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

Reserved on: 31st January, 2019
Pronounced on: 15th March, 2019

\+ W.P.(C) 4374/2018 & CM No.16982/2018

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

Through: Mr. Sunil Gupta, Sr. Adv. with Mr. Kamal Gupta and Ms. Pragya Agrawal, Advs.

versus

DIRECTORATE OF EDUCATION AND ANR .. Respondents

Through: Mr. Ramesh Singh, SC for GNCTD with Mr. Chirayu Jain and Ms. N. Goyal, Advs.
Mr. Khagesh B. Jha, Ms. Shikha Sharma Bagga, Advs. for Justice for All

Reserved on: 6th February, 2019
Pronounced on: 15th March, 2019

\+ W.P.(C) 13546/2018 & CM APPL. 52763/2018 (*for stay*)

MOUNT CARMEL SCHOOL SOCIETY AND ANR .... Petitioners

Through: Mr. Sunil Gupta, Sr. Adv. with Mr. Romy Chacko, Mr. Vedanta Varma, Mr. Chandan Kumar Mandal, Mr. Akhil Kumar Gola and Ms. Mannat Sandhu, Advs.

versus

DIRECTOR OF EDUCATION AND ORS. ..... Respondents

Through: Mr. Ramesh Singh, SC with Mr. Santosh Kumar Tripathi, ASC for

GNCTD, Mr. Chirayu Jain and Ms. Nikita Goyal, Advs. for R-DOE
Mr. Rajiv Bansal, Sr. Adv. with Mr. Anuj Chaturvedi, Ms. Vaishali Rawat and Ms. Parul Panthi, Advs. for DDA

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

% **J U D G M E N T**

1. These two writ petitions, though separately filed and separately argued by learned Senior Counsel Mr. Sunil Gupta, raise interconnected issues, and involve, essentially, interpretation and understanding of common judicial authorities and pronouncements. They are, therefore, being decided by this common judgment, though the judgments on these writ petitions were reserved on different dates.

2. Before adverting either to the facts of these cases, or the nature of the controversy involved, it would be appropriate to reproduce, *in extenso*, the relevant statutory provisions, as contained in the Constitution of India, the Delhi School Education Act, 1973 (hereinafter referred to as "the DSE Act") and the Delhi School Education Rules, 1973 (hereinafter referred to as "the DSE Rules").

(i) Relevant provisions from the Constitution:

Article 26

"**26. Freedom to manage religious affairs** - Subject to public order, morality and health, every

religious denomination or any section thereof shall have the right

(a) to establish and maintain institutions for religious and charitable purposes;

(b) to manage its own affairs in matters of religion;

(c) to own and acquire movable and immovable property; and

(d) to administer such property in accordance with law."

Article 30

"**30. Right of minorities to establish and administer educational institutions –**

(1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

(1A) In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.

(2) The state shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language."

(ii) Relevant provisions from the DSE 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 or may permit any person or local authority to establish and maintain any school in 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 recognised by the appropriate authority.

10. Salaries of employees.—

(1) The scales of pay and allowances, medical facilities, pension, gratuity, provident fund and other prescribed benefits of the employees of a recognised private school shall not be less than those of the employees of the corresponding status in schools run by the appropriate authority:

Provided that where the scales of pay and allowances, medical facilities, pension, gratuity, provident fund and other prescribed benefits of the employees of any

recognised private school are less than those of the employees of the corresponding status in the schools run by the appropriate authority, the appropriate authority shall direct, in writing, the managing committee of such school to bring the same up to the level of those of the employees of the corresponding status in schools run by the appropriate authority:

Provided further that the failure to comply with such direction shall be deemed to be non-compliance with the conditions for continuing recognition of an existing school and the provisions of section 4 shall apply accordingly.

(2) The managing committee of every aided school shall deposit, every month, its share towards pay and allowances, medical facilities, pension, gratuity, provident fund and other prescribed benefits with the Administrator and the Administrator shall disburse, or cause to be disbursed, within the first week of every month, the salaries and allowances to the employees of the aided schools.

17. Fees and other charges.—

(1) No aided school shall levy any 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 recognised school shall, before the commencement of each academic session, file with the Director a full statement of the fees to be levied by such school during the ensuing academic session, and except with the prior approval of the

Director, no such school shall charge, during that academic session, any fee in excess of the fee specified by its manager in the said statement.

18. School Fund.—

(1) In every aided school, there shall be a fund, to be called the "School Fund", and there shall be credited thereto—

(a) any aid granted by the Administrator,

(b) income accruing to the school by way of fees, charges or other payments, and

(c) any other contributions, endowments and the like.

(2) The School Fund and all other funds, including the Pupils' Fund, established with the approval of the Administrator, shall be accounted for and operated in accordance with the rules made under this Act.

(3) In every recognised unaided school, there shall be a fund, to be called the "Recognised Unaided School Fund", and there shall be credited thereto income accruing to the school by way of—

(a) fees,

(b) any charges and payments which may be realised by the school for other specific purposes, and

(c) any other contributions, endowments, gifts and the like,

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

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

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

24. Inspection of schools."

(iii) Relevant provisions from the DSE Rules:

"**50. Conditions for recognition**

No private school shall be recognised, or continue to be recognised, by the appropriate authority unless the school fulfils the following conditions, namely:—

(i) the school is run by a society registered under the Societies Registration Act, I860 (21 of 1860), or a public trust constituted under any law for the time being in force and is managed in accordance with a scheme of management made under these rules;

(ii) subject to the provisions of clause (1) of article 30 of the Constitution of India, the school serves a real need of the locality and is not likely to effect adversely the enrolment in a nearby school which has already been recognised by the appropriate authority;

(iii) the school follows approved courses of instructions as provided elsewhere in these rules;

(iv) the school is not run for profit to any individual, group of association of individuals or any other persons;

(v) admission to the school is open to all without any discrimination based on religion, caste, race, place of birth or any of them;

(vi) the managing committee observes the provisions of the Act and the rules made there under;

(vii) the building or other structure in which the school is carried on, its surroundings, furniture and equipment are adequate and suitable for an educational institution and, where there is any business premises in any part of the building in which such school is run, the portion in which the school is run adequately separated from such business premises;

(viii) the arrangements in the building or other structure and in the furnishings thereof meet adequately the requirements of health and hygiene;

(ix) the school buildings or other structures or the grounds are not used during the day or night for commercial or residential purposes (except for the purpose of residence of any employee of the school) or for communal, political or non-educational activity of any kind whatsoever;

(x) the accommodation is sufficient for the classes under instruction in the school;

(xi) there is no thoroughfare or public passage through any part of the school premises;

(xii) sanitary arrangements at the school are adequate and are kept in good order and a certificate from the Health Officer of the local authority having

jurisdiction over the area in which the school is located as to the health and sanitary conditions of the school and its surroundings has been furnished, and will also be furnished as and when required by the appropriate authority;

(xiii) arrangements are made for the supply of good drinking water to the students and suitable facilities are provided to enable them to take refreshments, lunch or the like;

(xiv) the school is so conducted as to promote discipline and orderly behaviour and to maintain a high moral tone;

(xv) no teacher or student of the school is compelled to attend a class in which religious instruction is given or take part in any religious activity, no teacher or student absenting himself from religious instruction or religious activity is made to suffer any disability on that account and student is refused admission to the school because exemption from attendance at religious exercises or religious instruction has been claimed by him or his parent or guardian;

(xvi) facilities are provided for teaching of languages in accordance with the three language formula, adopted by the Central Government;

(xvii) the school is open to inspection by any of the following officers, namely :-

(a) any officer authorised by the appropriate authority or the Director;

(b) Director of Medical Services or Health Officer of the local authority concerned;

(c) Civil Surgeon, Assistant Civil Surgeon or Head Officer authorised by the appropriate

authority or the Director to examine the health of students or the sanitary conditions of the school and surroundings;

(xviii) the school furnishes such reports and information as may be required by the Director from time to time and complies with such instructions of the appropriate authority or the Director as may be issued to secure the continued fulfilment of the condition of recognition or the removal of deficiencies in the working of the school;

(xix) all records of the school are open to inspection by any officer authorised by the Director or the appropriate authority at any time, and the school furnishes such information as may be necessary to enable the Central Government or the Administrator to discharge its or his obligations to Parliament or to the Metropolitan Council of Delhi, as the case may be.

56. Suspension or withdrawal of recognition

(1) If a school ceases to fulfill any requirement of the Act or any of the conditions specified in rule 50 or fails to provide any facility specified in rule 51, the appropriate authority may, after giving to the school a reasonable opportunity of showing cause against the proposed action, withdraw for reason to be recorded in writing, recognition from the school:

Provided that where the appropriate authority is satisfied that the deficiencies or defects are capable of immediate or early removal, it may, instead of withdrawing the recognition suspend the recognition for such period as it may think fit to enable I he managing committee of the school to remedy the deficiencies or defects to the satisfaction of the appropriate authority:

Provided further that where the recognition of a school has been withdrawn or suspended, no appropriate

authority shall grant recognition of such school whether run by the name by which it was known at the time of such withdrawal or suspension or by any other name, unless the school has removed the deficiencies or defects for which the recognition has been withdrawn or suspended.

(2) A recognised school which provides for hostel facilities shall comply with the provisions of rule 39 and the instructions made there under, and in case of any default in complying with such provisions or instructions, the appropriate authority may for reasons to be recorded in writing, withdraw the recognition in relation to the school itself.

(3) Where recognition of any school is withdrawn, the reasons for withdrawal of such recognition shall be communicated to the managing committee within seven days from the date on which the recognition is withdrawn.

(4) Any managing committee aggrieved by the withdrawal of recognition of the school managed by it may, within thirty days from the date of communication to it of the withdrawal of recognition, prefer an appeal against such withdrawal to the authority specified in rule 58.

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 recognised school; whether aided or not.

(2) Every fee, contribution or other charge collected from any student by a recognised 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 nationalised 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 authorised 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 Recognised Unaided School Fund shall be kept deposited in a nationalised 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 authorised 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 proportion 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.

174. Withdrawal from School Fund

Withdrawals from the School Fund or Recognised Unaided School Fund, as the case may be, shall be made jointly by the head of school and the manager of such school, or jointly by the head of the school and by any duly authorised member of the managing committee, where the head of the school is also the manager of the school.

175. Accounts of the school how to be maintained

The accounts with regard to the School Fund or the Recognised 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 realised by unaided recognised schools how to be utilized

(1) Income derived by an unaided recognised schools by way of fees shall be utilised 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 utilised 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 recognised 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.

(3) Funds collected for specific purposes, like sports, co-curricular activities, subscriptions for excursions or subscriptions for magazines, and annual charges, by whatever name called, shall be spent solely for the exclusive benefit of the students of the concerned school and shall not be included in the savings referred to in sub-rule (2).

(4) The collections referred to in sub-rule (3) shall be administered in the same manner as the monies standing to the credit of the Pupils Fund as administered.

180. Unaided recognised schools to submit returns

> (1) Every unaided recognised private school shall submit returns and documents in accordance with Appendix II.
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> (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 authorised by the Director in this behalf and also by any officers authorised by the Comptroller and Auditor General of India."

3. Having provided, thereby, the statutory backdrop in which the controversies in these writ petitions arise for consideration, I proceed to deal with these two writ petitions, separately.

WP (C) 4374/2018 – Action Committee Unaided Recognised Private Schools v. DoE

4. The petitioner, in this writ petition, is a registered association of 450 private unaided recognised schools in Delhi, and claims, in this writ petition, to espouse the cause of 325, of the said 450 schools. The challenge, in the writ petition, is essentially directed against an Order, dated 13th April, 2018, issued by the Directorate of Education (hereinafter referred to as "the DoE"). The said Order selectively withdrew an earlier Order, dated 17th October, 2017, also issued by the DoE. It is essential, therefore, to first paraphrase the latter Order, dated 17th October, 2017, thus:

Order No DE. 15 (318)/PSB/2016/19786, dated the 17th October, 2017, issued by the DoE

5. This Order was, avowedly, issued for the implementation of the recommendations of the 7th Central Pay Commission (hereinafter referred to as "the 7th CPC"), and was issued in exercise of the powers conferred by Section 17(3) and 24(3), read with Section 18(3), (4) and (5) of the DSE Act, read with Rule 50, 177 and 180 of the DSE Rules. Separate instructions were contained, in the said Order, for schools set up on land given by the Delhi Development Authority (DDA), in which a clause, proscribing the schools from increasing their fees without the prior approval of the DDA (hereinafter referred to as "the land clause") was contained, vis-à-vis schools in which no such "land clause" applied, while issuing general instructions, otherwise, covering all schools, irrespective of the "land clause". Among the instructions which were generally contained, in the said Circular, as applicable to *all* schools, irrespective of the "land clause", were the following:

> (i) Fee hike was not mandatory for recognized unaided schools. Schools were required, first, to explore the possibility of utilizing existing reserves to meet shortfall in payment of salaries and allowances, as a consequence of the increase in the salaries of employees consequent on the 7th CPC. They were not to consider increase in fee to be the only source of augmenting their revenue, and were required to "venture upon other permissible measures for

increasing revenue receipts". The following steps were suggested/mandated:

(a) Interest on deposits made as a condition precedent to recognition of schools and as pledged in favour of the Government should also be utilized for payment of arrears.

(b) Part of the reserve fund which had not been utilized for years together could also be used to meet the shortfall before proposing a fee hike.

(ii) Fees/funds were to be strictly utilized in accordance with Rules 176 and 177 of the DSE Rules. No amount whatsoever would be transferred from the school fund or the trust to any other institution.

(iii) The tuition fee had to be "so determined as to cover the standard cost of establishment including provisions for D.A., bonus, etc., and all terminal benfits as also the expenditure of revenue nature concerning curricular activities". No fees, in excess of the amount so determined or determinable could be charged from the students/parents.

(iv) Every recognized unaided school was required to maintain accounts on the principles applicable to non-business organization/not-for-profit organization as per Generally Accepted Accounting Principles (GAAP). The financial statements of such schools, consisting of their Balance Sheet, Profit & Loss Account and Receipts & Payment Account, would be prepared every year as

per the proforma prescribed by the DoE *vide* order dated 16th April, 2016.

(v) Every recognized unaided school was required to file a statement of fees, by the 31st of March every year, under Section 17(3) of the DSE Act, as per the proforma prescribed by the DoE.

(vi) If, after exploring all possibilities, the Managing Committee of the school, nevertheless, felt it necessary to increase the tuition fee, it had to hold a meeting with a group of teachers and parents which would include at least one parent representative from each section of the school, and would present the detailed budget of the school, the financial statements of the previous year, the requirement of funds for the implementation of the 7th CPC recommendations, the availability of cash/reserve fund/savings with the School Fund account, as well as present the proposal for fee hike, with justification and with all the documents mentioned in Annexure A to the Circular. Inputs would be solicited from the parents and teachers' representatives. The Managing Committee could take their suggestions into consideration, or record their dissent. The DoE's nominee would remain present in the meeting. The minutes and attendance sheet of this meeting, countersigned by the nominee of the DoE, including details of the parents invited for the meeting, along with photographs of the meeting, was required to be submitted by the School to the Deputy Director of Education (hereinafter referred to as "DDE") concerned. The circular, however, was cautious in clarifying that presentation of

the proposal for increase in fee before the parents' representatives would not be liable to be construed as seeking the approval of the parents, in view of the judgment, dated 12th August, 2011, of this Court in ***Delhi Abhibhavak Mahasangh v. G.N.C.T.D., ILR 2011 Supp (4) Del 247*** (hereinafter referred to as "***Delhi Abhibhavak Mahasangh-II"***). It was further clarified that, for the purpose of increase in tuition fee mid-session, the approval of the DoE was not required, in view of Section 17(3) of the DSE Act.

6. Thereafter, under the head "Procedure for Increase in Tuition Fees", the Circular proceeded to ordain as under, in respect of schools running on private land, or on government land *without* the "land clause", and, separately, in respect of schools running on land obtained from the Government *with* the "land clause".

7. In respect of the first category of schools, i.e. schools running on private land, or land leased from the Government without any "land clause", the Circular directed thus:

(i) If, after complying with the general stipulations prescribed, in the Circular, in respect of all schools (i.e. the stipulations enumerated in paragraph 4 *supra*), the school still felt it necessary to hike the tuition fee, it was required to present its case, along with detailed financial statements, before the Managing Committee of the School, which would include nominees of the DoE.

(ii) Prior to hiking the tuition fee, the school would ensure compliance with Section 18(4) of the DSE Act as well as Rules 172, 173, 174, 175, 176 and 177 of the DSE Rules, as also other relevant provisions of the DSE Act and DSE Rules, and the guidelines of the DoE, as issued from time to time and various judicial pronouncements, especially the ratio of the decision in ***Modern School v. U.O.I., (2004) 5 SCC 583*** and ***Delhi Abhibhavak Mahasangh-II (supra)***. A time-schedule, for circulating the agenda for the meeting, convening thereof and filing of the statement of revised tuition fee, in accordance with Section 17(3) of the DSE Act, was also prescribed.

(iii) The proposal, of the school, to increase the fee, would be evaluated by the Managing Committee, taking into consideration the availability of funds/reserves/cash in hand/bank balances/surplus.

(iv) Where the DoE nominee disagreed with the proposal for increase, or agreed with the proposal to increase the fee but to a lesser extent, she/he would record her/his dissent note in writing, justifying the dissent.

(v) A copy of the minutes of the meeting of the Managing Committee would, in all cases, be forwarded by the DoE's nominee to the DDE, for information and record.

(vi) The Managing Committee would file the full statement of fee with the DDE, as required by Section 17(3) of the DSE Act, in

the proforma prescribed by Order dated 3rd July, 2017, issued by the DoE. The statement would be compulsorily analyzed by the DDE.

(vii) The DDE would pass necessary orders with regard to refund/reduction of the fee, if any.

(viii) The school would not increase any other head of fee, like the annual fee, development fee, or earmarked levies, for implementation of the recommendations of the 7th CPC.

8. In respect of the second category of schools, i.e. schools running on land allotted by the DDA/Government, *with* the "land clause" (to which the petitioners in this writ petition belong), the Circular directed as under:

(i) In the first instance, the school had to try to pay the arrears/increased salary to their employees/teachers without increasing the fee, from their existing resources.

(ii) Schools, in respect of which the fee hike proposal, for the year 2016-2017, were examined and rejected by the DoE due to availability of sufficient funds with the School Fund account, were prohibited from increasing the rates of tuition fee w.e.f. 1st January, 2016. They were, however, permitted an 'interim fee hike', to be collected w.e.f. 1st April, 2017, in case of unavailability of funds/reserves from any other permissible source. The Circular went on to stipulate the maximum monthly increase of tuition fee

permissible in such cases, for collection of arrears, with 7.5% being permitted for the period 1st January to 31st March, 2016, 7.5% for the period 1st April to 30th June, 2017, 15% for the period 1st July to 30th November, 2017 and 15% (for payment of regular salary) for the period 1st December, 2017 to 31st March, 2018. This fee hike was to be treated as an interim measure, and was subject to scrutiny into the records of the schools if the need arose, to examine whether any necessity for increase of fee, having regard to the financial position of the schools, existed.

(iii) While stating that the above 'interim fee hike' would substantially cover the increased liability on the schools, pursuant to the 7th CPC recommendations, it was further provided that, in case any school needed further increase in fee, it could submit a detailed fee increase proposal in the online module of the DoE, which would be examined by the DoE by due process, and detailed order passed on the proposal. For this purpose, the Circular stated that the online module of the DoE would be re-opened from 1st November to 30th November, 2017.

(iv) It was further stipulated that, for the purpose of increase in tuition fee as above, a meeting of the Managing Committee of the school would be convened. A strict time schedule, for circulation of agenda, convening of the meeting, submission of revised statement of fee under Section 17(3) of the DSE Act and for submitting online proposal to the DoE, in case of increase of fee, beyond 7.5%/15%, being felt necessary, was also prescribed.

(v) This 'interim fee hike', it was clarified, was being permitted only in order to avoid further delay in dispensation of benefits of the 7th CPC to teachers and other employees of the schools, and to ensure that the burden of payment of arrears did not accumulate on parents.

(vi) It was further provided that, if it was found on examination of the fee statement under Section 17(3) of the DSE Act, that increase of 7.5%/15% in the tuition fee was not needed by the school, or that the provisions of paragraph 1 of the Circular or of judicial pronouncements were not complied with, individual orders, directing refund of fee, would be issued.

(vii) The schools were also advised not to plan fee hike under other heads of fee in the academic year 2017-2018, in view of the considerable fee burden on parents, because of the implementation of the 7th CPC recommendations.

9. Specific stipulations, regarding the manner in which the arrears of fee, for the period 1st January, 2016 to 30th November, 2017, were to be collected, were also contained in the Circular. These applied to all schools, irrespective of the nature of the land on which they were situated.

Order No. DE. 15 (318)/PSB/2016/23840-23847, dated 13th April, 2018, issued by the DoE

10. This Circular, admittedly and as expressly stated therein, was issued "in view of the stand taken by the Department, under instructions", in this Court, on 2nd February, 2018, in WP (C) 11265/2017 (***Taru Chauhan v. G.N.C.T.D.***). It withdrew the Circular, dated 17th October, 2017 *supra*, selectively in respect of private unaided schools running on land allotted by the DDA/governmental agencies *with the "land clause"*. Other directions were, instead, issued, in substitution thereof, for compliance by such schools. The Circular merits reproduction, thus:

"GOVERNMENT OF NCT OF DELHI
DIRECTORATE OF EDUCATION
(PRIVATE SCHOOL BRANCH)
OLD SECRETARIAT, DELHI - 110054

No. DE.15(318) PSB/2016/23840-23847 Dated: 13.04.2018

ORDER

Sub: **Withdrawal of this Directorate's Order No. DE.15 (318)PSB/2016/19786 dated 17/10/17**

In view of the stand taken by the Department, under instructions, in the Hon'ble High Court during the course of hearing on 02/02/2018 in Writ Petition (Civil) No. 11265/17 titled as Miss Taru Chauhan Vs Govt. of NCT of Delhi & Ors, the order No. DE.15 (318)PSB/2016/19786 dated 17/10/17 is hereby withdrawn, presently, only in the context of Private Unaided Recognized Schools running on the land allotted by Delhi Development Authority/L&DO/Any Govt. Agencies with the condition of seeking prior sanction of Director (Education) for increase in fee. Further, following directions are issued to all concerned for strict compliance:-

(a) The interim increase permitted vide this Directorate's Order dated 17/10/2017, 03/11/2017 &

20/11/2017 to such schools is hereby withdrawn from retrospective effect.

(b) Online proposal made by such schools vide this Directorate's Order dated 23/10/2017, 03/11/2017 and 20/11/2017 for increase in fee for the academic session 2017-18 on this directorate's website shall be treated as valid and the same shall be decided after examining the financial accounts of the schools as per the procedure laid down by the department.

Non-compliance of this order shall invite action under the provisions of Delhi School Education Act and Rules, 1973.

This issues with the prior approval of competent authority.

Sd/-
(YOGESH PRATAP)
DEPUTY DIRECTOR OF EDUCATION (PSB)

Manager/Heads of Schools
All Private Unaided Recognized Schools of Delhi"

11. As a result, the petitioners in this writ petition, being private unaided schools built on land allotted by DDA/government agencies, the documents of allotment in respect whereof contained the "land clause", the Order dated 17th October, 2017 *supra*, became inapplicable to them and, instead, the conditions engrafted in the Order dated 13th April, 2018, applied.

