* from retrospective effect, i.e., with effect from 01.01.2006. All aided and unaided recognized schools in Delhi were under obligation to give increase to their teachers and staff members which resulted in substantial hike in pay package of the

employees of these schools. Further, it happened across the board and it was not a situation specific to a particular school. As a result of this added financial burden whereas the schools wanted to increase the fee, PTAs on the other hand, maintained that some of the schools enjoyed robust financial health, which was sufficient to bear the additional monetary burden without hike in the fee to be charged from the students. This necessitated going into the records of each school. Therefore, in a situation like this where on the one hand, there was perceptible additional financial burden created on account of increase in the pay of the staff and on the other hand, the exercise demanded by the PTAs of going into the financial records of each schools was time consuming, the issuance of orders dated 11.02.2009 by the Government, as an interim measure, proposing to increase the tuition fee in the manner provided in the said order with a lid on the upper limit cannot be faulted with. It is moreso, when the proposed increase is not based on any whims of the DoE, but was preceded by the constitution of a Committee under the Chairmanship of Shri S.L. Bansal, a retired

I.A.S. officer and the impugned orders were the result of the reports submitted by the said Committee after undertaking requisite exercise, *albeit,* of preliminary nature, but after giving hearing to all stakeholders. At this stage, while passing such an order, there could not have been any option, but to pass a general order for increase in fee.

63. We are of the opinion that in the aforesaid exceptional circumstance in which such an order came to be passed, it did not impinge upon the autonomy of the recognized aided or unaided private schools as well. We, therefore, uphold Para 7 of the impugned order, making it clear that was only an interim measure adopted by the Court. When we look into the matter in the aforesaid perspective, which according to us, is the only manner in which orders dated 11.02.2009 are to be viewed, we are clear in mind that the increase in fees stipulated in the said orders as *ad-hoc* measure is legal and valid. However, as clarified above, we hasten to add that it would only be treated as an interim measure and would be subject to scrutiny into the records of each school to see as to whether there was any

necessity to increase the fee having regard to the financial position of the said schools. Outcome of such an exercise could result in higher hike in fee than stipulated in the orders dated 11.02.2009 or reducing the fee than what is permitted in the said orders.

64. At the same time, we again point out that the orders dated 11.02.2009 were issued under exceptional circumstances. We, therefore, clarify that in the normal course when the fee is to be fixed at the start of academic session, no permission from DoE is necessary before or after fixing tuition fee. Of course, once the requirement of Section 17 (3) of the Act is fulfilled, it would be open to the DoE to see whether such fixation is valid or it is irrational or arbitrary. The position in sub-para (iii) of Para 65 of DAM-1 is reiterated in this behalf.

65. At this stage, we would like to examine some other Clauses of the orders dated 11.02.2009, validity whereof have been challenged by the schools. Notification dated 11.02.2009 while allowing the increase in existing fee as specified therein also restrains the private schools from increasing fee without seeking approval of PTA (see

clause - 3). To our mind, this clause is clearly illegal and is not supported by any statutory or legal provisions. On the contrary, when as per Section 17(3) of the Act even the permission of the DoE is not required, asking the schools to be at the mercy of PTAs for making further increase would clearly be contrary to the said provision. We, thus, hold that this clause is not valid.

66. Likewise, we are of the opinion that even the requirement of seeking approval of the school accounts by PTA would not hold water and is not legally valid.

67. With regard to other Clauses, the directions contained in Interim order dated 28.05.2009 shall prevail.

Minority Educational Institutions:

68. No doubt, in **TMA Pai** while answering Question No.5 (C), the Supreme Court held that "fees to be charged by unaided institutions cannot be regulated" but also added "but no institution should charge capitation, etc." Further in the case of ***Modern School (supra)*** itself which discussed the fee issue of schools in Delhi with reference to Delhi School Education Act and Rules categorically held that even the minorities would not be entitled to indulge in

commercial exploitation and the mechanism of regulation at the hands of Department of Education would apply. We cannot accept the argument of the learned counsel appearing for the minorities schools that the view taken in ***Modern School*** cannot prevail in view of ***TMA Pai***. It is stated at the cost of repetition that while taking the aforesaid view in ***Modern School***, the Supreme Court took into consideration ***TMA Pai Foundation*** as well. This legal position was reiterated in ***Action Committee Unaided Pvt. Schools & Ors.*** judgments.

69. The reasons given by us holding para 7 of the notification dated 11.02.2009 to be valid would prompt us to further hold that such an order would be applicable to the minority schools as well and does not impinge upon their minority rights. It is for the reason that the principle laid down by the Apex Court to the effect that schools are not to be converted into commercial ventures and are not to resort to profiteering is applicable to minority schools as well.