Pleadings in the Writ Petition

12. The petitioner in this writ petition, in the circumstances seeks

"(i) mandamus directing the DoE not to enforce the impugned Order dated 13th April, 2018, against the 325 schools in question.

(ii) *mandamus* declaring all acts, circulars, orders, correspondences, etc. of the respondents, having the effect of obstructing, delaying, disabling and/or preventing the private unaided schools from giving effect to the 7th CPC immediately, as required by Section 10(1) of the DSE Act, to be illegal, without jurisdiction, arbitrary, unconstitutional and void.

(iii) *certiorari* quashing the Order dated 13th April, 2018, issued by the Respondent No. 1 whereby the guidelines dated 17th October, 2017, are sought to be selectively withdrawn only qua some of the private unaided schools, as being absolutely illegal, arbitrary, discriminatory, without jurisdiction, unconstitutional, biased, malicious and malafide."

13. These prayers are, essentially, predicated on the following facts/grounds:

(i) The DSE Act and the DSE Rules recognized and conferred maximum autonomy on private unaided recognized schools to determine their own fee structure. Section 17(3) of the DSE Act conferred autonomy on every unaided recognized private school to fix and levy fees, without any prior or later sanction or approval from the DoE. This position was confirmed, as far back as on 30th October, 1998, by this Court in ***Delhi Abhibhavak Mahasangh v.***

U.O.I., AIR 1999 Del 124 (hereinafter referred to as "***Delhi Abhibhavak Mahasangh-I***"), authored by Y. K. Sabharwal, J. (as the Hon'ble Chief Justice then was), as well as by the 11-Judge Constitution Bench of the Supreme Court in ***T. M. A. Pai Foundation v. State of Karnataka, (2002) 8 SCC 481***.

(ii) In ***Delhi Abhibhavak Mahasangh-II (supra)***, this Court held that the autonomy of unaided private schools could be ensured by first giving the right to such schools to increase their fees, retaining the right to regulate the *quantum* of such fees, with the DoE, under Section 17(3) of the DSE Act. It was reiterated that unaided schools were not required to obtain any prior approval from the DoE before fixing the fee to be charged by them.

(iii) In this respect, private unaided schools formed a separate class, as compared to aided or government schools, in respect of their right to establish and administer their institutions. Section 17(3) only requires such schools to file, with the DoE, a full statement of fee to be levied by the school during an ensuing academic year.

(iv) Section 10 of the DSE Act mandated that the scale of pay and allowances of employees of private unaided schools would not be less than those of corresponding employees in government schools.

(v) Unaided schools were entirely self-sustained, and were dependent on their fees for their sustenance, as contradistinguished

from aided schools, which drew sustenance from aid provided by the government.

(vi) The Central Civil Services (Revised Pay) Rules, 2016 [hereinafter referred to as "the CCS (Revised Pay) Rules"], notified consequent to the acceptance of the recommendations of the 7th CPC, had been adopted, by the DoE, for application to teachers and staff of government and aided schools by Orders dated 19th August, 2016 and 14th October, 2016. Such teachers and staff had also been paid arrears, w.e.f. 1st January, 2016.

(vii) In respect of private unaided recognized schools, the DoE first issued Circular, dated 6th January, 2017, which reads thus:

"**GOVERNMENT OF NCT OF DELHI**
DIRECTORATE OF EDUCATION
PRIVATE SCHOOL BRANCH, OLD SECTT.,
DELHI-54

No. DE-15/PSB/Misc/2016/29 Dated-06/01/2017

Circular

Circular No. No. 30-3(17)/(12)/VII Pay Comm./
Coord/2016/11016

Attention of Managers/HoS, of all Private Unaided Recognised Schools is invited towards dated 19.08.2016 vide which Directorate of Education, Government of NCT, Delhi adopted the Central Civil Services (Revised Pay) Rules, 2016 and implemented 7th Pay Commission Recommendations in respect of its employees.

However, *since a decision regarding manner of implementation of 7th Pay Commission's Recommendations in Private Unaided Recognised Schools, is yet to be announced by the Competent Authority, therefore, the Manager/HoS of all Private Unaided Recognised Schools are hereby directed not to hold any meeting of Managing Committee regarding increase in fee hike for the session 2017-18 till a decision is taken in this regard at the level of the Competent Authority and requisite guidelines are issued by the department.*

Sd/-
Dr Ashima Jain, IAS
Addl Director of Education, PSB

To
All the Managers/HoS,
Private Unaided Recognised Schools."

(Emphasis supplied)

(viii) This was closely followed by another Circular, dated 27th March, 2017, which read as under:

"**GOVERNMENT OF NCT OF DELHI**
DIRECTORATE OF EDUCATION
PRIVATE SCHOOL BRANCH, OLD SECTT.,
DELHI-54

No. DE-15/PSB/Misc/2016 Dated: 27/3/17

Circular

In continuation of the circular vide DE.15/PSB/Misc./2016/29 dated 06.01.2017, vide which the Managers/HoS, of PRIVATE Unaided Recognised Schools were directed not to hold any meeting of Managing Committee regarding increase in fee for the session 2017-18 till a decision is conveyed

regarding modalities of implementation of 7th Pay Commission Recommendations in respect of its employees.

Various requests for clarifications are being received in this regard, hence it is clarified that the circular dated 06.01.2017, applies only with respect to 7th Pay Commission benefits, detailed guidelines for which will be issued after decision of competent authority. In the meantime, managing committee may take decision in normal course, as per established procedure. However, no fee increase with respect to 7th Pay Commission may be implemented, as modalities are yet to be conveyed.

It is clarified here that the schools running on the DDA/Government Land owing agencies with a condition of seeking prior sanction of Director (Education) for fee hike, will not increase any fee without prior sanction of the Director (Education).

This issues with the prior approval of the competent authority.

Yogesh Pratap
Deputy Director of Education (PSB)"

(ix) The petitioner, in the circumstances, moved this Court by way of WP (C) 2637/2017, contending that, owing to the issuance of the aforesaid Circular by the DoE, it was being prevented from implementing the recommendations of the 7th CPC, in respect of teachers and employees in its member-institutions, as mandated by Section 7 of the DSE Act. It was also contended that the afore-extracted Circular dated 17th October, 2017 was contrary to Section 17(3) of the DSE Act. By an interim order, dated 30th March, 2017, a learned Single Judge of this Court opined that, *prima facie*, "the

unfettered right of the private unaided schools to notify the fee structure after taking into account the major expenditure to be incurred in a year before commencement of the academic session cannot be abridged or whittled down only on the ground that a decision with regard to a major head of expenditure, namely, the increase in salary due to 7th Pay Commission shall be worked out by the Directorate of Education in a few days after the commencement of the academic session." "Keeping in view the importance and relevance of 31st March, 2017, in the context of Section 17(3) of the DSE Act and to balance the equities", this Court directed that "in the event the 7th Pay Commission is directed to be implemented in private unaided schools by the respondent, … the petitioner-schools would have an option within 2 weeks from the date of implementation of the 7th Pay Commission to intimate the revised fee schedule and the same shall be taken as having been filed on 30th March, 2017." The said writ petition is still pending, as on date.

(x) On 25th August, 2017, the following Order was issued by the DoE:

"**GOVT OF NATIONAL CAPITAL TERRITORY OF DELHI**
DIRECTORATE OF EDUCATION
(PRIVATE SCHOOL BRANCH), OLD SECRETARIAT, DELHI-110054

No. DE-15 (318)/PSB/2016/18117 Dated: 25/08/17

ORDER

Sub: Implementation of Central Civil Services (Revised Pay) Rules, 2016 in the Private Unaided Recognised Schools of Delhi.

Directorate of Education has adopted the Central Civil Services (Revised Pay) Rules, 2016 vide circular No.30-3(17)/(12)/VIIPay Comm./Cord./2016 /110006-11016 dated 19-08-2016 and No.30-3(17)/ (12)/VII Pay Comm./Coord./2016/12659-12689 dated 14-10-2016 for employees of Government Schools. (Copies enclosed)

In accordance with section 10(1) of Delhi School Education Act 1973, scales of pay and allowances, medical facilities, pension, gratuity, Provident fund and other prescribed benefits of the employees of recognised private school shall not be less than those of the employees of the corresponding status in schools run by the appropriate authority.

Now therefore, in exercise of the powers conferred upon the undersigned under clause (xviii) of rule 50 of the Delhi School Education Rules, 1973, the managing committees of all Private Unaided Recognised Schools are hereby directed to implement Central Civil Service (Revised Pay) Rules, 2016 in respect of the regular employees of the corresponding status in their schools as adopted by this Directorate vide circulars referred above for employees of Government Schools.

This shall be applicable w.e.f. 01.01.2016 for the purpose of a fixation in arrears.

Detailed instruction in this regard will be issued separately.

(SAUMYA GUPTA), IAS
DIRECTOR (EDUCATION)

Managing Committee (Through Manager),
All Private Unaided Recognised Schools of Delhi."

(xi) The above Order was followed by the Order dated 17th October, 2017, which already stands distilled hereinabove.

(xii) WP (C) 11265/2017 (***Taru Chauhan v. G.N.C.T.D.***) was filed, before this Court, challenging the aforementioned Order, dated 17th October, 2017, to the extent that the said Circular allowed private unaided recognised schools to increase their fee, for implementing the 7th CPC. When the matter was taken up for preliminary hearing, by this Court on 20th December, 2017, a statement was made, on behalf of the DoE, on instructions, that, till the next date of hearing in the writ petition, i.e. 1st February, 2018, the Circular, dated 17th October, 2017 *supra* would be kept in abeyance. As a result, private unaided recognised schools were denied even the interim fee hike provided by the said Circular.

(xiii) In view of the Order passed, by this Court, on 20th December, 2017 *supra*, the DoE issued an Order, dated 2nd January, 2018, directing all private unaided recognised schools not to collect increased fee, if any, from parents/guardians/students, on account of the implementation of the 7th CPC, till further orders, to be passed by this Court in the aforementioned WP(C) 11265/2017.

(xiv) On the next date of hearing before this Court in the aforementioned WP(C) 11265/2017, the DoE filed an affidavit. Nothing substantial turns on the said affidavit, inasmuch as, on 1st

February, 2018, a statement was made, by the learned Standing Counsel appearing for the DoE, before this Court, that the Notification dated 17th October, 2017 was being withdrawn. In view thereof, the petitioner chose to withdraw WP(C) 11265/2017. It is necessary to reproduce the order passed by this Court, on the said date, though it is brief:

> "Mr. Ramesh Singh, learned Standing Counsel for the Government of NCT of Delhi, appearing on behalf of the Directorate of Education, states that the impugned Notification bearing No DE.15 (318)/PSB/2016/19786 dated 17.10.2017 is being withdrawn.
>
> Mr Khagesh Jha, learned counsel appearing on behalf of the petitioner, seeks leave to withdraw the said petition in view of the statement made on behalf of the official respondent.
>
> The petitioner along with the pending applications is dismissed as be drawn and disposed of accordingly."

(xv) Instead of withdrawing the Order, dated 17th October, 2017, as undertaken before this Court, the DoE proceeded to issue the Order, dated 13th April, 2018 *supra*, *partially* withdrawing the earlier Order, dated 17th October, 2017, limited to cases of schools located on land that was given by the DDA/government authorities with the "land clause".

(xvi) The withdrawal of the Order, dated 17th October, 2017, was completely uninformed by any reason whatsoever. The avowed object of the said Order was to allow for an interim fee hike, so that delay, in grant of benefit, to the teachers and employees of private

unaided recognised schools, situated on land to which the "land clause" applied, was not delayed. The said objective had not ceased to exist; consequently, the basis, for the selective withdrawal of the Order, dated 17th October, 2017, was unknown.

(xvii) The Order, dated 13th April, 2018, merely withdrew the earlier Order, dated 17th October, 2017, in respect of schools such as those run by the members of the petitioner-Association, without clarifying when the order would be reinforced or how, in the absence of the interim fee hike, such schools would bear the burden of the 7th CPC. The situation was aggravated because of the Order, dated 25th August, 2017 *supra*, which mandated immediate implementation of the 7th CPC recommendations. Even while the said order continued to remain in force, the impugned Order, dated 13th April, 2018 withdrew the means, by which the Order dated 25th August, 2017 could be implemented, in respect of a select category of schools.

(xviii) Section 10 of the DSE Act equalised all schools, in the matter of pay and allowances to be granted to teachers and employees. As such, there could be no justification to withdraw, selectively, the Order dated 17th October, 2017.

(xix) The result of the selective withdrawal of the Order, dated 17th October, 2017, in the case of schools situated on land, to which the "land clause" applied, was that compliance with Section 10 of the DSE Act, by granting, to the teachers and employees of such schools, the benefits of enhanced pay scales and allowances as per

the 7th CPC, had been stalled. This had resulted in dissatisfaction and discontentment among the teachers and staff of such schools.

(xx) There was no justifiable basis to differentiate staff of government and aided schools, vis-à-vis staff of private unaided recognised schools, the allotment letters in respect whereof contained the "land clause", in the matter of disbursement of the benefits flowing from the 7th CPC recommendations. The employees and staff of government and aided schools were entitled to receive the benefits of the 7th CPC *vide* Circulars/Orders dated 19th August, 2016 on 14th October, 2016. However, owing to the issuance of the impugned Order dated 13th April, 2018, the employees and teachers of unaided private schools, situated on land to which the "land clause" applied, were denied, indefinitely, the same benefits, which directly infracted Section 10 of the DSE Act.

(xxi) The members of the petitioner-Association, who were managing schools located on land, to which the "land clause" applied, had also paid institutional rates of allotment for the said land, which could not be treated as concessional in any manner. They could not, therefore, be justifiably discriminated vis-à-vis schools located on land to which the "land clause" did not apply, by requiring them to obtain prior approval of the DoE before enhancing fees.

Counter-affidavit by the GNCTD

14. A counter-affidavit, to the writ petition, stands filed by the GNCTD, in which reliance, for the issuance of the impugned Order, dated 13th April, 2018, has been placed on the judgment of the Supreme Court in ***Modern School v. U.O.I., (2004) 5 SCC 583*** and of this Court in ***Justice for All v. G.N.C.T.D., 2016 (227) DLT 354 (DB)***. It is contended that these judgments obligated the schools, situated on land to which the "land clause" applied, to seek prior approval of the DoE before increasing their fees. These decisions, it is further submitted, recognised the authority, of the DoE, to regulate the fees of such schools, in order to prevent commercialisation of education, under Rules 172, 173, 175 and 177 of the DSE Rules. Such schools, therefore, it is contended, were in a different category, as compared to schools running on private land, to which no "land clause" applied. The only option available to the DoE, in the said circumstances, it is contended, was to carry out a comprehensive audit of the accounts of private unaided schools situated on land to which the "land clause" applied, which would be completed in a time bound frame. This being an extraordinary situation, created by the requirement of mid-session implementation of the recommendations of the 7th CPC, extraordinary measures were required to be taken. The withdrawal of the Order, dated 17th October, 2017, by the impugned Order dated 13th April, 2018, in respect of schools situated on land, to which the "land clause" applied, it is contended, was because allowing of such an across the board interim fee hike, without prior approval of the DoE, was contrary to the ***Modern School*** mandate. The counter-affidavit also sets out the proposed procedure, to be followed for auditing the accounts of the schools, for which two firms of chartered accountants, it is contended, already stand

engaged. The exercise of auditing, it is further submitted, was already underway.

Submissions at the Bar

15. Arguments were advanced, on behalf of the petitioner, by Mr. Sunil Gupta, learned Senior Counsel, instructed by Mr. Kamal Gupta, learned Counsel, and, on behalf of the DoE, by Mr. Ramesh Singh, learned Standing Counsel instructed by Mr. Santosh Kumar Tripathi, learned ASC.

16. Mr Sunil Gupta, learned Senior Counsel, advanced the following submissions:

(i) Inasmuch as the necessity to enhance the fees of the 325 schools, which were members of the petitioner-Association and were built on Government land subject to the "land clause", did not arise mid-session, prior approval of the DoE was not required to be taken, in view of Section 17(3) of the DSE Act, which only required the school to submit its statement of fee, to the DoE, before commencement of the academic session, for its scrutiny. The scheme of Section 17(3) did not contemplate "prior approval" of the fees fixed by every school, before the fixation was brought into operation or before the onset of the academic session.

(ii) The DoE possessed, at all times, the regulatory power to receive complaints from parents, scrutinize the accounts of the

schools and even direct refund, if it came to the conclusion that the fees charged by the school were excessive.

(iii) The machinery provided under the DSE Act could not, however, be worked "in reverse gear", by requiring every school, to which the "land clause" applied, to be subjected to a mass parental audit, or to be required to seek prior approval before enhancing its fees for the oncoming academic session, which would necessarily work to its detriment.

(iv) It had been held, by this Court in ***Delhi Abhibhavak Mahasangh-II (supra)***, that the Supreme Court had stated "in so many judgments" the legal principle of "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*." Section 17(3), it was therefore held, "strikes a balance between the rights of the schools on the one hand and duty cast upon the DoE on the other hand." Reliance was placed, for this purpose, on Paragraphs 61 to 65 of ***Delhi Abhibhavak Mahasangh-II (supra)***.

(v) The "balance", to which the above words from the judgment in ***Delhi Abhibhavak Mahasangh-II (supra)*** referred, could only be struck if, in view of the fundamental right of the schools to fix and increase their fee, they were permitted to do so without prior approval of the DoE, subject to filing a full statement of fees with the DoE in advance of the academic session, in terms of Section 17(3) of the DSE Act, and were required to take prior approval

only in the case of mid-session increase of fees. Thus, and thus alone, could Section 17(3) of the DSE Act survive Article 19(1)(g) of the Constitution of India.

(vi) The "land clause" had, therefore, to be interpreted as requiring the school, which was subject thereto, to submit its statement of fees, in accordance with Section 17(3) of the DSE Act, before the commencement of the academic session, and, equivalently, requiring the DoE to complete the exercise of approval of the said statement of fees before the commencement of the academic session, so that school and students would benefit in equal measure.

(vii) Operated otherwise, the "land clause" would infract Article 19(1)(g) of the Constitution of India as well as Section 17(3) of the DSE Act.

(viii) The retrospective enforcement of the requirement of enhancing the pay scales of teachers and other employees as per the recommendations of the 7th CPC, coupled with the delay in granting 'approval' by the DoE, had resulted in a situation in which the school and students were burdened alike. The schools, which were dependent on the fees paid by the students for their sustenance, were forced to pay the increased wages out of their own pocket, and the parents/students were faced, at a later stage, with the burden of higher fees, owing to retrospective enhancement of the payments made to the teachers and other staff. Another incongruity that resulted was that, owing to the delay, the liability

which ought to have fallen on one batch of students, which would pass out while the DoE was sitting, as it were, on the issue of whether to grant "approval" or not, would fall on the shoulders of another batch.

(ix) In the circumstances, the Order dated 17th October, 2017 *supra* provided a belated relief, by allowing an interim increase in fees, by the schools, subject to imminent scrutiny of the accounts of the schools by the DoE. The impugned order dated 13th April, 2018, by withdrawing this relief, too, in the case of schools to which the "land clause" applied, had effectively handicapped the schools from conforming with Section 10 of the DSE Act, by extending, to their employees and teachers, the benefits of the 7th CPC, as was being extended to staff of government schools.

(x) A similar "interim fee hike", in the context of revision of pay scales consequent on the 6th CPC, stood upheld by this Court in ***Delhi Abhibhavak Mahasangh-II***.

(xi) The "land clause" had no nexus with the object of issuing the Order dated 17th October, 2017. In the implementation of the said Order, therefore, the DoE had acted illegally in discriminating between schools, on the basis of whether the "land clause" was applicable, or not.

(xii) The impugned Order dated 13th April, 2018, had been issued without the prior approval of the Hon'ble Lieutenant Governor, which had been accorded to the Order dated 17th October, 2017,

which stood partly withdrawn thereby. The impugned Order was also, therefore, jurisdictionally flawed. Reliance was also placed, for this submission, on the judgment of this Court in ***Action Committee for Unaided Recognized Private Schools v. Directorate of Education, 2016 SCC Online Del 672***.

(xiii) Exhaustive reference was made to the file notings, indicating the proposals and decisions taken at various stages, before the Orders dated 17th October, 2017 and 13th April, 2018, came to be issued. I do not deem it appropriate to burden this judgment, which is already over-prolix, with reference thereto. The law, in this regard, is well settled by a catena of authorities, including, *inter alia*, ***Bachittar Singh v. State of Punjab, AIR 1963 SC 1395*** and ***Puranjit Singh v. Union Territory of Chandigarh, 1994 Supp (3) SCC 471***, which hold that noting on files do not create any rights, unless and until they are communicated to the person seeking to place reliance thereon. In any event, this Court is concerned, in this case, with the validity, or otherwise, of the impugned Order dated 13th April, 2018, which has to be tested on the anvil of the law, and not on the basis of the opinions or views held by different officials, howsoever high, during the upward and downward journeys of the file. Mr. Sunil Gupta did, however, choose to point out, on the basis of the said file notings, that an exhaustive and painstaking exercise was undertaken, with application of mind at all levels, before the Order dated 17th October, 2017, was issued, and that, therefore, the evisceration of

the said order, even if only in part, by a single sweep of the pen, was completely unconscionable in law.

17. Arguing *per contra*, Mr. Ramesh Singh, learned Standing Counsel representing the DoE, submitted thus:

(i) Section 17 of the DSE Act had nothing, whatsoever, to do with the present controversy. In passing the impugned Order dated 13th April, 2018, the DoE was only acting in accordance with the directives contained in the concluding paragraphs of the judgment of the Supreme Court in ***Modern School (supra)***, which mandated the DoE to ensure enforcement of the "land clause". This directive was reiterated, by this Court, in ***Justice for All (supra)***.

(ii) The requirement of obtaining prior approval before enhancing their fees was an independent liability, to which schools who had obtained land from the Government with the "land clause" appendage were independently subjected, and this liability was neither subject to, nor did it override, the responsibilities cast on schools by Section 17(3) of the DSE Act.

(iii) The Circular, dated 17th October, 2017, infracted this legal requirement, by allowing an across-the-board interim fee hike of 7.5/15% without requirement of prior approval, thereof, from the DoE. This mistake was corrected by issuing the Circular dated 13th April, 2018.

(iv) Reliance was also placed on the Order, dated 11th May, 2012, passed by a Division Bench of this Court, disposing of LPA 286/2010 (***Rukmani Devi Jaipuria Public School v. Dinesh Chand***).

(v) Schools had no enforceable legal right to the interim hike granted by the Order dated 17th October, 2017. The DoE had, on the other hand, the power and authority to withdraw the said order.

(vi) In view of the directions contained in paragraph 27 of the report in ***Modern School (supra)***, it was impermissible for the DoE to permit an interim fee hike without undertaking the exercise contemplated therein.

(vii) The power of the Administrator, conferred by Section 3 of the DSE Act, would be exercised only "in accordance with the provisions of" the said Act "and the rules made thereunder". In view thereof, the act of the DoE, in granting interim increase of fee, without looking into the financials of the individual schools, being contrary to Section 17 of the DSE Act, had necessarily to be reversed. There is no estoppel against the law. If the law required prior approval, before allowing any fee hike, an interim fee hike, without such prior approval, subject to post-approval scrutiny, was impermissible. Reliance was also placed, for this purpose, on paragraphs 72 and 79 of the judgment of this Court in ***Delhi Abhibhavak Mahasangh-II (supra)***.

(viii) Section 18(5) of the DSE Act required the managing committee of every recognised private school to file, in the year, with the DoE, the prescribed duly audited financial and other dues, and required the Competent Authority in the DoE to audit the said response. To the same effect was Rule 180 of the DSE Rules. This exercise had necessarily to predate the grant of any fee hike to unaided private schools.

(ix) Reliance was also placed on Section 24 of the DSE Act. The schools could not be seen to complain against the withdrawal, *vide* the impugned Order dated 13th April, 2018, of the interim fee hike granted by the earlier Order dated 17th October, 2017, as, having obtained land at concessional rates, they had also to suffer the consequences that went with it.

(x) The contention that the impugned Order dated 13th April, 2018 was bad on account of it not having been approved by the Hon'ble Lieutenant Governor was also without merit, as the Hon'ble Lieutenant Governor had only approved the Order, dated 25th August, 2017 *supra*, and not the Order dated 17th October, 2017 *supra*.

18. Mr. Kamal Gupta submitted, by way of rejoinder to the submissions of Mr. Ramesh Singh, thus:

(i) The argument, of Mr. Ramesh Singh, that Section 17 of the DSE Act was irrelevant, in the context of the controversy in issue, was completely without merit. It was not possible, statutorily, to

dissociate Section 10, of the DSE Act, from Section 17 thereof. Neither was it possible to wish away Section 17 of the DSE Act, and merely restrict one's consideration to the "land clause".

(ii) The "land clause" could not be permitted to substitute the scheme statutorily contained in Section 17 of the DSE Act. The two were required to be harmonised.

(iii) Insofar as the reliance on Section 3 of the DSE Act was concerned, the framers of the DSE Act never contemplated a problem, of the magnitude that has now risen, consequent to the decision to extend, to teachers and other employees of schools, the benefits of the 7th CPC.

(iv) The reliance, by the DoE, on the affidavit filed before this Court in ***Taru Chauhan (supra),*** was neither here nor there, as the said affidavit had never been accepted by this Court, nor had any orders been passed in terms thereof. The affidavit was self-serving and self-congratulatory in nature.

(v) The petitioner was not pleading promissory estoppel.

19. Mr Khagesh B. Jha, learned Counsel, who was permitted to intervene on behalf of some of the affected parents, placed reliance on paragraph 72 of the judgment in ***Modern School (supra)*** and paragraph 11 of the judgment in ***U.O.I. v. Jain Sabha, (1997) 1 SCC 164***. He sought to distinguish the decision in ***T. M. A. Pai (supra)*** on the ground

that the said judgment did not deal with any petitioner who had obtained land, with the "land clause" thrown in.

Analysis

20. Inasmuch as the present dispute, and the resolution thereof, largely involves an understanding of the law laid down by various decisions of the Supreme Court and of this Court, it would be appropriate to browse through the said decisions, chronologically, before embarking on one's own analysis of the issue.

21. Chronologically, the relevant decisions required to be appreciated would be the following, and in that order:

(i) ***Jain Sabha (supra)***,

(ii) ***Delhi Abhibhavak Mahasangh-I (supra)***,

(iii) ***T. M. A. Pai (supra)***,

(iv) ***Islamic Academy of Education v. State of Karnataka, (2003) 6 SCC 697***,

(v) ***Modern School (supra)***,

(vi) ***P. A. Inamdar v State of Maharashtra, (2005) 6 SCC 537,***

(vii) ***Cochin University of Science and Technology v. Thomas P. John, (2008) 8 SCC 82***,

(viii) ***Delhi Abhibhavak Mahasangh-II (supra)***,

(ix) ***Justice for All v. G.N.C.T.D., 2016 SCC Online Del 355*** (hereinafter referred to as ***"Justice For All-I"***) and

(x) ***Justice for All v. G.N.C.T.D., 2016 SCC Online Del 4114*** (hereinafter referred to as ***"Justice For All-II"***).

Of these, the necessity of referring to the judgment in ***Delhi Abhibhavak Mahasangh-I (supra)*** stands obviated by the fact that ***Modern School (supra)*** was the judgment, of the Supreme Court, passed in the appeal filed thereagainst. ***Delhi Abhibhavak Mahasangh-I (supra)*** has, thus, merged with ***Modern School (supra)***.

Analysis of relevant judicial authorities

U.O.I. v. Jain Sabha, (1997) 1 SCC 164 (decided, on 21st November, 1996, by a Bench of two Hon'ble Judges)

22. The respondent Jain Sabha (hereinafter referred to as "the Sabha"), in this case, applied to the Land & Development Officer (L&DO), for allotment of a plot of land to run a school. A plot of land admeasuring 1.363 acres was allotted @ Rs 5000/- per acre, but physical possession thereof could not be delivered to the Sabha on account of the existence, thereon, of certain immovable structures. The Sabha continued to press for allotment, whereupon, on 18th July, 1990, a letter of allotment, for an alternate plot of land, admeasuring 2.15 acres, was issued in its favour. While doing so, however, consideration for the area of 0.787 acres, in excess of the area of 1.363 acres originally allotted, was fixed @ Rs 38 lakhs per acre. This fixation was challenged, by the Sabha, by way of a writ petition, which was allowed by this Court, which directed the Government to charge, for the entire land, including the excess 1.363 acres, @ Rs 5000/- per acre. The Union of India appealed to the Supreme Court.

23. Among the conditions, in the formal letter of allotment, dated 18th July, 1990, issued by the Government of India, was a proscription on the Sabha from increasing "the rate of tuition fee without the prior sanction of the competent authority". Further, the letter of allotment mandated adherence, by the Sabha, to the provisions of the DSE Act and the DSE Rules, and other instructions issued from time to time.

24. The Supreme Court observed that the Sabha had accepted all the conditions contained in the letter of allotment. Having done so, it held that the Sabha could not seek to challenge the rate fixed by the Government for allotting the land.

25. The concluding paragraph of the report (paragraph 11) contains certain observations, on which the respondents rely. The said paragraph reads thus:

> "Before parting with this case, we think it appropriate to observe that it is high time the Government reviews the entire policy relating to allotment of land to schools and other charitable institutions. *Where the public property is being given to such institutions practically free, stringent conditions have to be attached with respect to the user of the land and the manner in which schools or other institutions established thereon shall function.* The conditions imposed should be consistent with public interest and should always stipulate that in case of violation of any of those conditions, the land shall be resumed by the Government. *Not only such conditions should be stipulated but constant monitoring should be done to ensure that those conditions are being observed in practice.* While we cannot say anything about the particular school run by the respondent, *it is common knowledge that some of the schools are being run on totally*

commercial lines. Huge amounts are being charged by way of donations and fees. The question is whether there is any justification for allotting land at throw-away prices to such institutions. The allotment of land belonging to the people at practically no price is meant for serving the public interest, i.e., spread of education or other charitable purposes; it is not meant to enable the allottees to make money or profiteer with the aid of public property. We are sure that the Government would take necessary measures in this behalf in the light of the observations contained herein."

(Emphasis supplied)

26. Clearly, the concern expressed, in the italicized sentences from the above-extracted paragraph of the judgment, was to schools being run on totally commercial lines, indulging in profiteering, after having obtained land "practically free" from the Government. The Supreme Court has advised that, in order to curb such a malpractice, stringent conditions should accompany the allotment of land, and strict adherence, thereto, must be ensured.

27. Minority educational institutions, *per se*, did not engage the attention of the Supreme Court in this case.

T. M. A. Pai Foundation v. State of Karnataka, (2002) 8 SCC 481, rendered on 25th November, 2002, by a Constitution Bench of 11 Hon'ble Judges:

28. Learned counsel appearing for petitioners/appellants before the Supreme Court in this case, emphasised the fundamental right, available in the Constitution, to establish and administer educational institutions. This right, it was argued, was relatable, in the case of non-minority

institutions, to Articles 19(1)(g) and 26, and, in the case of minority institutions, to Article 30, of the Constitution. It was further argued that, while conditions, for grant of affiliation to private educational institutions, could be imposed, such conditions could relate only to the quality of education to be provided by the institution(s), and could, therefore, govern the qualifications of the teachers, the curriculum to be taught and minimum facilities which were to be provided to the students, but could not encroach into the arena of *administration* of the institutions, in respect whereof, it was contended, the institutions were entitled to full autonomy. Among the objections that were voiced, in this context, was the objection to the provisions governing fixing of the fee structure to be charged by the institution.

29. The Supreme Court culled out five main issues, as arising for its consideration.

30. Of these, the first issue, as framed by the Supreme Court, read thus:

> "Is there a fundamental right to set up educational institutions and if so, under which provision?"

31. The Supreme Court examined this issue in the context of Article 19(1)(g) of the Constitution, which guaranteed the fundamental right "to practise any profession, or to carry on any occupation, trade or business". Education, it was held, could not be regarded as a "trade" or "business", where the motive was profit. It was, however, liable to be regarded as an "occupation". While so holding, the Supreme Court overruled the observation, in its earlier judgment in ***J. P. Unnikrishnan v State of A.P.,***

(1993) 1 SCC 645, that education "may perhaps fall under the category of occupation provided no recognition is sought from the State or affiliation from the University is asked on the basis that it is a fundamental right", holding, classically, that "the question of whether there is a fundamental right or not cannot be dependent upon whether it can be made the subject matter of controls".

32. Equally, held the Supreme Court, the right to establish and maintain educational institutions could be sourced to Article 26(a), with which this judgment need not concern itself. Suffice it, therefore, to state that the Supreme Court upheld the fundamental right to set up and administer educational institutions, as available under the Constitution.

33. The second issue arising for its consideration, as delineated by the Supreme Court, read thus:

> "Does ***Unni Krishnan case*** require reconsideration?"

34. In examining this issue, the Supreme Court first referred to its earlier decision in ***Mohini Jain v. State of Karnataka, (1992) 3 SCC 666***, in which it was held that any fee charged, by private educational institutions, in excess of that charged by government educational institutions, was in the nature of a capitation fee, which was illegal. The correctness of this decision was questioned, by private educational institutions, in ***J. P. Unnikrishnan (supra)***, by contending that they would find it unviable to function, without appropriate funds, by way of tuition fees.

35. ***J. P. Unnikrishnan (supra)*** upheld the challenge in part. While upholding the right of private unaided educational institutions to charge fees higher than those charged by government institutions, it was held, nevertheless, that the fee so charged could not exceed the maximum limit fixed by the State, on the premise that "commercialization of education" was not permissible, and that charging of capitation fee was illegal. The Supreme Court went on, further, to formulate a scheme, and directed every authority granting recognition/affiliation to impose that scheme on the institution(s) concerned. Among the postulates of the scheme were (i) that the fee chargeable in each professional college (for ***Unnikrishnan*** dealt with the case of professional colleges) should be subject to a ceiling as may be prescribed by the appropriate authority or by a competent court, and (ii) that every State Government should constitute a committee to fix a ceiling for the fees chargeable by professional colleges.

36. The minority educational institutions contended, before the Supreme Court in ***T. M. A. Pai (supra)***, that the ***Unnikrishnan*** scheme was unwarranted, *inter alia* for the reason that the cost incurred in educating a student was more than the fee which would be realized on the basis of the formula devised in the said scheme.

37. The Supreme Court agreed with this contention in substance, holding (in paragraphs 35 and 36 of the report) thus:

> "35. It appears to us that the scheme framed by this Court and thereafter followed by the Governments was one that cannot be called a reasonable restriction under Article 19(6) of the Constitution. Normally, the reason for establishing an educational institution is to impart education. *The institution thus needs qualified and experienced teachers and proper*

facilities and equipment, all of which require capital investment. The teachers are required to be paid properly. As pointed out above, the restrictions imposed by the scheme, ***in Unni Krishnan case [(1993) 1 SCC 645]*** made it difficult, if not impossible, for the educational institutions to run efficiently. Thus, such restrictions cannot be said to be reasonable restrictions.

36. The private unaided educational institutions impart education, and *that cannot be the reason to take away their choice in matters, inter alia, of selection of students and fixation of fees.* Affiliation and recognition has to be available to every institution that fulfils the conditions for grant of such affiliation and recognition. The private institutions are right in submitting that it is not open to the Court to insist that statutory authorities should impose the terms of the scheme as a condition for grant of affiliation or recognition; this completely destroys the institutional autonomy and the very objective of establishment of the institution."

(Emphasis supplied)

38. Observing that private educational institutions were "a necessity", the judgment in ***T. M. A. Pai (supra)*** held (in paragraph 45 of the report) that "the decision in ***Unni Krishnan*** case insofar as it framed the scheme relating to the grant of admission *and the fixing of fee*, was not correct".

39. The third issue arising for its consideration, as framed by the Supreme Court in ***T. M. A. Pai (supra)***, read thus:

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

40. The Supreme Court preferred to examine this issue firstly in the context of private unaided non-minority educational institutions,

deferring examination of the issue in the context of minority educational institutions to a later stage of the judgment.

41. At the very outset of the discussion, the Supreme Court held that, among the rights which comprised the right to establish and administer educational institutions, was the right "to set up a reasonable fee structure". Referring, with approval and respect, to the recommendations of a University Education Commission, appointed on 4th November, 1948, under the Chairmanship of Dr S. Radhakrishnan, the Supreme Court went on (in paragraph 52 of the report) to hold that "governmental domination of the educational process must be resisted" and that educational institutions were contemplated as "soaring to great heights in pursuit of intellectual excellence and being free from unnecessary governmental controls". While recognizing the right of private unaided educational institutions to "set up a reasonable fee structure", it held (in paragraph 53 of the report) that, in doing so, "the element of profiteering is not as yet accepted in Indian conditions". It was held that "the fee structure must take into consideration the need to generate funds to be utilized for the betterment and growth of the educational institution, the betterment of education in that institution and to provide facilities necessary for the benefit of the students". Paragraph 54 of the report went on to hold thus:

> "The right to establish an educational institution can be regulated; but such regulatory measures must, in general, be to ensure the maintenance of proper academic standards, atmosphere and infrastructure (including qualified staff) and the prevention of maladministration by those in charge of management. *The fixing of a rigid fee structure*, dictating the

formation and composition of a governing body, compulsory nomination of teachers and staff for appointment or nominating students for admissions *would be unacceptable restrictions.*"

(Emphasis supplied)

Thus, the Supreme Court held, in unmistakable words, that no "rigid fee structure" could be fixed by the Government, in respect of private unaided educational institutions.

42. Paragraphs 55 to 57 of the report are even more instructive, in this regard:

"**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 case [(1993) 1 SCC 645]*** 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 prerequisite*. 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 student 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.*

> **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.*"
>
> (Emphasis supplied)

43. The point was stressed, yet again, in paragraph 61 of the report, in the following words:

> "It is in the interest of the general public that more good quality schools are established; *autonomy and non-regulation of the school administration* in the right of appointment, admission of the students *and the fee to be charged* will ensure that more such institutions are established."
>
> (Emphasis supplied)

44. The discussion on the issue was concluded, in paragraph 66 of the report, thus:

> "In the case of private unaided educational institutions, 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."

(Emphasis supplied)

45. In the case of private unaided educational institutions, therefore, the Supreme Court, in ***T. M. A. Pai (supra)*** took pains to underscore the autonomy to which they were entitled in the matter of fixation of fees. Bureaucratic and governmental interference, therein, was categorically proscribed, to the extent that, in paragraph 21 of the judgment, a policy of "non-regulation" was advocated. Governmental control, if any, was, it was clearly held, to be limited to "academic and educational matters and welfare of students and teachers", within which, (as per the judgment), the fees to be charged from the students would *not* merit inclusion. That was, on the other hand, a "matter of administration", falling within the exclusive province of the institution concerned. The sole caveat that the Supreme Court chose to enter, in this context, was to the effect that the fees charged ought not to be such as would result in "profiteering", or be in the nature of a "capitation fee", even while recognizing the right, of the institution, to maintain a "reasonable revenue surplus".

46. The fourth issue arising for its consideration, as framed by the Supreme Court in ***T. M. A. Pai (supra)***, related to the question of whether, in order to determine the existence of a religious or linguistic minority in relation to Article 30 of the Constitution of India, the appropriate unit would be the State, or the country as a whole. This issue does not really concern the controversy at hand; accordingly, reference, thereto, may conveniently be eschewed.

47. The fifth issue, as framed by the Supreme Court, read thus:

> "To what extent can the rights of aided private minority institutions to administer be regulated?"

48. Interestingly, though the issue, as thus worded, referred to the regulation of administration of *aided* private minority institutions, the Supreme Court, in examining the issue and pronouncing thereon, laid down the law in respect of private minority institutions in general.

49. Article 26(a) of the Constitution, the Supreme Court noted, gave every religious denomination the right to establish and maintain institutions for religious and charitable purposes. Treating the proposition that every educational institution was eligible to be regarded as having been established for a "charitable purpose", the Supreme Court brought, within the ambit of Article 26(a), the right of religious denominations to establish and administer educational institutions.

50. While Article 26(a) thus applied to *all religious denominations*, the right of *religious, as well as linguistic minorities* to establish and administer educational institutions, it was observed, also flowed from Article 30(1). Noting, further, that, unlike Articles 25 and 26, Article 30(1) did not specifically state, either, that the right thereunder was subject to public order, morality or health, or to other provisions of Part III of the Constitution, or that the said right would be subject to any rules or regulations, the Supreme Court put, to itself, the following posers (in paragraph 93 of the report):

> "Can Article 30(1) be so read as to mean that it contains an absolute right of the minorities, whether based on religion or

> language, to establish and administer educational institutions in any manner they desire, and without being obliged to comply with the provisions of any law? Does Article 30(1) give the religious or linguistic minorities a right to establish an educational institution that propagates religious or racial bigotry or ill will amongst the people? Can the right under Article 30(1) be so exercised that it is opposed to public morality or health? In the exercise of its right, would the minority while establishing educational institutions not be bound by town planning rules and regulations? Can they construct and maintain buildings in any manner they desire without complying with the provisions of the building bye-laws or health regulations?"

It is interesting to note that, while posing these posers, the Supreme Court did not choose to travel into the arena of fees.

51. Dealing with this issue, the Supreme Court first referred to the judgment in ***In Re. Kerala Education Bill, AIR 1958 SC 956***, which, while recognizing that Article 30(1) gave minorities two rights, viz. (i) to establish, and (ii) to administer, educational institutions of their choice, went on to clarify that the right to administer could not, obviously, include the right to maladminister, and that, therefore, where aid was sought from the State, it was open to the State, as a condition precedent, to prescribe reasonable regulations to ensure the excellence of the institution concerned.

52. This was clarified, yet again, in ***Rev. Sidhajbhai Sabhai v. State of Bombay, AIR 1963 SC 540*** (to which the Supreme Court, in ***T. M. A. Pai (supra)*** next referred), by postulating that "any law or executive direction which seeks to infringe the substance of" the right of minorities, to

establish and administer educational institutions of their choice, "would to that extent be void". At the same time, it was held that it was open to the State to impose regulations upon the exercise of the said right, provided the regulations were "made in the true interests of efficiency of instruction, discipline, health, sanitation, morality, public order and the like". Such regulations, it was clarified, were "not restrictions on the substance of the right which is guaranteed: they secure the proper functioning of the institution, in matters educational."

53. The following passage, from ***Sijadbhai Sabhai (supra)***, was, thereafter, extracted:

> "*The right established by Article 30(1) is a fundamental right declared in terms absolute*. Unlike the fundamental freedoms guaranteed by Article 19 *it is not subject to reasonable restrictions. It is intended to be a real right for the protection of the minorities in the matter of setting up of educational institutions of their own choice.* The right is intended to be effective and is *not to be whittled down by so-called regulative measures conceived in the interest not of the minority educational institution, but of the public or the nation as a whole. If every order which while maintaining the formal character of a minority institution destroys the power of administration is held justifiable because it is in the public or national interest, though not in its interest as an educational institution the right guaranteed by Article 30(1) will be but a 'teasing illusion' a promise of unreality. Regulations which may lawfully be imposed either by legislative or executive action as a condition of receiving grant or of recognition must be directed to making the institution while retaining its character as a minority institution effective as an educational institution.* Such regulation must satisfy a dual test — the test of reasonableness, *and the test that it is regulative of the educational character of the institution and is conducive to*

making the institution an effective vehicle of education for the minority community or other persons who resort to it."

(Emphasis supplied)

Qua the law enunciated in the above-extracted passage, however, the Constitution Bench, in ***T. M. A. Pai (supra)***, chose to enter a note of disapproval, opining that, once "regulations made in the true interests of efficiency of instruction, discipline, health, sanitation, morality and public order could be imposed", it was "difficult to appreciate how the Government can be prevented from framing regulations that are in the national interest", as the passage seemed to indicate. It was observed that "the right under Article 30(1) cannot be such as to override the national interest or to prevent the Government from framing regulations in that behalf", subject, of course, to the caveat that "government regulations cannot destroy the minority character of the institution or make the right to establish and administer a mere illusion". This enunciation is of significance, as one of the main contentions advanced by Mr. Ramesh Singh, learned Senior Standing Counsel appearing for the DoE, was that the only limitation on the power to impose regulations, regulating the right of the minority to establish and administer the educational institution, was that the regulation could not destroy the minority character of the institution. As the above extracted words from ***T. M. A. Pai (supra)*** disclose, this is not really the true legal position; the regulations, if any, were not permitted *either* to destroy the minority character of the institution *or* to render the right, of the minority, to establish and administer the institution, illusory.

54. The Supreme Court also noted the following elucidation, in ***State of Kerala v. Very Rev. Mother Provincial, (1970) 2 SCC 417***, of the concept of "administration":

> "Administration means 'management of the affairs' of the institution. This management must be free of control so that the founders or their nominees can mould the institution as they think fit, and in accordance with their ideas of how the interests of the community in general and the institution in particular will be best served. No part of this management can be taken away and vested in another body without an encroachment upon the guaranteed right."