Re: Grievance Redressal Committee:

70. The next question that we have to address at this stage as whether constitution of Grievance Redressal Committee by the aforesaid Notification dated 11.02.2009 was illegal. The contention of schools in this behalf is that establishment of such a committee is arbitrary, illegal and *ultra vires*. The provisions of 1973 Act and Rules impinge upon the autonomy of schools. As already pointed out above, the exceptional circumstances under which orders dated 11.02.2009 came to be passed providing an interim measure for fixation of fee which is found to be justified. The objection of constitution of Grievance Redressal Committee was to receive complains from either side. If such an increase in respect of particular school is not justified and downward or upwards revision is necessary. In such a scenario, one may not find fault with the step taken by the Government in establishing the Grievance Redressal Committee. After all, the DoE is empowered to discharge this function and if such a Committee is constituted with Director of Education as Chairperson, two other members and one Chartered Accountant to achieve the aforesaid purpose, in principle that may not be wrong.

Having said so, we are constrained to state in this behalf that such *ad hoc* approach by the Government or DoE may not be proper and is not a lasting solution to the problem at hand, viz., continuing tussle and conflict between the managements of the school, clamouring for higher hike in the fee on the one hand and the PTAs, grieving each time with schools announcing increase in students' fee and raising a voice that such an increase is not predicated based on any rationale or legal basis. This grievance of the PTA becomes stronger when we notice that the Government is failing to discharge its duty of ensuring auditing of accounts regularly as provided under Section 18(6) of the 1973 Act read with Rule 170 of Rules. Further, as noted above, the Supreme Court has emphasized and emphatically reemphasized, time and again, that the schools are not to indulge in profiteering; the fees/funds collected from parents/students are not to be transferred from the recognized schools to the societies or trust or any other institutions; schools are not supposed to charge more than 15% of the annual tuition fee for the purposes of "development fund". All these

aspects can be monitored and looked into only when there is continuous monitoring and regular auditing of the accounts of the schools, which is the statutory duty of the Government as well.

71. We are informed that Grievance Redressal Committee had received 58 complaints. Out of these, three were withdrawn and others have been considered a necessary order be passed. However, we get the feeling that the Redressal Committee could not do substantial job as the only focus of this Committee was to see as to whether fee fixed by orders dated 10.02.2009 was proper or it needs revision (upward or downward) by certain schools. The complaints of the parents which are brought forward by means of writ petitions, whether having been dealt with and could not be dealt with because of limited powers given to the said Redressal Committee.

Similarly, as would be pointed out at a later stage, even CAG has not performed its task.

Need of Regulatory Mechanism:

72. History of the litigation on this aspect, in this city, which has been outlined in this judgment and which was triggered by the 1st petition filed by DAM way back in 1997 amply demonstrates that *adhocism* in this behalf is not a suitable answer, much less a lasting solution. In DAM-1, this Court had constituted Duggal Committee. Though the said Committee undertook the task with all earnestness, sincerity and patience, for various reasons beyond the control of the Committee, it could not be completed and brought to the logical end. Further, in spite of the suggestions made by the Duggal Committee, further task in this behalf was not undertaken and no sincere efforts were made by the Government to ensure regular audit of the accounts of these schools. The result is that we are confronted with same situational and other roadblocks. Even this time, the Government chose to resort to *adhocism* by appointing S.L. Bansal Committee, assigning it a task which could only take care of shorter measure and then constituting a Grievance Redressal Committee contrary to legal provisions.

73. What should be the appropriate measure required to be adopted in the scenario is the poser that states at one and all. According to us, solution lies in establishing a permanent regulatory body/mechanism.

74. Regulatory mechanism, or what is called regulatory economics is the order of the day. In last 60-70 years, economic policy of this country has travelled from *laisse faire* to mixed economy to the present era of liberal economy with regulatory regime. With the advent of mixed economy, there was mushroom of public sector and some of the key industries like Aviation, Insurance, Railways, Electricity/Power, Telecommunication, etc. were monopolized by the State. License/permit raj prevailed during this period with strict control of the Government even in respect of those industries where private sectors were allowed to operate. However, Indian economy experienced major policy changes in early 90s on LPG Model, i.e., Liberalization, Privatization and Globalization. With the onset of reforms to liberalize the Indian economy in July of 1991, a new chapter has dawned for India. This period of economic transition has had a tremendous

impact on the overall economic development of almost all major sectors of the economy.