55. The concept of "administration" was also explained, in ***Ahmedabad St. Xaviers' College Society v. State of Gujarat, (1974) 1 SCC 717***, in the concurring judgment of H. R. Khanna, J., thus:

> "*Administration connotes management of the affairs of the institution. The management must be free of control* so that the founders or their nominees can mould the institution as they think fit and in accordance with their ideas of how the interest of the community in general and the institution in particular will be best served."
>
> (Emphasis supplied)

56. While referring to ***Ahmedabad St. Xaviers' College Society (supra)***, p aragraphs 115 and 116 of the report in ***T. M. A. Pai (supra)*** cull out the principles enunciated in the said decision, thus:

> "**115.** The Court then considered whether the religious and linguistic minorities, who have the right to establish and administer educational institutions of their choice, had a fundamental right to affiliation. Recognizing that *the affiliation to a university consisted of two parts, the first part relating to syllabi, curricula, courses of instruction, the qualifications of teachers, library, laboratories, conditions regarding health and hygiene of students (aspects relating to*

establishment of educational institutions), and the second part consisting of terms and conditions regarding the management of institutions, it was held that with regard to affiliation, *a minority institution must follow the statutory measures regulating educational standards and efficiency, prescribed courses of study, courses of instruction, the principles regarding the qualification of teachers, educational qualifications for entry of students into educational institutions etc.*

116. While considering the right of the religious and linguistic minorities to administer their educational institutions, it was observed by Ray, C.J., at SCR p. 194, as follows: (SCC pp. 745-46, paragraph 19)

> "The right to administer is said to consist of four principal matters. First is the right to choose its managing or governing body. It is said that the founders of the minority institution have faith and confidence in their own committee or body consisting of persons elected by them. Second is the right to choose its teachers. It is said that minority institutions want teachers to have compatibility with the ideals, aims and aspirations of the institution. Third is the right not to be compelled to refuse admission to students. In other words, the minority institutions want to have the right to admit students of their choice subject to reasonable regulations about academic qualifications. Fourth is the right to use its properties and assets for the benefit of its own institution."
>
> (Emphasis supplied)

57. The expostulation of the concept of "reasonable regulations", in the context of Articles 29(1) and 30 of the Constitution of India, as contained in the concurring report of Khanna, J., in the said judgment, were also referred to, with approval, in ***T. M. A. Pai (supra)***, in paragraph 122 of the report, in the following words:

> "The learned Judge then observed that the right of the minorities to administer educational institutions did not prevent the making of reasonable regulations in respect of these institutions. Recognizing that the right to administer educational institutions could not include the right to maladminister, it was held that regulations could be lawfully imposed, for the receiving of grants and recognition, while permitting the institution to retain its character as a minority institution. The regulation "*must satisfy a dual test — the test of reasonableness, and the test that it is regulative of the educational character of the institution and is conducive to making the institution an effective vehicle of education for the minority community or other persons who resort to it*". (SCC p. 783, paragraph 92) It was permissible for the authorities to prescribe regulations, which must be complied with, before a minority institution could seek or retain affiliation and recognition. But *it was also stated that the regulations made by the authority should not impinge upon the minority character of the institution. Therefore, a balance has to be kept between the two objectives — that of ensuring the standard of excellence of the institution, and that of preserving the right of the minorities to establish and administer their educational institutions. Regulations that embraced and reconciled the two objectives could be considered to be reasonable. This, in our view, is the correct approach to the problem.*"
>
> (Emphasis partly supplied)

58. Referring to the judgment in ***St Stephen's College v. University of Delhi, (1992) 1 SCC 558***, the Supreme Court extracted, in paragraph 126 of the report in ***T. M. A. Pai (supra)***, paragraph 59 of the said judgment, which read thus:

> "The need for a detailed study on this aspect is indeed not necessary. The right to minorities whether religious or linguistic, to administer educational institutions and the power of the State to regulate academic matters and management is now fairly well settled. *The right to administer does not include the right to maladminister*. *The*

State being the controlling authority has right and duty to regulate all academic matters. Regulations which will serve the interests of students and teachers, and to preserve the uniformity in standards of education among the affiliated institutions could be made. The minority institutions cannot claim immunity against such general pattern and standard or against general laws such as laws relating to law and order, health, hygiene, labour relations, social welfare legislations, contracts, torts etc. which are applicable to all communities. So long as the basic right of minorities to manage educational institution is not taken away, the State is competent to make regulatory legislation. Regulations, however, shall not have the effect of depriving the right of minorities to educate their children in their own institution. That is a privilege which is implied in the right conferred by Article 30(1)."

(Emphasis supplied)

59. After referring to the above, and a host of other, authorities on the issue, the Supreme Court noted, in paragraph 133 of the report in ***T. M. A. Pai (supra)***, that "the two competing rights are the right of the citizen not to be denied admission granted under Article 29(2), and right of the religious or linguistic minority to administer and establish an institution of its choice granted under Article 30(1)." In this context, paragraph 136 of the report went on to crystallize the *raison d'être* of the law, as it emerged from the above cited authorities, thus:

"Decisions of this Court have held that *the right to administer does not include the right to maladminister. It has also been held that the right to administer is not absolute, but must be subject to reasonable regulations for the benefit of the institutions as the vehicle of education, consistent with national interest. General laws of the land applicable to all persons have been held to be applicable to the minority institutions also — for example, laws relating to*

taxation, sanitation, social welfare, economic regulation, public order and morality."

(Emphasis supplied)

60. Thereafter, Paragraphs 137 to 139 of the report went on to hold thus:

"137. It follows from the aforesaid decisions that even though the words of Article 30(1) are unqualified, *this Court has held that at least certain other laws of the land pertaining to health, morality and standards of education apply*. The right under Article 30(1) has, therefore, *not been held to be absolute or above other provisions of the law*, and we reiterate the same. By the same analogy, *there is no reason why regulations or conditions concerning, generally, the welfare of students and teachers should not be made applicable in order to provide a proper academic atmosphere, as such provisions do not in any way interfere with the right of administration or management under Article 30(1).*

138. As we look at it, *Article 30(1) is a sort of guarantee or assurance to the linguistic and religious minority institutions of their right to establish and administer educational institutions of their choice*. Secularism and equality being two of the basic features of the Constitution, Article 30(1) ensures protection to the linguistic and religious minorities, thereby preserving the secularism of the country. Furthermore, the principles of equality must necessarily apply to the enjoyment of such rights. *No law can be framed that will discriminate against such minorities with regard to the establishment and administration of educational institutions vis-à-vis other educational institutions. Any law or rule or regulation that would put the educational institutions run by the minorities at a disadvantage when compared to the institutions run by the others will have to be struck down. At the same time, there also cannot be any reverse discrimination.* It was observed in ***St. Xavier's***

College case [(1974) 1 SCC 717 : (1975) 1 SCR 173] at SCR p. 192 that : (SCC p. 743, paragraph 9)

> *"The whole object of conferring the right on minorities under Article 30 is to ensure that there will be equality between the majority and the minority. If the minorities do not have such special protection they will be denied equality.*"

In other words, *the essence of Article 30(1) is to ensure equal treatment between the majority and the minority institutions. No one type or category of institution should be disfavoured or, for that matter, receive more favourable treatment than another. Laws of the land, including rules and regulations, must apply equally to the majority institutions as well as to the minority institutions. The minority institutions must be allowed to do what the non-minority institutions are permitted to do.*

139. *Like any other private unaided institutions, similar unaided educational institutions administered by linguistic or religious minorities are assured maximum autonomy in relation thereto; e.g. method of recruitment of teachers, charging of fees and admission of students. They will have to comply with the conditions of recognition, which cannot be such as to whittle down the right under Article 30*."

(Emphasis supplied)

61. It is not necessary, in my view, to refer, any further, to ***T. M. A. Pai (supra)***, or to the passages that follow the above. They deal with the position as it applies to *aided* minority institutions, and the right, of minority institutions to admit students, and autonomy enjoyed by them in that regard. This judgment is not concerned with the right to admit students. Mr. Ramesh Singh did exhort this Court to analogise grant of aid with grant of land by the DDA at concessional rates, but the two, in

my view, are distinct and different concepts. "Aid", in the context of educational institutions, has its own definite contours, and cannot be confused with the price at which land is granted for establishment of educational institutions. This is besides the fact that Mr. Sunil Gupta, learned Senior Counsel, did seek to contend, on facts, that, in fact, the petitioners had not been granted land at concessional rates at all.

62. The majority opinion in ***T. M. A. Pai (supra)***, as authored by B. N. Kirpal, J, the Hon'ble Chief Justice, condensed the findings, in the judgment, in the form of eleven questions, and the answers thereto (in paragraph 161 of the report). One may refer, profitably, to Questions Nos. 4, 5(a), and 9, and to the answers thereto, as rendered in the opinion (in part), thus:

> "Q. 4. Whether the admission of students to minority educational institution, whether aided or unaided, can be regulated by the State Government or by the university to which the institution is affiliated?
>
> A. Admission of students to unaided minority educational institutions viz. schools and undergraduate colleges where the scope for merit-based selection is practically nil, cannot be regulated by the State or university concerned, except for providing the qualifications and minimum conditions of eligibility in the interest of academic standards.
>
> The right to admit students being an essential facet of the right to administer educational institutions of their choice, as contemplated under Article 30 of the Constitution, the State Government or the university may not be entitled to interfere with that right, so long as the admission to the unaided educational institutions is on a transparent basis and the merit is adequately taken care of. *The right to administer, not being absolute, there could be regulatory measures for ensuring educational standards and maintaining excellence*

thereof, and it is more so in the matter of admissions to professional institutions.

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 staff, employees, teachers and principals including their service conditions *and regulation of fees, etc.* would interfere with the right of administration of minorities?

A. So far as the statutory provisions regulating the facets of administration are 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 the conditions of affiliation to a university or board have to be complied with, but in the matter of day-to-day management, like the appointment of staff, teaching and non-teaching, and administrative control over them, the management should have the freedom and there should not be any external controlling agency.* However, a rational procedure for the selection of teaching staff and for taking disciplinary action has to be evolved by the management itself.

For redressing the grievances of employees of aided and unaided institutions who are subjected to punishment or termination from service, a mechanism will have to be evolved, and in our opinion, appropriate tribunals could be constituted, and till then, such tribunals could be presided over by a judicial officer of the rank of District Judge.

The State or other controlling authorities, however, can always prescribe the minimum qualification, experience and other conditions bearing on the merit of an individual for being appointed as a teacher or a principal of any educational institution.

Regulations can be framed governing service conditions for teaching and other staff for whom aid is provided by the State, without interfering with the overall administrative control of the management over the staff.

Fees to be charged by unaided institutions ***cannot be regulated*** *but no institution should charge capitation fee.*"

Q. 9. Whether the decision of this Court in ***Unni Krishnan, J.P. v. State of A.P.[(1993) 1 SCC 645]*** (except where it holds that primary education is a fundamental right) and the scheme framed thereunder require reconsideration/modification and if yes, what?

A. The scheme framed by this Court in ***Unni Krishnan case [(1993) 1 SCC 645]*** and the direction to impose the same, except where it holds that primary education is a fundamental right, is unconstitutional. However, *the principle that there should not be capitation fee or profiteering is correct. Reasonable surplus to meet cost of expansion and augmentation of facilities does not, however, amount to profiteering.*

(Emphasis supplied)

The takeaway from ***T. M. A. Pai (supra)***

63. What, then, is the takeaway from ***T. M. A. Pai (supra)***?

64. Though it may tantamount to holding a candle to the sun, one may, with profound respect, identify the following propositions, as clearly emerging from the pronouncement in ***T. M. A. Pai (supra)***:

(i) All rights, constitutionally available, under Article 26(a), to non-minority unaided educational institutions, are equally available

to unaided minority educational institutions. *In addition*, they are entitled to the further protection of Article 30(1) thereof.

(ii) The Constitution guarantees, to every citizen, the fundamental right to set up and administer educational institutions. *The essence of every private educational institution was the autonomy enjoyed by the institution in its management and administration. Bureaucratic or governmental interference in the administration of such an institution would undermine its independence*. "Administration" meant "management of the affairs of the institution".

(iii) This right could be regulated by the Government. Such regulation had, however, to be with a view to ensure the maintenance of proper academic standards, atmosphere and infrastructure (including qualified staff), and prevention of maladministration, and to ensure excellence in education. Such regulations could, for instance, govern the quality of teachers, by prescribing minimum qualifications required to be possessed by them, the courses and curricula of study, and the existence of infrastructure sufficient for the growth of the institution. The conditions had to pertain to academic and educational matters, and to the welfare of students and teachers, and could not govern the manner in which the institution was to be run, which was a matter of administration, to be ensured by the management of the institution.

(iv) For proper imparting of education, qualified and experienced teachers, as also proper facilities and equipment, were essential. These required capital investment. Private unaided educational institutions, therefore, had a choice in the matter of selection of students *and fixation of fees*, which could not be taken away. Conditions could, no doubt, be attached, to grant of affiliation or recognition; such conditions could not, however, be destructive of the institutional autonomy of the institution. For this reason, the "scheme", framed in ***J. P. Unnikrishnan (supra)***, which governed grant of admission *and fixation of fee*, was termed to be without authority of law. Any restriction which fixed a rigid fee structure, was, therefore, unacceptable.

(v) The right to set up a reasonable fee structure was one of the rights which comprised the right to establish and administer the institution. *The essential ingredients of the management of a private educational institution included the quantum of fee to be charged by it. An institution, which chose not to seek aid from the Government, was entitled to determine the scale of fee to be charged from its students.*

(vi) *Profiteering, and charging of capitation fee, was, however, not permissible*, and the Government was within its right to introduce regulations to the said effect. Education was essentially a charitable function, and the purpose thereof could not be the making of profit. It was not permissible for the institution to

charge such a fee, as was not required for the purpose of fulfilling the said object.

(vii) There had necessarily to be a difference in the administration, and regulation, of government-aided institutions and private unaided institutions.

(viii) Maintenance of a reasonable revenue surplus, which was required for the purpose of development of education and expansion of the institution would, however, not amount to profiteering.

(ix) In addition to the rights available under Article 26(a), linguistic and regional minority educational institutions were also entitled to the protection of Article 30(1) of the Constitution, which clothed them with an independent right to, *inter alia*, establish and administer educational institutions.

(x) Any law, or executive direction, which sought to infringe the substance of the right of minorities, to establish and administer educational institutions of their choice, would, to that extent, be void.

(xi) Unlike Article 26(a), Article 30(1) did not specifically state that the right guaranteed thereunder was subject to public order, morality or health.

(xii) The right could not, however, be regarded as completely unbridled. It was open to the State to impose regulations upon the exercise of the said right provided the regulations were made in the true interests of efficiency of instruction, discipline, health, sanitation, morality, public order, and the like. Regulations, which remained confined within these parameters, were not restrictions on the substance of the guaranteed right, but secured the proper function of the institution, in matters educational. The institution was also required to follow statutory measures regulating educational standards and efficiency, prescribed courses of study, courses of instruction, principles regarding qualification of teachers, educational qualifications for entry of students into the institution, and the like. Minority institutions could not claim immunity against general laws, such as laws relating to law and order, health, hygiene, labour relations, social welfare legislations, contract, tort, etc., which were applicable to all communities. So long as the basic right of minorities to manage educational institutions was not taken away, the state was competent to make regulatory legislation.

(xiii) *The "administration" of the minority institution had, however, necessarily to be free of control, so that the management of the institution could mould the institution as it thought fit, in accordance with their ideas of how the interests of the community in general, and of the institution in particular, would be best served. No part of this administration could be taken away and vested in another body without encroachment on the guaranteed*

right. The regulations, framed by the Government, in respect of minority institutions, could neither impinge on their minority character, nor be such as to render the right to establish and administer the institution, illusory. Neither could they place educational institutions run by minorities at a disadvantage, when compared to institutions run by others. At the same time, reverse discrimination, in favour of minorities vis-à-vis others, was also not permissible.

(xiv) Like any other private unaided institution, unaided educational institutions administered by linguistic or religious minorities were assured maximum autonomy in relation thereto, as, for example, in the matter of method of recruitment of teachers, charging of fees and admission of students. They would, however, have to comply with the conditions of recognition which could not be permitted to whittle down the right available under Article 30 of the Constitution of India.

Islamic Academy of Education v. State of Karnataka, (2003) 6 SCC 697
(rendered, on 14th August, 2003, by a bench of 5 Hon'ble Judges)

65. This Bench came to be constituted only because the Union of India, various State Governments, and educational institutions, chose to interpret the judgment in ***T. M. A. Pai (supra)*** in different ways, each to suit its own intended objective. The following note of anguish, as contained in the concurring opinion of S. B. Sinha, J., to be found in paragraph 221 of the report, is significant:

> "It is unfortunate that a Constitution Bench had to be constituted for interpreting an eleven-Judge Bench judgment. Probably, in judicial history of India, this has been done for the first time. It is equally unfortunate that all of us cannot agree on all the points, despite the fact that the matter involves construction of a judgment. In the name of interpretation we have to some extent, however little it may be rewritten the judgment. We have laid down new laws and issued directions purported to be in terms of Article 142 of the Constitution. We have interpreted ***T.M.A. Pai [(2002) 8 SCC 481]*** , but we have also made endeavours to give effect to it. In some areas it was possible, in some other, it was not."

Sinha, J., was, therefore, apparently not in entire agreement with the wisdom of the exercise which they had to undertake in ***Islamic Academy of Education (supra)***, or even of the permissibility thereof, in law. Be that as it may, this Court is bound by the view of the majority in the said decision, as authored by V. N. Khare, J., the then Hon'ble Chief Justice.

66. The submission, of the petitioners before the Supreme Court in ***Islamic Academy of Education (supra),*** who were educational institutions, both minority and non-minority, was that the answers to the questions, set out at the conclusion of the majority judgment in ***T. M. A. Pai (supra)***, represented the entire judgment, in a microcosm, as it were, and that it was not necessary, therefore, to look outside the said questions, or the answers as postulated thereto, in order to understand the majority judgment. This submission was rejected, outright, in the following words (in paragraph 2 of the report):

> "On behalf of the petitioners/applicants it was submitted that the answers given to the questions, as set out at the end of the majority judgment, lay down the true ratio of the judgment. It was submitted that any observation made in the

> body of the judgment had to be read in the context of the answers given. We are unable to accept this submission. The answers to the questions, in the majority judgment in ***Pai case [(2002) 8 SCC 481]*** are merely a brief summation of the ratio laid down in the judgment. The *ratio decidendi* of a judgment has to be found out only on reading the entire judgment. In fact, the ratio of the judgment is what is set out in the judgment itself. The answer to the question would necessarily have to be read in the context of what is set out in the judgment and not in isolation. In case of any doubt as regards any observations, reasons and principles, the other part of the judgment has to be looked into. By reading a line here and there from the judgment, one cannot find out the entire *ratio decidendi* of the judgment. We, therefore, while giving our clarifications, are disposed to look into other parts of the judgment other than those portions which may be relied upon."

67. On merits, the submission, of the petitioners before the Supreme Court in ***Islamic Academy of Education (supra)***, was that private unaided educational institutions had complete autonomy, even as regards the determination of their fee structure, which could include a reasonable revenue surplus for the purposes of development of education and expansion of the institution, and that the only restraint, thereon, was to the extent that profiteering and capitation fee were not permitted. As against this, the Union of India contended that States and universities had the statutory right to fix the fees and to regulate admission of students, in order to ensure that there was no profiteering, capitation fees were not charged, admissions were based on merit, and persons from backward classes and poorer sections had an opportunity to receive education.

68. As in ***T. M. A. Pai (supra)***, the Constitution bench, ***Islamic Academy of Education (supra),*** also chose to delineate the issues arising before it, for consideration. Four specific issues were framed, of which the first two, alone, are of any significance, insofar as the present controversy is concerned. They read thus:

> "(1) whether educational institutions are entitled to fix their own fee structure;
>
> (2) whether minority and non-minority educational institutions stand on the same footing and have the same rights."

69. The answer to Issue (1), as thus framed by the Supreme Court, was provided, by it, in paragraph 7 of the report. While the latter part of the said paragraph recommended the setting up of Committees to examine the fee structures of educational institutions, the following words, from the said paragraph, are relevant:

> "So far as the first question is concerned, in our view the majority judgment is very clear. There can be no fixing of a rigid fee structure by the Government. Each institute must have the freedom to fix its own fee structure taking into consideration the need to generate funds to run the institution and to provide facilities necessary for the benefit of the students. *They must also be able to generate surplus which must be used for the betterment and growth of that educational institution*. In paragraph 56 of the judgment it has been categorically laid down that the decision on the fees to be charged must necessarily be left to the private educational institutions that do not seek and which are not dependent upon any funds from the Government. Each institute will be entitled to have its own fee structure. The fee structure for each institute must be fixed keeping in mind the infrastructure and facilities available, the investments made, salaries paid to the teachers and staff, future plans for

expansion and/or betterment of the institution etc. Of course there can be no profiteering and capitation fees cannot be charged. It thus needs to be emphasized that as per the majority judgment imparting of education is essentially charitable in nature. Thus the surplus/profit that can be generated must be only for the benefit/use of that educational institution. Profits/surplus cannot be diverted for any other use or purpose and cannot be used for personal gain or for any other business or enterprise."

(Underscoring supplied)

70. Issue (2), as framed by the Supreme Court, was also answered, by it, in the negative, thus (in paragraph 9 of the report):

"Undoubtedly, at first blush it does appear that these paragraphs equate both types of educational institutions. However, on a careful reading of these paragraphs it is evident that *the essence of what has been laid down is that the minority educational institutions have a guarantee or assurance to establish and administer educational institutions of their choice.* These paragraphs merely provide that laws, rules and regulations cannot be such that they favour majority institutions over minority institutions. *We do not read these paragraphs to mean that non-minority educational institutions would have the same rights as those conferred on minority educational institutions by Article 30 of the Constitution of India. Non-minority educational institutions do not have the protection of Article 30.* Thus, in certain matters they cannot and do not stand on a similar footing as minority educational institutions. Even though the principle behind Article 30 is to ensure that the minorities are protected and are given an equal treatment yet the special right given under Article 30 does give them certain advantages."

(Emphasis supplied)

The takeaway from ***Islamic Academy (supra)***

71. The following propositions emerge from ***Islamic Academy (supra)***:

(i) No rigid fee structure could be fixed, by the Government, in respect of unaided educational institutions. Each institute must have the freedom to fix its own fee structure taking into consideration the need to generate funds to run the institution and to provide facilities necessary for the benefit of the students.

(ii) Unaided educational institutions were also permitted to generate a reasonable surplus, which had to be utilised towards advancement of the institution and betterment of the students, and diversion thereof was not allowed.

(iii) Discretion, regarding the quantum of fees to be charged, had to be left to the unaided educational institution concerned. This was required to be exercised, keeping in mind the infrastructure and facilities available, the investments made, salaries paid to the teachers and staff, future plans for expansion and/or betterment of the institution etc.

(i) Profiteering, or charging of capitation fees, was, however, completely prohibited.

(ii) "The protection of Article 30" was uniquely available only to minority educational institutions, and was not available to non-minority educational institutions, unaided or otherwise.

Modern School v U.O.I., (2004) 5 SCC 583, rendered by a bench of 3 Hon'ble Judges on 27th April, 2004

72. This judgment, or, more particularly, paragraph 27 thereof, constitutes the sheet-anchor to employ a time-worn cliché of the respondents' case.

73. ***Modern School (supra)***, as already noted hereinabove, was an appeal from ***Delhi Abhibhavak Mahasangh-I (supra)***.

74. The constitution of the bench which decided ***Modern School (supra)*** is significant, constituting, as it did, of V. N. Khare, the Hon'ble Chief Justice, S. B. Sinha, J. and S. H. Kapadia, J. (as he then was). The judgment was authored by Kapadia, J., for himself and Khare, C. J., with Sinha, J., penning a dissent. This is significant because Khare, C. J., was also part of the bench which decided ***T. M. A. Pai (supra)*** and ***Islamic Academy of Education (supra)*** and was, in fact, the author of the majority judgment in ***Islamic Academy (supra)***. It would be reasonable, therefore, to presume that ***Modern School (supra)*** could not be interpreted as breaking away from the legal position as enunciated in ***T. M. A. Pai (supra)*** and ***Islamic Academy (supra)***. The attempt has, at all times, therefore, to be to harmonize these decisions, and read them as a cohesive whole, representing the law on the issue.

75. The Supreme Court, in this case, framed the following questions, as arising for its consideration:

> "(1) Whether the Director of Education has the authority to regulate the quantum of fees charged by unaided schools under Section 17(3) of the Delhi School Education Act, 1973?
>
> (2) Whether the direction issued on 15-12-1999 by the Director of Education under Section 24(3) of the Act stating *inter alia* that no fees/funds collected from parents/students shall be transferred from the Recognised Unaided School Fund to the society or trust or any other institution, is in conflict with Rule 177 of the Delhi School Education Rules, 1973 ("The Rules")?
>
> (3) Whether managements of recognised unaided schools are entitled to set up a Development Fund Account under the provisions of the Delhi School Education Act, 1973?"

76. Of these, only Issue (a) concerns the present controversy.

77. The Supreme Court distilled the judgment of this Court in ***Delhi Abhibhavak Mahasangh-I (supra)*** thus (in paragraphs 7 and 8 of the report):

> "**7.** Delhi Abibhavak Mahasangh, a federation of parents' association moved the Delhi High Court by Writ Petition No. 3723 of 1997 challenging the fee hike in various schools in Delhi. It was a public interest writ petition filed on 8-9-1997 impleading thirty unaided recognised public schools. The grievance of the Mahasangh was that recognised private unaided schools in Delhi are indulging in large-scale commercialisation of education which was against public interest. That commercialisation has reached an alarming situation on account of failure of the Government to perform

its statutory functions under the Delhi School Education Act, 1973 (hereinafter for the sake of brevity referred to as "the Act"). One of the serious charges in the writ petition against the said unaided recognised schools was transfer of funds by the said schools to the society/trust and/or to other schools run by the same society/trust. In this connection, it was alleged that there was excess of income over expenditure under the head "Tuition fee" and further interest-free loans of huge amount have been taken from parents for giving admissions to the children. It was also alleged that huge amounts collected remained unspent under the head "Building fund". On the other hand, before the High Court, it was submitted on behalf of the schools that the above increase in fees, annual charges, admission fees and security deposit was justified on account of increase in the expenses and in particular, salaries of teachers in compliance with recommendations of the Fifth Pay Commission.

8. The key issue before the High Court, therefore, was whether unaided recognised schools were indulging in commercialisation of education. The High Court found from the reports submitted by the inspection teams appointed by the Government that there were irregularities in the management of the accounts. Therefore, by the impugned judgment, directions were given regarding utilisation of tuition fees for payment of salaries of teachers and employees and also for utilisation of the surplus under the specific head of tuition fees. By the impugned judgment, the High Court declared that the said Act and the Rules framed thereunder prohibited transfer of funds from the schools to the society/trust or to other schools run by the same society/trust. By the impugned judgment, the High Court appointed a committee headed by Ms Justice Santosh Duggal (hereinafter referred to as "the Duggal Committee") to examine the economics of each of the recognised unaided schools in Delhi. Being aggrieved, the unaided recognised schools and the Action Committee of Unaided Private Schools have come by way of appeal to this Court. During the pendency of the civil appeals, the Duggal Committee submitted its report which has been accepted by the

> Government of National Capital Territory of Delhi (Directorate of Education), consequent upon which the Director of Education has issued directions to the Managing Committees of all recognised unaided schools in Delhi under Section 24(3) read with Sections 18(4) and (5) of the Act, which directions are the subject-matter of the civil appeals herein."

The dispute which engaged this Court in ***Delhi Abhibhavak Mahasangh (supra)*** – and, consequently, the Supreme Court in ***Modern School (supra)*** – was whether schools were indulging in "commercialisation of education" by charging fees which were excessive and disproportionate in comparison to their requirement, and whether, therefore, the DoE had acted within, or in excess of, the jurisdiction vested in it, by issuing directives to control the same.

78. The appellant, before the Supreme Court, is a well known private unaided recognized school. It sought to fault the judgment, of this Court in ***Delhi Abhibhavak Mahasangh-I (supra)***, and the contention advanced, in this regard, stands precisely distilled, in paragraph 12 of the report, thus:

> "It was urged on behalf of the management that in the impugned judgment the High Court had erred in holding that tuition fees should be ordinarily utilised for payment of salaries and if incidental surplus remained, it could be used for other educational purposes but that would not empower the management to levy higher tuition fees. It was submitted on behalf of the management that the Government has no authority to regulate the fees payable by the students of unaided schools as indicated by Section 17(3) of the Act which required the management only to submit to the Director a full statement of fees leviable during the ensuing academic session. In this connection, Section 17(3) was contrasted with Section 17(1) and Section 17(2) of the Act,

> which empower the Government to regulate the fees payable by the students of aided schools."

79. "The first point for determination", says the judgment in paragraph 13, "is whether the Director of Education has the authority to regulate the fees of unaided schools". Having thus got, straightaway as it were, to the meat of the matter, the judgment proceeds, in paragraph 14, to hold thus:

> "At the outset, before analysing the provisions of the 1973 Act, we may state that it is now well settled by a catena of decisions of this Court that *in the matter of determination of the fee structure unaided educational institutions exercise 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 commercialisation of education.*** Hence, *we have to strike a balance between autonomy of such institutions and measures to be taken to prevent commercialisation 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 the 1973 Act."
>
> (Emphasis supplied)

The emphasis, in these opening words of the Supreme Court, on "commercialisation of education", is of paramount significance. The balance that is required to be struck – as postulated in the above-extracted passage – is *not* between the autonomy of the institutions and *the power of the DoE to regulate*, but between the autonomy of the institutions and *measures to be taken to prevent commercialization of education*. In so holding, ***Modern School (supra)*** reiterates what ***T. M. A. Pai (supra)*** so

painstakingly clarified – viz., that the regulatory power of the DoE was to be directed at *preventing commercialization of education*. It was not, therefore, a regulatory power to be exercised in such a manner as to take over the autonomy of the schools in the matter of fixation of their fees, or even appropriation of their financial resources. Paragraph 15 of the report, in fact, goes on to note that, in ***T. M. A. Pai (supra)***, the Supreme Court "observed … 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."

80. What falls for consideration is, therefore, the extent to which, given the right of the unaided educational institution to "set up a reasonable fee structure", and, for the said purpose, to fix its fees, the DoE could exercise its regulatory jurisdiction, and the point at which the exercise of such jurisdiction overstepped its legitimate boundaries and transgressed into the domain of the discretion vested in the institution.

81. In this context, paragraph 15 of the report goes on to note thus:

> "However, the 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 paragraph 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 were held to be forbidden. Subject to the above two prohibitory parameters, this Court in T.M.A. Pai Foundation case [(2002) 8 SCC 481] 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*."
>
> (Emphasis supplied)

The above extracted passage clarifies two important aspects, which have necessarily to be borne in mind while appreciating the judgment in ***Modern School (supra)***, viz. that (i) the position, in law, emanating from ***T. M. A. Pai (supra)***, that private unaided educational institutions should be permitted reasonable profits after providing for investment and expenditure, subject to a proscription against charging of capitation fee and profiteering, was noted and, needless to say, approved, and (ii) the issue, with which the Supreme Court engaged itself, was "as to what constitutes reasonable surplus", in the context of the DSE Act.

82. Proceeding, thereafter, to deal with the judgment in ***Islamic Academy (supra)*** in the light of the provisions of the DSE Act and the DSE Rules, the Supreme Court held, in paragraph 17 of the report, thus:

> "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 authorised to regulate the fees and other charges* ***to prevent commercialisation 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 Sections 18(3) and (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)

Here, again, the Supreme Court is at pains to emphasize that the authority of the DoE, to regulate fees and other charges, is "to prevent commercialisation of education". "Commercialisation of education", and the necessity of preventing it at all costs, *for which* regulatory power vests in the DoE, therefore, runs as the constant undercurrent behind the surface of the DSE Act and the DSE Rules, and the rights and powers conferred on various entities thereby and thereunder. It is also significant that the Supreme Court localizes this regulatory power and authority, of the DoE, to Section 17(3) of the DSE Act. The parameters and peripheries of Section 17(3) must, therefore, necessarily inform any examination of the balance of powers conferred by the said provision.

83. Paragraphs 18 to 26 of the report, thereafter, go on to discuss the second and third issues framed by the Supreme Court, as extracted hereinabove. Inasmuch as these issues do not concern the controversy in the present petition, these paragraphs need not detain us.

84. Then follows the "Conclusion", as set out in paragraph 27 of the judgment, which constitutes the essential basis of the submissions of Mr. Ramesh Singh, and would, as he would seek to contend, provide sublime justification for all subsequent actions of the DoE, including the issuance of the impugned order dated 13th April, 2018. The said paragraph reads thus:

> "27. In addition to the directions given by the Director of Education vide Order No. DE.15/Act/Duggal.Com/203/99/ 23989-24938 dated 15-12-1999, we give further directions as mentioned hereinbelow:

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

In this connection, we *inter alia* direct every such school to prepare their financial statement consisting of the balance sheet, profit-and-loss account, and receipt-and-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 recognised unaided schools. We reproduce herein clauses 16 and 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 Administration and shall follow the provisions of the 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 freeship from the

> tuition fee, as laid down under the rules by the Delhi Administration, is from time to time strictly complied with. They will ensure admission to the student belonging to weaker sections to the extent of 25% and grant freeship to them."
>
> 28. *We are directing the Director of Education to look into letters of allotment issued by the Government and ascertain whether they have been complied with by the schools.* This exercise shall be complied with within a period of three months from the date of communication of this judgment to the Director of Education. *If in a given case, the Director finds non-compliance with the above terms, the Director shall take appropriate steps in this regard."*
>
> (Emphasis supplied)

85. The above extracted paragraphs 27 and 28 of the report direct the DoE to *ascertain whether the terms of allotment of land by the Government to the schools have been complied with*, and to *look into the letters of allotment* for the said purpose. Among the conditions of allotment, as extracted verbatim by the Supreme Court, is the proscription on increasing the rates of tuition fee without the *prior sanction* of the DoE.

86. A holistic and conjoint reading of the above directions, with the earlier decision in ***T. M. A. Pai (supra)***, would make it clear that the Supreme Court could not have intended the implementation of its directions to have been undertaken either *de hors* the provisions of the DSE Act and the DSE Rules, or in the teeth of the ***Pai*** pronouncement. ***T. M. A. Pai (supra)*** conferred complete autonomy, on private unaided schools, in the matter of fixation of their fees. The only limitation – if

one may call it that – to the sweep of this right is in the stipulation that the fees fixed should not be in the form of capitation, or amount to profiteering. Absent these interdictions, it is clearly not open to the DoE to entrench on the territory of the schools, insofar as the matter of fixation of their fees is concerned.

87. The emphasis, by the Supreme Court, in paragraph 27 of the ***Modern School*** judgment, on compliance with the provisions of the DSE Act and the DSE Rules, makes it clear that the Supreme Court intended compliance, with its directions, to be in tandem with the provisions thereof, and not blind thereto. How, then, is that possible, if at all? The answer, quite obviously, is that, if the provisions of the DSE Act and/or the DSE Rules contain anything which harmonizes with paragraphs 16 and 17 of the terms of allotment of the land, those provisions have to be borne in mind while examining whether compliance, with the "land clause", has, or has not, taken place.

88. The submission of Mr. Sunil Gupta, learned Senior Counsel appearing for the petitioner, is that such harmonization is possible only if the requirement of "prior approval", contemplated by Clause 16 of the terms of allotment of the land, is dovetailed into Section 17(3) of the DSE Act. Thus viewed, Mr Gupta would submit, the directions issued by the Supreme Court required the schools to furnish their statement of fee, to the DoE, before the commencement of the academic session, and the DoE to examine the same and take a decision thereon *before* such commencement. The directions contained in ***Modern School (supra)***, Mr. Gupta would exhort us to hold, do not afford a *carte blanche* to the

DoE to sit, as it were, over the statement of fees submitted by the schools, thereby preventing them from increasing their fees, and, as a result, trespassing on their right to establish and administer the schools, as guaranteed by Article 26(a) of the Constitution of India. Mr. Gupta would also emphasize, repeatedly, the position – which, he submits, is practically gilt-edged – that, so long as the schools do not charge capitation fee, and do not indulge in profiteering, their decision, qua the fees to be charged by them, cannot brook interference at the hands of any governmental authority, including the DoE.

The takeaway from ***Modern School (supra)***

From ***Modern School (supra)***, the following propositions emerge:

(i) The issue for consideration, before the Supreme Court, was whether schools were indulging in "commercialisation of education", by charging excessive and disproportionate fees and whether, therefore, the DoE had acted within its jurisdiction in issuing directives to control the same.

(ii) Unaided educational institutions enjoyed greater autonomy, in the matter of determination fee structure, and were also entitled to a reasonable surplus for development of education and expansion of the institution. Such institutions are to be allowed to plan their investment and expenditure, so as to generate profit. Reasonable profit, after providing for investment and expenditure, was permissible

(iii) In the garb thereof, however, these institutions could not be permitted to engage or indulge in "commercialisation of education". Charging of capitation fees, and profiteering, could not be allowed. The Government was, therefore, justified in taking measures to prevent this malady.

(iv) A balance, therefore, was required to be struck between autonomy of the institutions and measures to be taken to prevent commercialisation of education. The prevalent undercurrent of the discussion and conclusion, in ***Modern School (supra)*** was, therefore, that "commercialisation of education" had, at all costs, to be prevented. It is this "commercialisation of education" which, according to the Supreme Court, had to be curbed, and for the curbing whereof, regulatory measures could legitimately be put in place by the Government. These regulatory measures have, however, to operate, and be operated, within the parameters and peripheries of Section 17(3) of the DSE Act.

(v) These regulatory measures could not, however, be permitted to trespass on the autonomy of the unaided educational institutions, or take it over, in the matter of fixation of fees, or even appropriation of financial resources. The right to set up a reasonable fee structure, therefore, transcendentally remained with the unaided educational institution concerned.

(vi) The right to establish and administer minority educational institutions, while independently conferred, on such institutions, by Article 30(1) of the Constitution, was subject to reasonable regulations, in public and national interest.

(vii) Subject to the prohibitory parameters, regarding charging of capitation fee and profiteering, fees chargeable by unaided educational institutions could not be regulated.

(viii) The "issue before it", as encapsulated by the Supreme Court, was "as to what constitutes reasonable surplus in the context of the provisions of the 1973 Act".

(ix) Among the directions, issued to the DoE at the conclusion of the judgment, was the direction to "ascertain whether terms of allotment of land by the Government to the schools have been complied with, by the schools". In the event of non-compliance being detected, the DoE was directed to take "appropriate steps in that regard".

P. A. Inamdar v. State of Maharashtra, (2005) 6 SCC 537 [rendered, on 12th August, 2005, by a bench of 7 Hon'ble judges]

89. This Bench was constituted, essentially, to iron out the creases in the ***Pai*** fabric, which, according to the appellants before the Supreme Court, had been created by ***Islamic Academy (supra)***. Paragraphs 2 to 4 of the judgment, as authored by R. C. Lahoti, C. J., encapsulate, tellingly the brief, before the Supreme Court, thus:

"**2.** A coram of 11 Judges, not a common feature in the Supreme Court of India, sat to hear and decide ***T.M.A. Pai Foundation v. State of Karnataka [(2002) 8 SCC 481]*** (hereinafter ***"Pai Foundation" [(2002) 8 SCC 481]*** for short). It was expected that the authoritative pronouncement by a Bench of such strength on the issues arising before it would draw a final curtain on those controversies. The subsequent events tell a different story. A learned academician observes that the eleven-Judge Bench decision in ***Pai Foundation*** is a partial response to some of the challenges posed by the impact of liberalisation, privatisation and globalisation (LPG); but the question whether that is a satisfactory response, is indeed debatable. It was further pointed out that "the decision raises more questions than it has answered". (See *Annual Survey of Indian Law*, 2002 at pp. 251, 254.) The survey goes on to observe "the principles laid down by the majority in ***Pai Foundation*** are so broadly formulated that they provide sufficient leeway to subsequent courts in applying those principles while the lack of clarity in the judgment allows judicial creativity …" (*ibid*. at p. 256).

3. The prophecy has come true and while the ink on the opinions in ***Pai Foundation*** was yet to dry, the High Courts were flooded with writ petitions, calling for settlements of several issues which were not yet resolved or which cropped up post ***Pai Foundation*** . A number of special leave petitions against interim orders passed by the High Courts and a few writ petitions came to be filed directly in this Court. A Constitution Bench sat to interpret the eleven-Judge Bench decision in ***Pai Foundation*** which it did vide its judgment dated 14-8-2003 in ***Islamic Academy of Education v. State of Karnataka [(2003) 6 SCC 697]*** ("*Islamic Academy*" for short). The 11 learned Judges constituting the Bench in ***Pai Foundation*** delivered five opinions. The majority opinion on behalf of six Judges was delivered by B.N. Kirpal, C.J. Khare, J. (as His Lordship then was) delivered a separate but concurring opinion, supporting the majority. Quadri, J., Ruma Pal, J. and Variava, J. (for himself and Bhan, J.) delivered three

separate opinions partly dissenting from the majority. ***Islamic Academy*** too handed down two opinions. The majority opinion for four learned Judges was delivered by V.N. Khare, C.J. S.B. Sinha, J., delivered a separate opinion.

4. The events following ***Islamic Academy*** judgment show that some of the main questions have remained unsettled even after the exercise undertaken by the Constitution Bench in ***Islamic Academy*** in clarification of the eleven-Judge Bench decision in ***Pai Foundation***. A few of those unsettled questions as also some aspects of clarification are before us calling for settlement by this Bench of seven Judges which we hopefully propose to do."

90. The Supreme Court delineated, thereafter, the duty cast on it, in paragraph 20 of the report, thus:

"... At the very outset, we may state that our task is not to pronounce our own independent opinion on the several issues which arose for consideration in ***Pai Foundation***. Even if we are inclined to disagree with any of the findings amounting to declaration of law by the majority in ***Pai Foundation*** we cannot; that being a pronouncement by an eleven-Judge Bench, we are bound by it. We cannot express dissent or disagreement howsoever we may be inclined to do so on any of the issues. The real task before us is to cull out the *ratio decidendi* of ***Pai Foundation*** and to examine if the explanation or clarification given in ***Islamic Academy*** runs counter to ***Pai Foundation*** and if so, to what extent. If we find anything said or held in ***Islamic Academy*** in conflict with ***Pai Foundation*** we shall say so as being a departure from the law laid down by ***Pai Foundation*** and on the principle of binding efficacy of precedents, overrule to that extent the opinion of the Constitution Bench in ***Islamic Academy***."

91. The judgment goes on, in paragraph 26, to set out the three issues, arising before it, for consideration, of which the controversy before this Court pertains only to the third, i.e., "the fee structure". Paragraph 27 of the judgment proceeded to frame four issues, which arose for determination, before the Supreme Court. Of these, the third and the fourth issues alone are relevant for the purpose of the present controversy and may, therefore, be reproduced thus:

> "(3) Whether ***Islamic Academy*** could have issued guidelines in the matter of regulating the fee payable by the students to the educational institutions?
>
> (4) Can the admission procedure and fee structure be regulated or taken over by the committee ordered to be constituted by ***Islamic Academy***?"

92. Paragraphs 68 to 79 of the report, thereafter, proceed to record the rival submissions advanced before the Court. Reliance was placed, by Mr. Ramesh Singh, on paragraph 70 of the report; however, reference to the said paragraph may conveniently be eschewed, as it does not reflect the findings of the Supreme Court, but only records the submission made by learned Counsel before it.

93. Paragraphs 91 to 93 of the report proceed, thereafter, to juxtapose Articles 19(1)(g) and 30(1) of the Constitution of India, thus:

> "91. The right to establish an educational institution, for charity or for profit, being an occupation, is protected by Article 19(1)(*g*). Notwithstanding the fact that the right of a minority to establish and administer an educational institution would be protected by Article 19(1)(*g*) yet the founding fathers of the Constitution felt the need of enacting Article 30. The reasons are too obvious to require

elaboration. Article 30(1) is intended to instil confidence in minorities against any executive or legislative encroachment on their right to establish and administer educational institution of their choice. Article 30(1) though styled as a right, is more in the nature of protection for minorities. *But for Article 30, an educational institution, even though based on religion or language, could have been controlled or regulated by law enacted under clause (6) of Article 19, and so, Article 30 was enacted as a guarantee to the minorities that so far as the religious or linguistic minorities are concerned, educational institutions of their choice will enjoy protection from such legislation.* However, such institutions cannot be discriminated against by the State solely on account of their being minority institutions. The minorities being numerically less *qua* non-minorities, may not be able to protect their religion or language and such cultural values and their educational institutions will be protected under Article 30, at the stage of law-making. However, *merely because Article 30(1) has been enacted, minority educational institutions do not become immune from the operation of regulatory measures because the right to administer does not include the right to maladminister.* To what extent the State regulation can go, is the issue. The real purpose sought to be achieved by Article 30 is to give minorities some additional protection. Once aided, the autonomy conferred by the protection of Article 30(1) on the minority educational institution is diluted as provisions of Article 29(2) will be attracted. Certain conditions in the nature of regulations can legitimately accompany the State aid.

92. As an occupation, right to impart education is a fundamental right under Article 19(1)(*g*) and, therefore, subject to control by clause (6) of Article 19. This right is available to all citizens without drawing a distinction between minority and non-minority. Such a right is, generally speaking, subject to the laws imposing reasonable restrictions in the interest of the general public. In particular, laws may be enacted on the following subjects: (*i*) the professional or technical qualifications necessary for

practising any profession or carrying on any occupation, trade or business; (*ii*) the carrying on by the State, or by a corporation owned or controlled by the State of any trade, business, industry or service whether to the exclusion, complete or partial of citizens or otherwise. *Care is taken of minorities, religious or linguistic, by protecting their right to establish and administer educational institutions of their choice under Article 30. To some extent, what may be permissible by way of restriction under Article 19(6) may fall foul of Article 30. This is the additional protection which Article 30(1) grants to the minorities.*

93. *The employment of expressions "right to establish and administer" and "educational institution of their choice" in Article 30(1) gives the right a very wide amplitude.* Therefore, a minority educational institution has a right to admit students of its own choice, it can, as a matter of its own free will, admit students of non-minority community. However, non-minority students cannot be forced upon it. The only restriction on the free will of the minority educational institution admitting students belonging to a non-minority community is, as spelt out by Article 30 itself, that the manner and number of such admissions should not be violative of the minority character of the institution."

(Emphasis supplied)

94. Paragraph 94 of the judgment went on, nevertheless, to acknowledge the legal position, flowing from earlier pronouncements including ***Rev. Sidhajbhai Sabhai (supra)*** and ***Ahmedabad St Xaviers' College Society (supra)*** that grant of aid, and affiliation or recognition, could be made conditional on fulfilment of regulations, but that such regulations had to be (i) reasonable and rational, (ii) regulative of the essential character of the institution and conducive to making the institution an effective vehicle of education for the minority community or other person who resort to it, (iii) directed towards maintaining

excellence of education and efficiency of administration so as to prevent it from falling in standards. These tests, it was also noted, stood approved in ***T. M. A. Pai (supra)***.