75. When we have liberal economy which is regulated by the market forces (that is why it is also termed as market economy), prices of goods and services in such an economy are determined in a free price system set up by supply and demand. This is often contrasted with a planned economy, in which a Central Government determines the price of goods and services using a fixed price system. Market economies are also contrasted with mixed economy where the price system is not entirely free but under some Government control or heavily regulated, which is sometimes combined with State led economic planning that is not extensive enough to constitute a planned economy.

76. With the advent of globalization and liberalization, though the market economy is restored, at the same time, it is also felt that market economies should not exist in pure form. Some regulation of the various industries is required rather than allowing self-regulation by market forces. This intervention through Regulatory bodies,

particularly in pricing, is considered necessary for the welfare of the society and the economists point out that such Regulatory economy does not rob the character of a market economy which still remains a market economy. Justification for Regulatory bodies even in such industries managed by private sector lies in the welfare of people. Regulatory measures are felt necessary to promote basic well-being for individuals in need. It is because of this reason that we find Regulatory bodies in all vital industries like, Insurance, Electricity & Power, Telecommunications, etc.

77. Thus, it is felt that in a any welfare economy even for private industries, there is a need for Regulatory body, such a Regulatory framework for education sector becomes all the more necessary. It would be more so when, unlike other industries, commercialization of education is not permitted and mandate of the Constitution of India backed by various judgments of the Apex Court is that profiteering in the education is to be avoided.

78. The concept of welfare of the Society would apply more vigorously in the field of education. Even otherwise for economist, education as an economic activity, favourably compared to those of other economic concerns like agriculture and industry, has its own inputs and outputs; and is thus analyzed in terms of the basic economic tools like the laws of return, principle of equimarginal utility and the public finance. Guided by these principles, the State is supposed to invest in education upto a point where the socio-economic returns to education equal to those from other State expenditures, whereas the individual is guided in his decision to pay for a type of education by the possibility of returns accruable to him. All these considerations make out a case for setting up of a stable Regulatory mechanism.

79. The case at hand, however, demonstrates that because of the *adhocism*, we have not found a permanent solution. Result is that both the sides, viz., schools on the one hand and parents on the other hand are unhappy with the prevailing situation. Whereas some of the schools feel that they have not been allowed to increase the fee

substantially to cover even the expenses, parents bodies on the other hand, have the grievance that hike of fee in certain schools is much more than justified. Such a problem would not arise if provisions of the School Education Act as well as the Rules are strictly adhered to by the schools, particularly, relating to the preparation of accounts, etc. and the increase in fee, if at all, based on the financial health of the schools. It would not arise if the DoE along with Comptroller and Auditor General discharge their duties sincerely undertaking the scrutiny of accounts and records to find out as to whether increase in fees is justified or not. Whether it is because of the reason that it is huge and onerous task for which DoE has no appropriate infrastructure and for any other reasons, fact remains that the DoE has not performed its task quite well giving rise to such situations. If a Regulatory body is established either by appropriate amendments in the Delhi School Education Act or by making a separate legislation or by administrative orders issued under the existing provisions, if so permissible, that may solve the problem once for all.

80. We, therefore, recommend that the Government should consider this aspect. If necessary, an expert Committee be constituted which can go into feasibility of establishing a Regulatory body for unaided/aided and recognized private schools in Delhi and recommend the changes that are required to be made in the existing law or to suggest separate legislation if that is required.

81. The Central Government may even consider the feasibility of formulating 'National Policy on Fee'.

82. If and when such measures are adopted that may provide lasting solution to the problem. However, even when the Government is willing this process is likely to take substantial time. In the integerrum, neither the deserving schools who need to increase fee but are not permitted, nor the poor parents who may be coughing out much more fee than what is justified and charged by certain schools cannot be left in lurch. Since we have held that fee hike in the orders dated 11.02.2009 is to be construed as an interim measure, to resolve the matter finally, this exercise is to be completed and taken to its logical end. We are, therefore, of the opinion that for this purpose, a

Committee be constituted in the same manner in which this Court had earlier appointed Justice Santosh Duggal (Retired). Accordingly, we appoint a Committee of Three Members, which shall comprise of Justice Anil Dev Singh, retired Chief Justice, Rajasthan High Court. He will be assisted by Shri J.S. Kochar, Chartered Accountant (Cell No.9810047401 and another Member can be from the field of Education, who shall be nominated by the Chief Secretary, Govt. of NCT, Delhi. All the schools shall render full cooperation to the Committee in order to enable the Committee to undertake its job effectively and speedily. This Committee will be for the period covered by the impugned order dated 11.02.2009 and specifically looking into the aspect as to how much fee increase was required by each individual schools on the implementation of the recommendation of VIth Pay Commission, i.e., it would examine the records and accounts, etc. of these schools and taking into consideration the funds available, etc. at the disposal of schools at that time and the principles laid down by the Supreme Court in ***Modern School and***

Action Committee Unaided Pvt. Schools as explained in this judgment.