95. The Supreme Court went on to classify minority educational institutions into three categories, in paragraph 103 of the report, thus:

> "To establish an educational institution is a fundamental right. Several educational institutions have come up. In ***Kerala Education Bill [1959 SCR 995 : AIR 1958 SC 956]*** "minority educational institutions" came to be classified into three categories, namely, (*i*) those which do not seek either aid or recognition from the State; (*ii*) those which want aid; and (*iii*) those which want only recognition but not aid. It was held that the first category protected by Article 30(1) can "exercise that right to their hearts' content" unhampered by restrictions. The second category is most significant. Most of the educational institutions would fall in that category as no educational institution can, in modern times, afford to subsist and efficiently function without some State aid. So it is with the third category. An educational institution may survive without aid but would still stand in need of recognition because in the absence of recognition, education imparted therein may not really serve the purpose as for want of recognition the students passing out from such educational institutions may not be entitled to admission in other educational institutions for higher studies and may also not be eligible for securing jobs. *Once an educational institution is granted aid or aspires for recognition, the State may grant aid or recognition accompanied by certain restrictions or conditions which must be followed as essential to the grant of such aid or recognition.* This Court clarified in ***Kerala Education Bill [1959 SCR 995: AIR 1958 SC 956]*** that "the right to establish and administer educational institutions" conferred by Article 30(1) does not include the right to maladminister, and that is very obvious. *Merely because an educational institution belongs to a minority it cannot ask for aid or recognition though running*

in unhealthy surroundings, without any competent teachers and which does not maintain even a fair standard of teaching or which teaches matters subversive to the welfare of the scholars. Therefore, the State may prescribe reasonable regulations to ensure the excellence of the educational institutions to be granted aid or to be recognised. To wit, it is open to the State to lay down conditions for recognition such as, an institution must have a particular amount of funds or properties or number of students or standard of education and so on. The dividing line is that in the name of laying down conditions for aid or recognition the State cannot directly or indirectly defeat the very protection conferred by Article 30(1) on the minority to establish and administer educational institutions. Dealing with the third category of institutions, which seek only recognition but not aid, Their Lordships held that "the right to establish and administer educational institutions of their choice" must mean the right to establish real institutions which will effectively serve the needs of the community and scholars who resort to these educational institutions. *The dividing line between how far the regulation would remain within the constitutional limits and when the regulations would cross the limits and be vulnerable is fine yet perceptible and has been demonstrated in several judicial pronouncements which can be cited as illustrations.* They have been dealt with meticulous precision coupled with brevity by S.B. Sinha, J. in his opinion in ***Islamic Academy [(2003) 6 SCC 697]***. *The considerations for granting recognition to a minority educational institution and casting accompanying regulations would be similar as applicable to a non-minority institution subject to two overriding considerations: (i) the recognition is not denied solely on the ground of the educational institution being one belonging to minority, and (ii) the regulation is neither aimed at nor has the effect of depriving the institution of its minority status.*"

(Emphasis supplied)

96. Apropos "minority unaided educational institutions asking for affiliation or recognition", it was further held, in Paragraphs 121 and 122 of the report, thus:

> "121. Affiliation or recognition by the State or the Board or the university competent to do so, cannot be denied solely on the ground that the institution is a minority educational institution. However, the urge or need for affiliation or recognition brings in the concept of *regulation by way of laying down conditions consistent with the requirement of ensuring merit, excellence of education and preventing maladministration. For example, provisions can be made indicating the quality of the teachers by prescribing the minimum qualifications that they must possess and the courses of studies and curricula. The existence of infrastructure sufficient for its growth can be stipulated as a prerequisite to the grant of recognition or affiliation. However, there cannot be interference in the day-to-day administration. The essential ingredients of the management, including admission of students, recruiting of staff* ***and the quantum of fee to be charged****, cannot be regulated*. (Paragraph 55, ***Pai Foundation [(2002) 8 SCC 481]***)
>
> 122. Apart from the generalised position of law that the right to administer does not include the right to maladminister, an additional source of power to regulate by enacting conditions accompanying affiliation or recognition exists. A balance has to be struck between the two objectives: (*i*) that of ensuring the standard of excellence of the institution, and (*ii*) that of preserving the right of the minority to establish and administer its educational institution. Subject to a reconciliation of the two objectives, any regulation accompanying affiliation or recognition must satisfy the triple tests: (*i*) the test of reasonableness and rationality, (*ii*) the test that the regulation would be conducive to making the institution an effective vehicle of education for the minority community or other persons who resort to it, and (*iii*) that there is no inroad into the protection conferred by Article 30(1) of the Constitution, that is, by framing the regulation the essential character of the

institution being a minority educational institution, is not taken away. (Paragraph 122, ***Pai Foundation [(2002) 8 SCC 481]***)

(Emphasis supplied)

97. Specifically addressing the issue of regulation of fees, Paragraphs 139 to 141 of the report held thus:

"139. To set up a reasonable fee structure is also a component of "the right to establish and administer an institution" within the meaning of Article 30(1) of the Constitution, as per the law declared in ***Pai Foundation [(2002) 8 SCC 481] .*** Every institution is free to devise its own fee structure subject to the limitation that there can be no profiteering and no capitation fee can be charged directly or indirectly, or in any form (Paragraphs 56 to 58 and 161 [answer to Question 5(*c*)] of ***Pai Foundation[(2002) 8 SCC 481]*** are relevant in this regard).

Capitation fees

140. Capitation fee cannot be permitted to be charged and no seat can be permitted to be appropriated by payment of capitation fee. "Profession" has to be distinguished from "business" or a mere "occupation". While in business, and to a certain extent in occupation, there is a profit motive, profession is primarily a service to society wherein earning is secondary or incidental. A student who gets a professional degree by payment of capitation fee, once qualified as a professional, is likely to aim more at earning rather than serving and that becomes a bane to society. *The charging of capitation fee by unaided minority and non-minority institutions for professional courses is just not permissible. Similarly, profiteering is also not permissible*. Despite the legal position, this Court cannot shut its eyes to the hard realities of commercialisation of education and evil practices being adopted by many institutions to earn large amounts for their private or selfish ends. If capitation fee and profiteering is to be checked, the method of admission has to be regulated so that the admissions are based on merit and

> transparency and the students are not exploited. *It is permissible to regulate admission and fee structure for achieving the purpose just stated.*
>
> 141. Our answer to Question 3 is that *every institution is free to devise its own fee structure but the same can be regulated in the interest of preventing profiteering. No capitation fee can be charged.*"
>
> (Emphasis supplied)

98. In paragraph 143, the report reiterated that "even unaided minority institutions can be subjected to regulatory measures *with a view to curb commercialisation of education, profiteering and exploitation of students*".

99. Apropos the two Committees constituted by ***Islamic Academy (supra)***, the Supreme Court held that the constitution of the said two Committees was, in its view, "permissible as regulatory measures aimed at protecting the interest of the student community as a whole as also the minorities themselves, in maintaining required standards of professional education on non-exploitative terms in their institutions". Thus, though the authority of the Court, to constitute Committees to regulate or monitor the fees, or the fee structure, of unaided educational institutions,, including those administered by minorities, was affirmed, the question, nevertheless, arises whether the DoE could also exercise a similar authority.

100. The following words, from Paragraphs 145 to 148 of the Report, are relevant in this regard:

"145. *The suggestion made on behalf of minorities and non-minorities that the same purpose for which Committees have been set up can be achieved by post-audit or checks after the institutions have adopted their own admission procedure and fee structure, is unacceptable for the reasons shown by experience of the educational authorities of various States. Unless the admission procedure and fixation of fees is regulated and controlled at the initial stage, the evil of unfair practice of granting admission on available seats guided by the paying capacity of the candidates would be impossible to curb.*

146. *Non-minority unaided institutions can also be subjected to similar restrictions which are found reasonable and in the interest of the student community.* Professional education should be made accessible on the criterion of merit and on non-exploitative terms to all eligible students on a uniform basis. Minorities or non-minorities, in exercise of their educational rights in the field of professional education have an obligation and a duty to maintain requisite standards of professional education by giving admissions based on merit and making education equally accessible to eligible students through a fair and transparent admission procedure and based on a reasonable fee structure.

147. *In our considered view, on the basis of judgment in* ***Pai Foundation [(2002)8 SCC 481]*** *and various previous judgments of this Court which have been taken into consideration in that case, the scheme evolved out of setting up the two Committees for regulating admissions and determining fee structure by the judgment in* ***Islamic Academy [(2003)6 SCC 697]*** *cannot be faulted either on the ground of alleged infringement of Article 19(1)(g) in case of unaided professional educational institutions of both categories and Article 19(1)(g) read with Article 30 in case of unaided professional institutions of minorities.*

148. *A fortiori, we do not see any impediment to the constitution of the Committees as a stopgap or ad hoc arrangement made in exercise of the power conferred on this*

Court by Article 142 of the Constitution until a suitable legislation or regulation framed by the State steps in. Such Committees cannot be equated with ***Unni Krishnan [(1993) 1 SCC 645]*** *Committees which were supposed to be permanent in nature."*

(Emphasis supplied)

101. The challenge, before it, to the earlier decision in ***Islamic Academy (supra)***, to the extent of the constitution, in the said judgment, of two Committees, to monitor the admission and the fee structure of the educational institutions, it was therefore held, failed, as, in doing so, the said judgment did "not go beyond the law laid down in ***Pai Foundation*** and earlier decisions of this Court, which had been approved in that case".

The takeaway from ***Inamdar (supra)***

102. ***Inamdar (supra)***, therefore, in sum and substance, holds thus:

(i) The right to establish an educational institution, whether for charity or profit, was protected by Article 19(1)(g) of the Constitution of India.

(ii) The educational institution was entitled to set up a reasonable fee structure, which was one of the primary components of the right to establish and administer the institution. The only limitations, thereon, were that, there could not be any profiteering, and no capitation fee could be charged directly or indirectly. Commercialisation of education was entirely impermissible.

(iii) Even so, Article 30 was conceptualised, and conceived, as an independent and separate dispensation in favour of minorities, intended to instil confidence in minorities against any executive or legislative encroachment on their right to establish and administer educational institutions of their choice. The said Article, therefore, though styled as a right, was more in the nature of protection of minorities.

(iv) By virtue of the said additional protection, minority educational institutions could not be subjected to laws, relatable to Article 19(6) of the Constitution. What, therefore, could amount to a "reasonable restriction", within the meaning of Article 19(6) of the Constitution might, nevertheless, fall foul of Article 30 thereof.

(v) That, however, did not immunise minority educational institutions from the operation of regulatory measures, for the simple reason that the right to administer did not include the right to maladminister. These regulatory measures had to be, however, reasonable and rational, as well as regulative of the essential character of the institution, conducive to making the institution an effective vehicle of education for the minority community, and directed towards ensuring excellence of education and efficiency of administration, so as to prevent the institution from falling in standards.

(vi) Grant of recognition could legitimately be made subject to reasonable conditions or restrictions, aimed at ensuring excellence

of the educational institution concerned. These could, for example, regulate the amount of funds, or properties, or number of students, or standard of education to be dispensed by the institution. They could not, however, be such as to defeat the protection conferred, on the minority institution by Article 30(1) of the Constitution, or dilute the right, of the minority, to establish and administer the educational institution. In this respect, the considerations, for granting recognition to minority educational institution would be similar to those applicable to a non-minority institution, subject to the stipulation that the regulation did not deprive the institution of its minority status.

(vii) Neither could such regulations interfere with the day-to-day administration of the institution, nor the essential ingredients of the management thereof, which would include, *inter alia*, the quantum of fee to be charged for admission of the students.

(viii) The setting up, in ***Islamic Academy (supra)***, of the two Committees, to regulate the admissions made by the minority institutions, and the fees charged by them, did not infract either Article 19(1)(g) or Article 30 of the Constitution. This was, however, permissible only because the Committees were temporary, and would not be permissible, were the committees to be permanent entities.

Cochin University of Science and Technology v. Thomas P. John, (2008) 8 SCC 82, rendered by a bench of 3 Hon'ble Judges on 6th May, 2008

103. It is not necessary to refer, in any detail, to the facts of this case, inasmuch as the *ratio decidendi* thereof, to the extent it is relevant for the controversy in issue, is fairly clear. Suffice it to state that the dispute pertained to the fixation of fees, by the appellant-University before the Supreme Court, for the years 1995-1996 and 1996-1997, with which the students claimed to be aggrieved. While observing that, for the years in question, the fee structure had been devised by Committees set up by the Supreme Court in the aftermath of ***T. M. A. Pai (supra),*** the Supreme Court, nevertheless, opined, clearly, in paragraph 11 of the report, that "the matter relating to the fixation of fee is a part of the administration of an educational institution and *it would impose a heavy onus on such an institution to be called upon to justify the levy of a fee with mathematical precision*". It was noted that the Supreme Court had laid down broad principles with regard to the fixation of the fees, which were being universally adopted.

104. Thereafter, in paragraph 12 of the report, the Supreme Court observed that "*an educational institution chalks out its own program year-wise on the basis of the projected receipts and expenditure* and for the court to interfere in this purely administrative matter *would be impinging excessively on this right*". Even so, it was held, "it should not be understood that the educational institution has a *carte blanche* to fix any fee that it likes but *substantial autonomy must be left to it*." The principles enunciated in ***T. M. A. Pai (supra),*** regarding regulatory control over unaided minority educational institutions being required to be minimal, with complete absence of any external controlling agency in

the matter of day-to-day administration, was again emphasised. Also emphasised were the principles, so clearly enunciated in ***T. M. A. Pai (supra)***, that, subject to the proscriptions on profiteering or charging of capitation fee, fees to be charged by unaided educational institutions cannot be regulated. The Supreme Court also observed that reasonable surplus, for expansion and augmentation of the facilities in the institution, was permissible, and would not amount to profiteering.

105. Referring, thereafter, to the principles laid down in ***Islamic Academy (supra)*** and ***Inamdar (supra)***, the Supreme Court went on, in Paragraphs 16 and 17 of the report, to hold, thus:

> "**16.** A reading of the aforesaid judgments would reveal that *the broad principle is that an educational institution must be left to its own devices in the matter of fixation of fee though profiteering or the imposition of capitation fee is to be ruled out and that some amount towards surplus funds available to an institution must be permitted and visualised, but it has also been laid down by inference that* ***if the broad principles with regard to fixation of fee are adopted, an educational institution cannot be called upon to explain the receipts and the expenses as before a Chartered Accountant***. We find that *the observations of the Division Bench of the High Court that no rational basis for the fixation of a higher fee for two years had been furnished lays down an onus on the educational institution, which would be difficult for it to discharge with accuracy.*
>
> **17.** It bears repetition that the University had set up the self-financing BTech course in the year 1995 and no grant-in-aid was available during this period or later and it had to make arrangements for its own funds. We have also examined the budget estimates, receipts and expenditure from the years 1996-1997 to 1999-2000. *We do find that there is a surplus in the hands of the institution but in the facts that a new course was being initiated which would*

require huge investments, the surplus was not unconscionable so as to require interference. Moreover, the University had made its budget estimates keeping in view the proposed receipts and if the fee levied by it and accepted by the students was permitted to be cut down midterm on the premise that the University had not been able to explain each and every item to justify the levy, it would perhaps be impossible for it to function effectively."

(Emphasis supplied)

The above extracted passages, from ***Cochin University (supra)***, carried the principles enunciated in the decisions which preceded it, and to which reference has already been made hereinabove, a notch further. It was held that the said principles also implied, inferentially, that the educational institution could not be called upon to explain its receipts and expenses as before a Chartered Accountant, once it was found that the institution was not engaging in profiteering and charging of capitation fee, and that the surplus funds available with it, if any, were reasonable. The Supreme Court specifically disapproved the finding, by the High Court, that the fixation of higher fee, for two years, by the appellant-University before it, did not have any rational basis, holding that this cast, on the University, the onus to explain the fixation, the accurate discharging of which would be difficult. On facts, the Supreme Court found that there was a surplus in the hands of the appellant-University before it, but that, keeping in view the fact that it was starting a new course, the surplus could not be regarded as unconscionable. The decision, of the said University, to work out its budget estimates keeping in view proposed receipts, was also impliedly approved.

Delhi Abhibhavak Mahasangh-II

106. Much would turn on this judgment, authored by A. K. Sikri, J. (as his Lordship then was), on behalf of the Division Bench of this Court, as it involved a challenge to an Order, dated 11th February, 2009, issued by the DoE, in the wake of the recommendations of the 6th CPC, and the acceptance, thereof, by the Government, the terms thereof were considerably similar to those of the Order dated 17th October, 2017 *supra*, with which the present controversy is, *inter alia*, concerned. Moreover, it also considered the various judgments, of the Supreme Court, which preceded it, and to which reference already stands made hereinabove. Rendered, as it is, by a Division Bench of this Court, the judgment is binding upon me, in the absence of any subsequent decision to the contrary.

107. Some clauses, of the said Order, dated 11th February, 2009 *supra*, as set out in paragraph 10 of the judgment of this Court, as reported in ***2011 SCC Online 3394***, may be reproduced thus:

> "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 paragraph 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."

108. The above Order, dated 11th February, 2009, was called into question by parents, who were aggrieved by the increase in fees, as well as by the Schools, who were aggrieved by what they perceived to be the unconstitutionally regulatory framework provided in the said Order. The arguments advanced by both sides, before the Court, were, to an extent, predictable, with the affected parents complaining that the hike in fees was unjustified and disproportionate in nature, and the Schools claiming, *per contra*, that the framework set out in the Order dated 11th February, 2009 *supra*, trespassed on their fundamental rights, guaranteed by Article 19 and Article 29 of the Constitution of India. Additionally, some of the petitioners, who were minority schools, also sought to invoke Article 30 of the Constitution of India.

109. After painstakingly setting out, at the outset, the principles enunciated in ***Delhi Abhibhavak Mahasangh-I (supra)***, ***T. M. A. Pai (supra), Islamic Academy (supra)***, ***Inamdar (supra)*** and ***Modern School (supra)***, this Court opined, in paragraph 56 of the report, that a conjoint reading of these decisions would clearly demonstrate, *inter alia*, that the "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." It is important to note that the regulatory authority, conferred on the DoE, has been, thus, attributed, by this Court, to Section 17(3) of the DSE Act, and that the objective, to be achieved while exercising the said authority, is also recognised as ensuring that the schools are not indulging in profiteering.

110. Paragraphs 62 to 64 of the report, which are of stellar significance, read as under:

> "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 <u>by virtue of Section 17(3) of 1973 Act</u>*. This is specifically held by the Supreme Court in ***Modern School (supra)*** and ***Action Committee Unaided Private Schools (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 <u>if hike in fee by a particular school is found to be excessive and perceived as "indulging in</u>*

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 Paragraph 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-paragraph (iii) of Paragraph 65 of* ***DAM-1*** *is reiterated in this behalf."*

(Emphasis supplied)

That the fee hike, provided in the notification dated 11th February, 2009 *supra*, was by way of an interim measure, as reiterated in paragraph 83 of the report.

111. Dealing separately with the objections voiced by the minority educational institutions, this Court observed that ***Modern School (supra)*** had clarified, categorically, the legal position that minorities, too, were

not exempt from the interdiction against indulging in commercial exploitation in the name of education and, to that extent, therefore, the regulatory power of the DoE would continue to apply. In paragraph 69 of the report, this Court held thus, qua minorities:

> "The reasons given by us holding paragraph 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*."
>
> (Emphasis supplied)

112. Finally, this Court deemed it appropriate to constitute a three-member Committee, headed by Anil Dev Singh, J., the former Chief Justice of the High Court of Rajasthan, which was required to look into the aspect of the increase of fee, which each individual school would be requiring, consequent to the implementation of the recommendations of the 6th CPC, by examining the records and accounts of each of the schools, and taking into account the available funds and the principles enunciated by the Supreme Court in, *inter alia*, ***Modern School (supra)***. The rationale for constitution of this Committee was provided, in paragraph 82, thus:

> "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."

It is apparent, on a reading of the judgment, that this Court has been overcautious in clarifying that the fee hike, provided by the Order dated 11th February, 2009 *supra*, was only an interim measure.

The takeaway from ***Delhi Abhibhavak Mahasangh-II***

113. ***Delhi Abhibhavak Mahasangh-II (supra)*** is significant, as, for the first time, it signalled a breakaway from the ***Pai-Islamic Academy-Inamdar-Modern School*** regime, in the case of the Order, dated 11th February, 2009 *supra*, even while otherwise reiterating the principles contained in the said decisions which may, justifiably, be regarded, by now, as fossilised in education jurisprudence. The following principles, as contained in the earlier decisions, of the Supreme Court, to which reference has already been made hereinabove, find iteration in ***Delhi Abhibhavak Mahasangh-II (supra)***:

(i) Schools could not indulge in commercialisation of education. "Commercialisation of education" was equated, by this Court, to "indulging in profiteering".

(ii) For this purpose, the fee structures of schools had to remain within bounds.

(iii) At the same time, a "reasonable surplus" was permissible, for development of the school and for the benefit of the students.

(iv) In the ultimate eventuate, a balance was required to be struck between the autonomy of the institution and the measures to be taken *in order to avoid commercialisation of education*.

(v) The first right, to fix the fee or increase the fee, was with the schools.

(vi) The DoE could step in and interfere, if the fee was found to be excessive and amounted to "indulging in profiteering". This exercise would be relatable to Section 17(3) of the DSE Act.

(vii) The situation that arose, consequent to their requirement of compliance with the recommendations of the Pay Commission was, however, required to be "judged in a different hue altogether". This was a pan-school phenomenon, covering all aided and unaided recognised schools in Delhi. Conflicting interests came into being, with the schools claiming that the additional burden, which had fallen on their shoulders, could be borne only if they were permitted to increase their fees, and the parents contending, on the other hand, that the financial health of the schools was robust enough to bear the burden, without fee increase – or, at least, without increase to the extent to which it had been effected. Examination of the merits of these rival contentions required going into the financial condition of each school, which would be a time consuming exercise. In such circumstances, it was permissible to allow an "interim fee hike", as was done by the Order dated 11th February, 2009 *supra*, which would temporarily still the waters,

with a cap on the upper limit of fees chargeable. The circumstances being exceptional, it could not be said that the order, allowing such interim fee hike, trespassed on the autonomy of the schools to fix their fees.

(viii) In the normal course, however, the position that, at the time of fixation of fees, by the school at the start of the academic session, no prior permission of the DoE was required, continued to operate.

Justice for All v. G.N.C.T.D., 2016 SCC Online Del 355 ["***Justice for All-I"***] and ***Justice for All v. G.N.C.T.D., 2016 SCC Online Del 4114*** ["***Justice for All-II"***]

114. This was a public interest litigation, which sought enforcement of the "land clause", as contained in the allotment letters, whereunder land was allotted, to private unaided schools by the DDA at concessional rates. Reliance was, needless to say, placed, almost exclusively, on ***Modern School (supra)***. The schools, on the other hand, placed reliance on the judgment of this Court in ***Delhi Abhibhavak Mahasangh-II (supra)***.

115. The Division Bench of this Court, speaking through G. Rohini, C.J., held that the reliance, placed by the schools, on the decision in ***Delhi Abhibhavak Mahasangh-II (supra)*** was misplaced, as the said decision did not deal with the liability of private unaided schools who had been allotted land, by the DDA, at concessional rates. After having culled out the passages, containing the enunciation of the law in ***Delhi Abhibhavak***

Mahasangh-II (supra), this Court concluded, in paragraphs 17 and 18 of the report, thus:

> "**17.** Thus it is clear that the *schools cannot indulge in profiteering and commercialization of school education. Quantum of fees to be charged by unaided schools is subject to regulation by DoE* in terms of the power conferred under Section 17(3) of DSE Act, 1973 and *he is competent to interfere if hike in fee by a particular school is found to be excessive and perceived as indulging in profiteering. So far as the unaided schools which are allotted land by DDA are concerned, in the light of the decision of the Supreme Court in* ***Modern School v. Union of India (supra)****, we are clear in our mind that they are bound to comply with the stipulation in the letter of allotment. Paragraph 28 of the majority judgment in* ***Modern School v. Union of India (supra)*** *upholds the binding nature of the stipulation in the letter of allotment issued by the DDA that the school shall not increase the rate of tuition fees without the prior sanction of DoE.*
>
> **18.** For the aforesaid reasons, *we consider it appropriate to dispose of the writ petition with a direction that the respondent No. 1/DoE shall ensure the compliance of term, if any, in the letter of allotment regarding the increase of the fees by all the recognized unaided schools which are allotted land by DDA. The respondent No. 2/DDA shall also take appropriate steps in accordance with law in case of violation of such stipulation in the letter of allotment by the unaided schools.*"
>
> (Emphasis and underscoring supplied)

116. A Review Petition, seeking review of the above judgment was filed, by certain societies, which were claiming to promote the right of education. While holding that no ground, for review of its decision, was made out, this Court entered the following important caveat, in paragraph 25 of the report:

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

The upshot

117. In sum and substance, therefore, the position that emerges, is this: The right to establish, and administer, unaided educational institutions, is essentially absolute, and bureaucratic and governmental interference, therewith, has necessarily to be minimal. Among the facets of this right is the right to set up a fee structure, which included determination of the quantum of fee to be charged by it. Regulation, of the right to establish and administer educational institutions by the Government was, however, permissible, *to ensure excellence in education and prevent maladministration*. Such regulation could govern, for example, the quality of teachers (by prescribing minimum qualifications for appointment), the courses and curricula of study, and the existence of requisite and sufficient infrastructure. It could not, however, trespass into the arena of *administration*, complete discretion, in respect whereof, had

to be left to the institution and those who managed it. Maintenance of a reasonable revenue surplus, for augmentation of the institution and its facilities, and for the betterment of the students studying therein, was perfectly in order. While, therefore, a reasonable profit could be earned by the institution, after providing for investment and expenditure, *profiteering*, and charging of capitation fee, was entirely impermissible, and the Government could introduce regulations *to ensure that this did not happen*. The Government could not, however, fix a rigid fee structure, for unaided educational institutions.

118. Profiteering appears, in the above-cited decisions, to have, impliedly, be distinguished from earning of profit. While the latter is permissible, to a reasonable extent, the former is not. The distinction, between the two, appears to be relatable to the essentially "charitable" character of the exercise of dispensation of education. Education is classically regarded as "charitable", and not geared at earning profit. Money, however, does not grow on trees, and, while educational institutions are entitled to earn profit, in order to survive, and to augment their resources and aim at higher standards, they cannot be vehicles geared at earning profits. If the *aim and objective*, of running educational institution, is earning of profit, rather than dissemination of knowledge, it would be treated as indulging in "profiteering". Earning of profit is, however, by itself, not "profiteering".

119. Minorities were entitled to "additional protection" under Article 30 of the Constitution of India, in the matter of establishment and administration of educational institutions of their choice. A study of the

various judicial pronouncements on the issue reveals, however, that, in the matter of fixation and determination of fees, the rights of minority, and non-minority, educational institutions, were nearly alike. Regulation of minority educational institutions, too, was permissible, in the interests of efficiency of instruction, discipline, health, sanitation, morality, public order, and the like. Such institutions, too, were subject to the ordinary laws of the land, and had to follow the statutory measures regulating educational standards and efficiency, prescribed courses and curricula of study, qualifications of teachers and students, and the like. Regulatory control, of minority educational institutions had, however, to stop short of encroaching on the "minority character" of the institutions, or the establishment and administration thereof.

120. Specifically in the matter of charging of fees, and the fixation and determination of the quantum thereof, all decisions, at least of the Supreme Court, have been uniform in asserting that maximum autonomy, to unaided educational institutions, whether minority or non-minority, was guaranteed by the Constitution, the only curbs, thereon, being in relation to commercialisation of education, i.e., profiteering and charging of capitation fee. So long as the fees charged by the concerned educational institution(s) did not amount to "commercialisation of education", thus understood, the Constitution clearly advocates a "hands off" approach by the Government, insofar as the establishment and administration of the institution, including the fixation of fees by it, was concerned. This would also immunise the institution from the requirement of being called upon to explain its receipts and expenses, as before a Chartered Accountant.

121. Regulatory measures, in every case, were relatable to Article 17(3) of the DSE Act.

122. Exceptional situations, however, justified exceptional measures and where, for example, schools, across the board, were subjected to escalated financial burden, by having to disburse higher salaries to their employees, consequent to the acceptance of the recommendations of the CPC by the Government, it could not be expected that, pending evaluation of the financials of every school, to assess whether the hiking fees, proposed by it as contained in the statement of fees filed under Section 17(3) of the DSE Act, was, or was not, disproportionate and did, or did not, therefore, amounted to "profiteering", a situation of flux should continue to exist. To maintain an equilibrium, while such an exercise was undertaken (for which the Justice Anil Dev Singh Committee was constituted), it was permissible for the DoE to, by an across-the-board executive order, applicable to all schools, provide for an "interim fee hike", subject to an upper limit. Such an interim hike, as a temporary measure, did not infract the fundamental rights, either of the institution, or of those to whom it imparted education.

Applying the law to the facts

123. The "interim fee hike", as provided in the Order dated 17th October, 2017, therefore, was perfectly in order, in view of the law laid down in ***Delhi Abhibhavak Mahasangh-II (supra)***. I am not entering into the legality, or otherwise, of any of the other clauses of the said

Order – though the discussion, hereinabove, make throws sufficient hints in that direction – as the Order dated 17th October, 2017 is not under challenge in these proceedings.

124. Given this position, the DoE seeks to justify the issuance, by it, of the impugned Order, dated 13th April, 2018, on the anvil of the pronouncement of this Court in ***Justice for All-I (supra)***. At this juncture, I may observe that, in my opinion, the caveat, contained in the concluding paragraph of the order passed in ***Justice For All-II (supra)***, reproduced in paragraph 114 *supra*, cannot be used as a handle to escape ***Justice For All-I (supra)***. All that is said, in the said concluding paragraph, is that the decision in ***Justice For All-I (supra)*** would not foreclose the right of any party, aggrieved by action taken by the DoE for enforcement of the "land clause", from challenging the same, "by raising all the grounds available under law". The "law", for the purposes of this caveat, would, needless to say, include the first ***Justice For All*** judgment. The legality, or otherwise, of the act of the DoE in issuing the impugned Order dated 13th April, 2018 has, therefore, to be gauged *in the light of* ***Justice For All-I (supra)***, and *de hors* the said decision.

125. ***Justice For All-I (supra)*** directs the DoE to ensure compliance of the "land clause", and directs the DDA to take appropriate steps, in accordance with law, in case of violation of the said stipulation by unaided schools. Taking of action for violation of the clause, therefore, is, clearly, to be by the DDA, and not by the DoE. Even so, Mr. Ramesh Singh, appearing for the DoE, would seek to content that "ensuring compliance" with the "land clause" necessarily required obtaining of

prior approval, by any school which desired to increase its fees. The "interim fee hike", provided in the Order dated 17th October, 2017, he would submit, violated this requirement and had, therefore, to go. And so, he would submit, had the said Circular to be eviscerated, in respect of schools governed by the "land clause", by the impugned Order dated 13th April, 2018.

126. Did, however, the provision for "interim fee hike", as contained in the Order dated 17th October, 2017, infract the "land clause", in respect of educational institutions to which the said clause applied?

127. The "land clause" read thus:

> "*The school shall not* increase the rates of tuition fee without the *prior sanction* of the Directorate of Education, Delhi Administration…"

128. The afore-extracted clause, quite clearly, operates as a proscription on the school(s). *Schools* , the allotment documents in respect where of contained this clause were, by operation thereof, not permitted to increase the rates of tuition fee without the prior sanction of the DoE. Even for this simple reason, the entire argument, of Mr. Ramesh Singh, that the issuance of the impugned Order, dated 13th April, 2018, was necessitated as the provision for "interim fee hike", as contained in the Order dated 17th October, 2017, infracted the "land clause", has necessarily to fail. The "interim fee hike", permitted by the Order dated 17th October, 2017, was a dispensation by the DoE itself, which had the imprimatur of the ***Delhi Abhibhavak Mahasangh-II*** decision. It was not an act of increase

of fees by the schools. The "land clause", as contained in the allotment documents of the DDA, did not, at any point of time, inhibit the DoE from allowing an interim fee hike.

129. Indeed, even logistically, the argument of Mr. Ramesh Singh appears incomprehensible, as there could be no question of the DoE taking its own prior approval before allowing an interim fee hike. The interim fee hike being a decision of the DoE, the requirement of "prior approval" – which, even otherwise, did not apply – could not be said to have been violated.

130. The decision for allowing an interim fee hike, as contained in the Order dated 17th October, 2017, being that of the DoE, there was no justification for jettisoning the said Order, in respect of schools governed by the "land clause", as was done by the impugned Order dated 13th April, 2018.

131. The impugned Order, dated 13th April, 2018, therefore, cannot sustain, in law on facts, and is, accordingly, quashed and set aside.

132. In the light of the law, as enunciated in the judgments cited hereinabove, the "interim fee hike" would operate immediately, in favour of all private unaided schools, without the requirement of any prior approval. The statements of fees, submitted by the schools under Section 17(3) of the DSE Act would, however, be subjected to scrutiny, by the DoE, *with a view to ensuring that the schools were not indulging in commercialisation of education, by resorting to profiteering, or charging*

of capitation fee. While undertaking this exercise, the DoE would be required to keep in mind the principles enunciated hereinabove.

133. Needless to say, if any school is, in fact, found to be indulging in commercialisation of education, the DoE would be well within its rights in proceeding, against such institution, in accordance with law, and keeping in mind the provisions of the DSE Act and the DSE Rules.

134. The writ petition stands allowed, accordingly, with no order as to costs.

WP (C) 13456/2018 – Mount Carmel School v. DoE

135. The petitioner, in this writ petition, is a minority educational institution, which was granted minority status, by the National Commission for Minority Educational Institutions, on 3rd August, 2006. It was granted recognition, prior thereto, under the DSE Act, in 2000. It is affiliated to the Central Board of Secondary Education (CBSE). It is an unaided institution, not dependent, for any aid or assistance, on governmental funds.

136. As in the case of the 325 schools, with which WP (C) 4374/2018 was concerned, the letter, dated 9th March, 2000, issued by the DDA, whereunder land was allotted to the petitioner, also contained a clause (Clause No 17), which was identical to the "land clause" as quoted in ***Modern School (supra)*** but which may, nevertheless, for the sake of the record, be reproduced thus:

> "The School shall not increase the rates of tuition fee without the prior sanction of 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."

The petitioner is, however, at pains to point out, in the writ petition, that land was, in fact, allotted to it at the prevalent institutional rates, as per Circular dated 24th May, 2004, issued by the Land Costing Wing of the DDA and that, therefore, it could not be said that the petitioner had been allotted land at any "concessional rate". The said Circular reads thus:

> "Delhi Development Authority
> (Land Costing Wing)
>
> No. F. 2(4) 96/AO (P)/95/33 Dated: 24.05.2004
>
> Subject: **Institutional Land rates for the year 2002-03, 2003-04 and 2005**
>
> The Ministry of UD&PA vide their letter No.J-13036/3/2000-DDVA dated 20.02.2004 has conveyed the approval of the Government for the rates of institutional land premium for the year 2002-03, 2003-04and 2004-05.While the rates for 2002-03 and 2003-04 are the same as circulated vide even no.16 dated 01.04.04 the rates for 2004-05 are 10% higher than the rates for the year 2003-04 as against the proposed increase of 5%. Further, the Ministry has directed that no allotment may be done other than on rates approved by the Government.
>
> Now in pursuance of the approval of the Government a fresh schedule of the institutional land rates incorporating the rates for 2002-03, 2Q03-04 and 2004-05 as approved has been drawn and is annexed for reference and necessary action.

The receipt of this circular note may kindly be acknowledge.

S.N. Bansal
Dy. CAO (L.C)"

137. Subsequently, a lease agreement, dated 22nd November, 2007, was executed between the DDA and the petitioner, and it is not in dispute that the said lease agreement did not contain any "land clause", akin to Clause 17 of the letter dated 9th March, 2000 *supra.* Mr. Sunil Gupta, learned Senior Counsel was, however, customarily fair in submitting that, as such a clause did figure, in the letter dated 9th March, 2000, he would proceed on the premise that the allotment of land, to the petitioner, was subject to the "land clause".

138. On 15th March, 2016, the petitioner filed its Statement of Fees, for the ensuing academic session 2016-17, with the DoE, under Section 17(3) of the DSE Act.

139. On 16th April, 2016, the DoE issued an Order, referring to the "land clause", and directing thus:

> "Now, therefore, all the HoSs /Managers of Private Unaided recognised Schools, allotted land by the land owning agencies *on the condition of seeking prior sanction of Director of Education for increase in fee, are directed to submit their proposals, if any, for prior sanction of the Director of Education for increase in tuition fee/fee* for the academic session 2016-17, online through website of the Directorate and upload the returns on documents mentioned therein latest by 31st May, 2016. Any incomplete proposal shall be summarily rejected."
>
> (Emphasis supplied)

140. Simultaneously, another Order was issued, by the DoE, on the same date, i.e. 16th April, 2016, referring to Rule 180 of the DSE Rules and, after observing that returns and documents submitted by various schools, thereunder, were not uniform in format, resulting in difficulty in ensuring transparency and accountability to all stakeholders, directed that the returns on documents submitted by the schools were to be as per the format specified by the Institute of Chartered Accountants of India, in its Guidance Note on Accounting by Schools (2005). The Order purported to be issued in exercise of powers conferred by clause (xviii) of Rule 50 and Rule 180 of the DSE Rules.

141. This, it is averred, was followed by an e-mail, dated 21st April, 2016, by the DoE, to all private unaided recognised schools (including the petitioner) in the South West District, built on land to which the "land clause" applied, to submit the proposal, if any, for prior sanction of the DoE for increase in tuition fee for the academic session 2016-2017. The petitioner responded *vide* return e-mail dated 25th April, 2016.

142. Further similar communications, on the same lines, ensued, between the petitioner and the DoE.

143. On 3rd October, 2016, a Show Cause Notice was issued, to the petitioner, by the DoE, directing the petitioner to show cause, within 10 days, as to why its recognition be not withdrawn under Rule 56 of the DSE Rules. The Show Cause Notice noted the fact that the petitioner had submitted its statement of fees, for the session 2016-2017, on 15th March, 2016, in which an enhancement of 25%, in comparison to the fees being

charged for earlier years, was contemplated. Recounting, thereafter, the further communications that took place, between the DoE and the petitioner, to which reference already stands made hereinabove, the Show Cause Notice concluded thus:

> " And whereas, the Hon'ble Supreme Court in the judgment dated 27-04-2004 in the matter of Modern ***School Vs Union of India & Ors***, failed that so far as allotment of land by the DDA is concerned, suffice it to point out that the same has no bearing with the enforcement of the provisions of the Act and the rules framed there under but indisputably the institutions are bound by the terms and conditions of allotment. In the event such terms and conditions of allotment been violated by the allottees, the appropriate statutory authorities would be at liberty to take appropriate step as is permissible in law.
>
> And whereas, in view of the above, it is evident that the school has violated the condition of allotment of land laid down in Sl. No. 17 of the allotment letter dated 09-03-2000 by increasing the fee without prior sanction of Director (Education) as well as a direction of Hon'ble Supreme Court in Modern School case and the Hon'ble High Court in WPC 4109/2013 and orders dated 19-02-2016, 16-04-2016 of this Directorate.
>
> Now therefore, the Managing Committee/Manager of the Mount Carmel School, Sector-22, Dwarka, New Delhi is hereby directed to show cause in writing as to why the recognition of the school may not be withdrawn under rule 56 of DSE AR, 1973 for non-compliance of this Directorate's Order as mentioned above in the matter of violation of condition of allotment of land may not be referred to DDA for cancellation of lease deed of the society. The reply should reach the undersigned within 10 days of receipt of this notice failing which the action as deemed fit shall be taken against the School without any further notice.

This issues with the prior approval of Director (Education)."

144. The petitioner responded, *vide* communication dated 8th November, 2016. Besides furnishing reasons for its decision to increase its fees for the academic session 2015-16, the petitioner also submitted that, as a minority educational institution, the "land clause" could not be so operated, against it, as to surpass the constitutional mandate.

145. Be that as it may, the writ petition avers that the petitioner did, in fact, release, to all staff members, enhanced pay scales, as recommended by the 7th CPC, along with arrears.

146. On 25th May, 2018, a second Show Cause Notice was issued, to the petitioner, by the DoE, again reiterating its intention to withdraw the recognition granted to the petitioner, under Rule 56 of the DSE Rules, for non-compliance with the orders dated 19th February, 2016 and 16 April, 2016, issued by the DoE, and for violation of the "land clause". The petitioner was also directed to show cause as to why the matter be not referred to the DDA for cancellation of the lease deed of the petitioner. The petitioner responded, to this Show Cause Notice, *vide* communication dated 11th June, 2018.

147. On 6th December, 2018, the DoE issued the impugned Order, withdrawing the recognition granted to the petitioner, with immediate effect. The order was purportedly issued in exercise of the powers conferred on the DoE by Section 24(4) of the DSE Act, but was made

effective from 1st April, 2019, so as not to prejudice students studying in the school. The reasoning in the impugned Order is contained in the following passages:

> " the foremost issue raised by Mount Carmel School is that the school is not running on the land allotted by DDA at concessional rates as was the matter of Modern School. It was allotted at an institutional rate; therefore, judgment of Hon'ble High Court does not apply to their school. The plea taken by the school does not hold good since as per allotment letter dated 9.3.2000, the land measuring 1.5 Acre was allotted on perpetual lease deed and the land measuring 0.5 Acre was allotted to society for playfield on temporary basis on payment of nominal ground rent @ ₹ 5000/-+120% enhanced per acre per annum. Thus, the allotment letter substantiates that land has been allotted on nominal/concessional rates to the Mount Carmel School.
>
> The next issue to be examined and decided by the department, is whether the judgment of Hon'ble Supreme Court in Modern School's Case and Hon'ble High Court in Justice for All Vs. GNCTD in respect of seeking prior sanction of Director (Education) for any fee increase due to "condition of allotment of land" is applicable to Minority Schools or not.
>
> The plea taken by the school regarding immunity granted to the minority schools from the obligation attached to the allotment of the land and reliance on the judgments of the Hon'ble Supreme Court in Paramati case and Hon'ble High Court in St. Columba case, is without merit as these rulings only deal with the admission of non-minority students under the EWS category minority school.
>
> In case of St Columba School Vs. Lt Governor, the petitioner, which was unaided minority schools has challenged the directions of DoEs admit children belonging to EWS category to the extent of 20% at entry level on the ground that the school was obliged to do so in view of terms and conditions of lease deed as the land was allotted to them

by DDA on concessional rate. Hon'ble High Court considering the matter from that aspect held that state cannot abrogate the rights of minorities to establish and administer the schools of their choice, then by covenant in lease deed, government certainly cannot appropriate the right to nominate non-minority EWS students to a minority school. The concern of the Hon'ble High Court was to protect the minority feature of the school as regards admission of non-minority students.

Hon'ble High Court in the aforementioned judgment dated 19.01.2016 in WPC 4109/2013 has again clarified in respect of compliance of allotment of land by the Private Schools in respect of seeking prior sanction of Director (Education) for any fee increase. The relevant paragraph is as under: –

> " So far as the unaided schools which are allotted land by DDA are concerned, in the light of the decision of the Supreme Court in ***Modern School vs. Union of India & Ors., (2004) 5 SCC 583***, we are clear in our mind that they are bound to comply with the stipulation in the letter of allotment. Paragraph 28 of the majority judgment in ***Modern School vs. Union of India & Ors (supra)*** upholds the binding nature of the stipulation in the letter of allotment issued by the DDA that the school shall not increase the rate of tuition fees without the prior sanction of DoE."

Thus the judgment dated 19.01.2016 of Hon'ble High Court is also applicable to the unaided Minority Schools and there seems to be no infringement of constitutional rights of Minority Schools in this regards.

Further, it is relevant to mention here that no differentiation was made in the minority and non-minority schools in the judgment of Modern School's case as well as in "***Justice for All Vs. GNCTD***" case. This seems quite plausible as the parents of the students studying in the minority schools are equally affected like parents of

nonminority schools with any such arbitrary increase of fee despite the restriction to that effect i.e. with the prior approval of the Directorate of Education in terms of lease deed.

In view of above, it is quite evident that both the abovementioned judgment had been passed in two different perspectives. In case of St Columba School Vs Lt Governor, the concern of the Hon'ble High Court was to protect the minority feature of the Schools as regards admission of non-minority students. Whereas in the case of Justice for All vs. GNCTD of Delhi, the PIL was disposed with the directions that any school which obtained land on concessional rate, are bound to comply with the stipulation in the letter of allotment.

Thus, it is evident that the schools has violated the terms of allotment of the allotment letter dated 09.03.2000 by increasing the fee without prior sanction of Director (Education) and thereby has also violated the directions of the Hon'ble Supreme Court in Modern School case and of the Hon'ble High Court in WPC no 4109/2013 and orders dated 19.02.2016, 16.04.2016, and 25.05.2018 of this Directorate.

And Whereas, notice for a personnel hearing was issued for 16.08.2018 which was deferred for 24.08.2018 on the receipt of written request of the Principal of the School. Upon hearing on 24.08.2018, Dr. Michael Williams, Dean appearing for school reiterated their earlier reply and stated that being minority unaided school, the Hon'ble High Court of Delhi order dated 19.01.2016 is not applicable to them.

Now, therefore, in the larger interest of the students, the undersigned is left with no other option but to exercise the powers conferred under sub-section 4 of Section 24 of the DSEAR, 1973, for withdrawal of recognition with immediate effect. However, keeping in view of the interest of students studying in the school and appearing in the Board examination, the recognition granted to the Mount Carmel

School, Sector-22, Dwarka, new Delhi is hereby withdrawn w.e.f. 01.04.2019 for non-compliance of this Directorate's orders and Hon'ble Supreme Court's and High Courts orders as mentioned above. The school is further directed not to take any fresh admission for the academic session 2019-2020."

148. Impacted, and aggrieved, thereby, the petitioner-School has knocked at the doors of this Court, seeking a writ of *certiorari*, quashing the Order, dated 6th December, 2018 *supra*, issued by the DoE.

Statutory provisions relating to withdrawal of recognition by the DoE

149. Withdrawal of recognition, to an unaided school, is covered by Section 24 of the DSE Act and Rules 50 and 56 of the DSE Rules. These provisions may be reproduced thus:

Section 24, DSE Act

"**24. Inspection of schools. –**

(1) Every recognised school shall be inspected at least once in each financial year in such manner as may be prescribed.

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

(3) The Director may give directions to the manager requiring the manager to rectify any defect or deficiency found at the time of inspection or otherwise in the working of the school.

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

(a) stoppage of aid,

(b) withdrawal of recognition, or

(c) except in the case of a minority school, taking over of the school under section 20."