83. We reiterate that the fee hike contained in orders dated 11.02.2009 was by way of interim measure. There is a need to inspect and audit accounts of the schools to find out the funds to meet the increased obligation cast by the implementation of VIth Pay Commission and on this basis, to determine in respect of these schools as to how much hike in fee, if at all, is required. On the basis of this exercise, if it is found that the increase in fee proposed, orders dated 11.02.2009 is more the same shall be slided down and excess amount paid by the students shall be refunded along with interest @ 9%. On the other hand, if a particular school is able to make out a case for higher increase, then it would be permissible for such schools to recover from the students over and above what is charged in terms of Notification dated 11.02.2009.

84. One more aspect needs to be stated at this juncture. On 17.03.2011, the Comptroller and Auditor General of India (CAG) filed its report after auditing and inspecting the accounts of as many as 25 out 1211 privately

administered unaided schools in Delhi. It covers the period from April, 2006 to March, 2009. Report states that the audit has been conducted in accordance with Rules 170 and 180(3) of the Delhi Education Rules. This report comprising of five chapters, starts with an 'Introduction' outlining the scope, objectives and methodology of audit. The audit involved examination of records in compliance with the Delhi School Education Act and Rules framed thereunder by the Education Department 25 unaided private schools. Chapter 2 covers monitoring of the functioning of the schools by the DoE. Chapter 3 discusses the maintenance of accounts by the schools and their certification in conformity with the applicable laws, rules and executive directions. Chapter 4 contains observations on collection of fees and other charges and application of the funds by the schools. In Chapter 5, CAG assessed the compliance by schools with the instructions of the High Court regarding admission of the students from economically weaker sections.

85. In this Report, CAG has adversely commented upon the functioning of the schools in respect of certain aspects. It

is, *inter alia*, stated that schools did not follow the accounting standard and the applicable legislation while preparing their final account; many schools levied excess tuition fee and other charges without linking the admissible expenses to be covered; certain schools transferred the additional financial burden on account of implementation of 6th Pay Commission recommendations to the students instead of utilization their free reserves first; they collected enhanced development fee even though the available development and specified fund was not exhausted; some schools were not even paying their teachers' salary and allowances on part with the Government teachers, etc.

86. During the arguments, various counsels appearing for these schools refuted those remarks and they had their own version while alleging that CAG had not carried out its function properly. The report of CAG is furnished to these schools by the DoE/Government and show cause notices had already been issued Schools are responding to the said show cause notices. Since it is for the Government to take further steps after giving proper hearing to the

schools on the said report, we are eschewing any further discussion thereupon.

87. However, what we want to highlight is that in all these years CAG has inspected only 25 schools, that too under pressure, which is one of the reasons given by us to have the need for a Regulator. Other aspect which becomes discernible is the non-performance of the obligations on the part of the DoE have also been severely criticized in the Report. In the executive summary, it is*, inter alia*, stated in this behalf as under:

> "We observed non-submission or delayed submission of Fee Statements as well as the Annual Returns by the schools. Many schools submitted the Fee Statements after the completion of the academic year; even the quantum of fee hike was not specified in the Statement. There was no evidence of scrutiny of the Annual Accounts and other returns to ascertain that the receipts and expenditure of the schools were in consonance with the projected budget estimates of the schools and any fee hike was not unreasonable. Inspection of the schools by the Directorate was inadequate. The DoE made only 10 visits in 25 schools during 2006-09 against 75, envisaged in the Act. The Department did not fulfil its obligation to get the accounts of the unaided recognized schools duly audited, though provided in the Act. Due to weak governance by the DoE, the schools continued to enhance the fees despite having surplus funds. A proper system should be put in place whereby all returns received from schools are scrutinized to ascertain that the provisions of the Act and Rules have been complied with.
>
> xxx xxx xxx

> We feel that the DoE should have a role in appointment of statutory auditors for the private schools so that compliance with the provisions of DSE Act & Rules is ensured. Institute of Chartered Accounts of India may be consulted for regulating the professional conduct of the statutory auditors.
>
> xxx xxx xxx
>
> The Government may evolve a comprehensive fee structure clearly defining each component and fixing an upper limit for fees to be collected."

88. The abdication of the role assigned to DoE and the weak monitoring also provides justification for introducing regulatory mechanism. We can only hope that the Government will bestow serious consideration to this suggestion.

89. Writ petitions are disposed of in the aforesaid terms without any orders as to costs.

(A.K. SIKRI)
JUDGE

(SIDDHARTH MRIDUL)
JUDGE

AUGUST 12, 2011
pmc