Rules 50 and 56 of the DSE Rules:

"**50. Conditions for recognition** – No private school shall be recognised, or continue to be recognised, by the appropriate authority unless the school fulfils the following conditions, namely:—

(i) the school is run by a society registered under the Societies Registration Act, I860 (21 of 1860), or a public trust constituted under any law for the time being in force and is managed in accordance with a scheme of management made under these rules;

(ii) subject to the provisions of clause (1) of article 30 of the Constitution of India, the school serves a real need of the locality and is not likely to effect adversely the enrolment in a nearby school which has already been recognised by the appropriate authority;

(iii) the school follows approved courses of instructions as provided elsewhere in these rules;

(iv) the school is not run for profit to any individual, group of association of individuals or any other persons;

(v) admission to the school is open to all without any discrimination based on religion, caste, race, place of birth or any of them;

(vi) the managing committee observes the provisions of the Act and the rules made there under;

(vii) the building or other structure in which the school is carried on, its surroundings, furniture and equipment are adequate and suitable for an educational institution and, where there is any business premises in any part of the building in which such school is run, the portion in which the school is run adequately separated from such business premises;

(viii) the arrangements in the building or other structure and in the furnishings thereof meet adequately the requirements of health and hygiene;

(ix) the school buildings or other structures or the grounds are not used during the day or night for commercial or residential purposes (except for the purpose of residence of any employee of the school) or for communal, political or non-educational activity of any kind whatsoever;

(x) the accommodation is sufficient for the classes under instruction in the school;

(xi) there is no thoroughfare or public passage through any part of the school premises;

(xii) sanitary arrangements at the school are adequate and are kept in good order and a certificate from the Health Officer of the local authority having jurisdiction over the area in which the school is located as to the health and sanitary conditions of the school and its surroundings has been furnished, and will also be furnished as and when required by the appropriate authority;

(xiii) arrangements are made for the supply of good drinking water to the students and suitable facilities

are provided to enable them to take refreshments, lunch or the like;

(xiv) the school is so conducted as to promote discipline and orderly behaviour and to maintain a high moral tone;

(xv) no teacher or student of the school is compelled to attend a class in which religious instruction is given or take part in any religious activity, no teacher or student absenting himself from religious instruction or religious activity is made to suffer any disability on that account and student is refused admission to the school because exemption from attendance at religious exercises or religious instruction has been claimed by him or his parent or guardian;

(xvi) facilities are provided for teaching of languages in accordance with the three language formula, adopted by the Central Government;

(xvii) the school is open to inspection by any of the following officers, namely :—

(a) any officer authorised by the appropriate authority or the Director;

(b) Director of Medical Services or Health Officer of the local authority concerned;

(c) Civil Surgeon, Assistant Civil Surgeon or Head Officer authorised by the appropriate authority or the Director to examine the health of students or the sanitary conditions of the school and surroundings;

(xviii) the school furnishes such reports and information as may be required by the Director from time to time and complies with such instructions of the appropriate authority or the Director as may be

issued to secure the continued fulfilment of the condition of recognition or the removal of deficiencies in the working of the school;

(xix) all records of the school are open to inspection by any officer authorised by the Director or the appropriate authority at any time, and the school furnishes such information as may be necessary to enable the Central Government or the Administrator to discharge its or his obligations to Parliament or to the Metropolitan Council of Delhi, as the case may be."

"**56. Suspension or withdrawal of recognition –**

(1) If a school ceases to fulfill any requirement of the Act or any of the conditions specified in rule 50 or fails to provide any facility specified in rule 51, the appropriate authority may, after giving to the school a reasonable opportunity of showing cause against the proposed action, withdraw for reason to be recorded in writing, recognition from the school: Provided that where the appropriate authority is satisfied that the deficiencies or defects are capable of immediate or early removal, it may, instead of withdrawing the recognition suspend the recognition for such period as it may think fit to enable I he managing committee of the school to remedy the deficiencies or defects to the satisfaction of the appropriate authority: Provided further that where the recognition of a school has been withdrawn or suspended, no appropriate authority shall grant recognition of such school whether run by the name by which it was known at the time of such withdrawal or suspension or by any other name, unless the school has removed the deficiencies or defects for which the recognition has been withdrawn or suspended.

(2) A recognised school which provides for hostel facilities shall comply with the provisions of rule 39

> and the instructions made there under, and in case of any default in complying with such provisions or instructions, the appropriate authority may for reasons to be recorded in writing, withdraw the recognition in relation to the school itself.
>
> (3) Where recognition of any school is withdrawn, the reasons for withdrawal of such recognition shall be communicated to the managing committee within seven days from the date on which the recognition is withdrawn.
>
> (4) Any managing committee aggrieved by the withdrawal of recognition of the school managed by it may, within thirty days from the date of communication to it of the withdrawal of recognition, prefer an appeal against such withdrawal to the authority specified in rule 58."

150. Withdrawal of recognition, of a running school, is an extreme step. It throws, into complete jeopardy, not only the school but, more importantly, the teachers, the staff and the students studying in the school. The damage caused, by an act of withdrawal of recognition, is often as immeasurable as it is irremediable. The compliance, with the above-extracted provisions in the DSE Act and the DSE Rules, under which, alone, withdrawal of recognition, of the school, may be effected is, therefore, of the utmost essence.

Rival submissions at the Bar

151. Mr. Sunil Gupta, who acted as helmsman, steering the course of the petitioner, in this case, as well, through the murky ***Pai-Islamic***

Academy-Inamdar-Modern School-DAM-Justice for All waters, advanced the following submissions:

(i) The act of withdrawing recognition of the petitioner was contrary to the provisions of the DSE Act and the DSE Rules, which stands reproduced hereinabove. Even if it were to be assumed that there was a violation, by the petitioner, of the "land clause", that could not invite de-recognition. The contract between the petitioner and the DDA, the allotment letter, whereby land was allotted for setting up of the petitioner-School, did not contemplate de-recognition of the School, as a consequence of violation of the said clause.

(ii) The Recognition Certificate, issued to the petitioner by the DoE, did not refer to any "prior approval", but referred, instead, only to Section 17(3).

(iii) The ***Modern School*** mandate, even if it were to be deemed to exist, did not direct the DoE to recognise the school, if it was found to be violating the "land clause".

(iv) There was no allegation of profiteering, against the petitioner. In the absence thereof, there was no requirement, on the part of the petitioner, to take prior approval of the DoE, before increasing its fees.

(v) The "land clause" could not override the spirit and the scheme of Section 17(3) of the DSE Act, which had the imprimatur of ***Delhi Abhibhavak Mahasangh-II (supra)***.

(vi) The DoE could not sit, indefinitely, over the Statement of Fees, submitted by the petitioner under Section 17(3) of the DSE Act and, thereafter, when the petitioner enhanced its fees, proceed to withdraw recognition from the petitioner on the ground that it had violated the provisions of the Act.

(vii) The manner in which the DoE had proceeded, in the present case, was in stark violation of the fundamental rights of the petitioner, under Article 19(1)(g) read with Article 30(1) of the Constitution of India.

(viii) Minority schools were not required to take "prior approval", before enhancing their fees. Reliance was placed, for this purpose, on the following decisions:

(a) ***Ahmedabad St. Xaviers' College Society (supra)***,

(b) ***Lily Kurian v. Lewina, (1979) 2 SCC 124***,

(c) ***All Saints High School v. Govt of Andhra Pradesh, (1980) 2 SCC 478*** and

(d) ***Frank Anthony Public School v. U.O.I., (1986) 4 SCC 707***,

(e) ***St. Columba's School v. Lieutenant Governor of Delhi, (2014) SCC OnLine Del 4448*** and

(f) ***Mount Carmel School v. D.D.A., (2017) SCC OnLine Del 6620***

(ix) Mr. Sunil Gupta sought to point out that, in the above decisions, the conditions regarding admission of students from the economically weaker sections, and the "neighbourhood" clause, which were also part of the allotment letter whereby land had been allotted by the DDA, had been held to be not enforceable against minority schools. Equally, Mr. Gupta would seek to submit, the "land clause" was also not enforceable against minority schools.

(x) The law, as enunciated in the decisions to which reference has already been made hereinabove, only required the school to desist from profiteering and from charging of capitation fee.

(xi) The DoE had sat on the Statement of Fee, submitted by the petitioner on 15th March, 2018.

(xii) The recital, in the very first sentence of the impugned Order dated 6th December, 2018, to the effect that "numerous complaints" had been received, in the office of the DoE, against the petitioner School, was misleading as well as untrue. The counter-affidavit of the DoE revealed that there were only two such complaints, which had been annexed, collectively, as Annexure R-4 to the counter-affidavit.

(xiii) It was stated, in the impugned Order, that the reply, dated 8th November, 2016, submitted by the petitioner to the Show Cause Notice dated 3rd October, 2016, had been "examined in the light of the provisions of section 17(3) of the Delhi School Education Act, 1973…". The outcome of the said examination was, however, neither known, nor disclosed.

152. Responding to the above submissions of Mr. Gupta, Mr. Ramesh Singh, learned Standing Counsel appearing for the DoE, submitted that the judgment of the Supreme Court in ***Modern School (supra***) clearly confirmed the requirement, of the school, to take prior approval of the DoE, before increasing its fee. The power of the DoE to regulate the fees fixed by the school was upheld, Mr. Singh would submit, in the said decision. The enforcement of the "land clause", vis-à-vis the fee fixed by the School was, he submits, directly in issue in ***Modern School*** (***supra***). The regulatory power of the DoE, as confirmed in the said decision, according to him, would apply, equally, to minority schools, subject to the sole caveat that such application did not denude or affect the minority character of the school. For this purpose, reliance was placed on paragraphs 122, 124, 125, 126 and 138 of the report in ***T. M. A. Pai (supra).***

153. Mr. Singh took me through the various judgments, to which reference has already been made hereinabove, and also relied on a decision, of the High Court of Gujarat, in ***Atulkumar Niranjanbhai Dave v. State of Gujarat (MANU/GJ/2152/2017).***

154. Drawing attention to the fact that ***Modern School (supra)*** had mandated that his client ensure compliance with the "land clause", by the schools, who had been allotted land, with the said clause thrown in, Mr. Singh sought to "ask himself" as to how he could ensure such compliance, save and except by resorting to the coercive measure of withdrawal of recognition, were such compliance not to be forthcoming from the School. It was also pointed out that Condition 11, in the conditions governing grant of provisional recognition, to the petitioner, also clarified that fees, during the ensuing academic session, would not be enhanced without the prior approval of the DoE.

155. Mr. Singh also sought to place reliance on Section 4(4) of the DSE Act. Inasmuch as the said sub-section refers back to sub-section (1) of the same Section, sub-Sections (1) and (4) of Section 4 of the DSE Act may, to advantage, be reproduced thus:

> "**4. Recognition of schools. –**
>
> (1) The appropriate authority may, on an application made to it in the prescribed format the prescribed manner, recognise any private school:
>
> Provided that no school shall be recognised unless –
>
> (a) it has adequate funds to ensure its financial stability and regular payment of salary and allowances to its employees;
>
> (b) it has a duly approved scheme of management as required by section 5;
>
> (c) it has suitable or adequate accommodation and sanitary facilities having

regard, among other factors, to the number, age and sex of the pupils attending it;

(d) it provides for approved courses of study and efficient instruction;

(e) it has features with prescribed qualifications; and

(f) It has the prescribed facilities for physical education, library service, laboratory work, workshop practice of co-curricular activities.

(4) Where the managing committee of the school obtains recognition by fraud, misrepresentation or suppression of material particulars or *where, after obtaining recognition, the school failed to continue to comply with any of the conditions specified in the proviso to sub- section(1),* the authority granting the recognition may, after giving the managing committee of the school a reasonable opportunity of showing cause against the proposed action, withdraw the recognition granted to such school under sub- section (1)."

(Emphasis supplied)

Mr. Singh also placed reliance on clause (xviii) of Rule 50 of the DSE Rules, which already stands reproduced, *in extenso*, hereinabove. Under the DSE Act, therefore, Mr. Singh would seek to point out that the only manner in which the DoE could take action against the delinquent school, would be to derecognise the school, or to take over the management. The latter option being not available in the case of minority schools, the DoE was, he would submit, well within its right in withdrawing the recognition granted to the petitioner. ***Modern School (supra)***, it is pointed out, directed the DoE to undertake investigation and ensure compliance with the "land clause". The said direction was reiterated by

this Court in ***Justice for All-I (supra)***. The only manner in which the DoE could "ensure" such "compliance", it is submitted, was by taking recourse to sub-sections (3) and (4) of Section 24 of the DSE Act. Where the judgment was silent, on the manner in which it was to be implemented, Mr. Singh would submit, it was permissible to take recourse to the statute, for which proposition he relies on ***Gajraj Singh v. State of U.P., (2001) 5 SCC 762***.

156. It is not as if, Mr. Singh would submit, the DoE acted in haste. As many as three notices were issued, to the petitioner, resulting, in each case, in the petitioner "stonewalling" the DoE, by merely submitting a reply to the notice, without ensuring compliance therewith. In these circumstances, Mr. Singh would submit that the school had, as it were, pushed the DoE to the wall, leaving it with no option but to pass the impugned order. Even at this stage, Mr. Singh would seek to point out, the petitioner could seek prior approval of the DoE, for the increase of fees, and rectify the omission.

157. Advancing submissions by way of rejoinder, Mr. Sunil Gupta, learned Senior Counsel, pointed out that the petitioner had filed its Statement of Fee, under Section 17(3) of the DSE Act and had, thereby, complied with the ***Modern School (supra)*** mandate. The DoE, on the other hand, did nothing with the said Statement, but sat on it, deeming the petitioner with no option but to increase the fees, as per its Statement of Fee.

158. Mr. Gupta further pointed out that the communication, dated 9th March, 2000, of the DDA, whereby land was allotted to the petitioner, did not contain any condition of prior approval, before the petitioner were to enhance its fees. The reference of the "ensuing academic session", in Clause 11 of the said document, Mr. Gupta would seek to submit, related to the second part of Section 17(3) of the DSE Act.

159. Mr. Gupta also emphatically opposes the submission, of Mr. Singh, that his client had, at any stage, "stonewalled" the DoE. All that his client had done, Mr. Gupta points out, was to impress, on the DoE, the fact that the condition of prior approval would not apply to it, as it was a minority educational institution and to request the DoE, therefore, to examine the Statement of Fees submitted by it. This, in his submission, could never be regarded as "stonewalling". Despite this aspect having been brought to the notice of the DoE repeatedly, no decision was taken, by the DoE, for as long as three years. In fact, Mr. Gupta would seek to submit, it was the DoE which was in contempt of ***Modern School (supra)*** and ***Justice For All (supra)***.

160. The mandamus in paragraph 28 of ***Modern School (supra)***, Mr. Gupta would seek to point out, was effectively to proceed under Section 17(3) of the DSE Act. The attempt, of Mr. Singh, to read the said direction as empowering the DoE to proceed, against the petitioner, under Section 24 of the said Act, it was submitted, was totally misguided. Mr. Gupta emphatically refutes the submission of Mr. Singh, that Section 24 of the DSE Act was the only avenue open to the DoE, to ensure compliance with the "land clause", pointing out that it was always open

to the DoE to examine the Statement of Fees submitted by the petitioner and take a decision, thereon, on merits, as to whether the increase in fee, stated therein, was justifiable, or unjustifiable. He draws my attention, in this context, to Section 18(5) of the DSE Act, read with Rules 59 and 180 of the DSE Rules which requires every return, submitted by the school, to be audited. This, Mr. Gupta would submit, was never done.

161. Making a final submission by way of surrejoinder, as it were, Mr. Singh would seek to point out that, by submitting its Statement of Fee under Section 17(3) of the DSE Act, the petitioner convey the impression that the said submission was not for the purpose of obtaining "prior approval" as, under the said sub-section, prior approval was required to be obtained only in the case of midsession hike of fees.

Analysis

Whether the impugned action of withdrawal of recognition of the petitioner-School was bad for want of jurisdiction

162. It would be appropriate, at the very outset, to examine the objection, of the petitioner, that the DoE did not have the jurisdiction to withdraw the petitioner's recognition, *vide* the impugned Order dated 6th December, 2018.

163. Mr. Ramesh Singh seeks to source the jurisdiction, of his client, to pass the impugned Order, withdrawing the petitioner's recognition, to the directions contained in paragraph 27 of the judgment in ***Modern School***

(supra), which stands reproduced in paragraph 84 *supra*. Direction (c), in the said paragraph, directs the DoE "to *ascertain* whether terms of allotment of land by the Government to the schools have been complied with". Paragraph 28 of the report clarifies, once again, that the Supreme Court was "directing the DoE to *look into* letters of allotment issued by the Government and *ascertain* whether they have been complied with by the schools.*"* Towards the conclusion of the said paragraph, the Supreme Court directs the DoE, in case he finds non-compliance with the terms of allotment, to "take appropriate steps" in this regard.

164. Nowhere, in paragraph 28 of the judgment in ***Modern School (supra)***, does the Supreme Court even direct the DoE to *ensure compliance* with the "land clause"; far less does it, expressly or by necessary implication, authorise the DoE to withdraw the recognition of the School, for such non-compliance. Even the steps, which the said paragraph directs the DoE to take, in the event of non-compliance with the allotment conditions (including the "land clause"), had necessarily to be "appropriate".

165. The question that would then arise is, therefore, whether the law permits the DoE, in the event of non-compliance with the "land clause", by any particular School, to withdraw the recognition granted to it.

166. No provision, akin to the "land clause", i.e., requiring the petitioner to take prior approval of the DoE, before increasing its fees, is to be found, anywhere in the DSE Act, or in the DSE Rules. It cannot, therefore, be said that, even if a particular school violates the "land

clause", i.e. increase its fees without taking prior approval of the DoE, it has violated any provision of the DSE Act, or the DSE Rules. Prior approval of the DoE, before increase of fees, it is conceded at the Bar by both sides, is required only where increase of fees is a mid-session exercise, and not otherwise.

167. Mr. Ramesh Singh has sought to submit that the action, of withdrawing the petitioner's recognition, was taken, by the DoE, in exercise of the powers conferred by Section 24(4), and, that the judgment of the Supreme Court in ***Modern School (supra)*** authorised the DoE to do so. I have already noted, hereinabove, that the Supreme Court, in ***Modern School (supra)*** only authorised the DoE to "take appropriate action", in case any school was found not to be complying with the allotment conditions.

168. There is no reference, in the said judgment, to Section 24, and Mr. Ramesh Singh does not dispute this fact. It is a well settled proposition of law that no more can be read into a judgment than is expressly stated therein. Equally well-settled is the ancillary proposition that the judgment is an authority only for what it states, and not for what may be read into the judgment by implication. (Refer: ***Union of India v. Chajju Ram (dead) by LRs. AIR 2003 SC 2339***)

169. What Mr. Ramesh Singh would seek to contend, however, is that the power to act, under Section 24(4), can be read into the directions contained in paragraph 24 of the judgment in ***Modern School (supra)***. Can it, though?

170. I am of the opinion that the attempt, of Mr. Ramesh Singh, to trace the authority of the DoE, in the present case, to withdraw the recognition granted to the petitioner, to Section 24(4) of the DSE Act, is completely misguided. Section 24 constitutes a self-contained scheme, dealing with "Inspection of schools". At the cost of reiteration, the said Section may be reproduced, thus:

> "**24. Inspection of schools. –**
>
> (1) Every recognised school shall be inspected at least once in each financial year in such manner as may be prescribed.
>
> (2) The Director may also arrange special inspection of any school on such aspects of its working as may, from time to time, be considered necessary by him.
>
> (3) The Director may give directions to the manager to rectify any *defects or deficiency* found *at the time of inspection or otherwise* in the *working* of the school.
>
> (4) *If the manager fails to comply with the direction given under sub- section (3)*, the Director may, after considering the explanation or report, if any, given or made by the manager, take such action as he may think fit, including –
>
> (a) stoppage of aid,
> (b) withdrawal of recognition, or
> (c) except in the case of minority school taking over of the school under section 20."

171. The scheme of Section 24 is unmistakable. The withdrawal of the recognition of a school may be resorted to, under sub- section (4) of the

said Section, only if the Manager of the school fails to comply with the direction given under sub-section (3) thereof. Such direction, in its place, has to be "to rectify any defects or deficiency found at the time of inspection or otherwise in the working of the school", and has to follow any inspection, which takes place under sub-section (1), or sub-section (2). There has, therefore, in the first instance, to be an inspection of the school. Following on the inspection, if any defects or deficiencies, in the working of the school, are found, the Director is to give directions to the Manager of the school to rectify the same. It is only where such directions are not complied with, that the DoE can proceed, under sub-section (4), to take further action, which may include withdrawal of recognition.

172. It is significant that, even under sub-section (4), withdrawal of recognition is not the inevitable sequitur to non-compliance, by the Manager of the school, with the directions issued under sub-section (3) of Section 24. It is only one of the measures which could be taken by the Director, which, themselves, need not be limited to the three measures enumerated at (a) to (c) of Section 24(4), as is made clear by the use of the word "including", in the said sub-section. If, therefore, the DoE chooses to adopt the extreme step of withdrawal of recognition of the school, it would be necessary for the order, passed to the said effect, to justify taking of such an extreme step, instead of any other step which could, alternatively, be taken.

173. In the present case, however, it is not necessary for this Court to proceed to that stage as, in my view, sub-section (4) of Section 24 was totally inapplicable. The impugned Order of withdrawal of recognition

does not purport to have been passed as a sequel to non-compliance, by the petitioner, which any directions issued under sub-section (3) of the DSE Act, following upon an inspection of the School, in accordance with the scheme of Section 24.

174. In this context, it is necessary to note, once again, that sub-section (3) of Section 24 contemplates directions being issued by the DoE, to the school to rectify any *defect* or *deficiency* found in the *working* of the school. These are words of definite import. "Defect" is defined, in P. Ramanatha Aiyar's Major Law Lexicon, as "a shortcoming; a fault, flaw, imperfection". In ***Tale v. Latham, 66 LJQB 351***, Bruce, J., speaking for the Queen's Bench, defined "defect" in the following terms:

> "A want or absence of something necessary or essential for completeness or perfection; shortcoming; blemish. It includes the idea of a fault or want of perfection. It means a lack or absence of something essential to completeness."

175. Similarly, the following definition of "deficiency" as contained in the Consumer Protection Act, 1986, was adopted, with approval, by the Supreme Court, in ***Patel Roadways v. Birla Yamaha Ltd, (2000) 4 SCC 91***:

> " 'Deficiency' means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service."

176. These definitions, it would be apparent, conform, by and large, to the etymological, common parlance understanding of the expressions "defect" and "deficiency".

177. Thus understood, irrespective of the correctness, or even legality, of the manner in which the petitioner was fixing its fees, it cannot, in my opinion, be said that, for that reason, any "defect" or "deficiency", *in the working of the petitioner-School*, existed. There is no allegation, whatsoever, that any deficiency existed, in the working of the establishment of the petitioner.

178. On its plain terms, therefore, Section 24(3) of the DSE Act would have no application to a case such as this. *Per sequitur*, sub-section (4), of Section 24, equally, could have no application. It would, therefore, be entirely improper to read the directions, contained in paragraph 24 of the report in ***Modern School (supra)*** as directing the DoE to proceed, against the petitioner, in a manner which was not permissible under the statute.

179. In fact, a bare reading of paragraph 24 of ***Modern School (supra)*** makes it clear that the directions, contained therein, were issued in exercise of the extraordinary power, vested in the Supreme Court by Article 142 of the Constitution of India. Needless to say, under the said provision, the Supreme Court could, at all times, direct statutory authorities to perform acts which were not required to be relatable to any existing statutory provision, guided solely by the consideration of the interests of justice. It would be doing disservice to the said extraordinary jurisdiction, of the Supreme Court, and the exercise thereof, as reflected

in paragraph 24 of ***Modern School (supra)***, to read the said paragraph as requiring the DoE to exercise powers vested in it by Section 24 of the DSE Act.

180. The submission of Mr. Ramesh Singh, to the effect that paragraph 24 of the judgment in ***Modern School (supra)*** authorised the DoE to take action under Section 24(4) of the DSE Act has, therefore, to be rejected as completely misconceived.

181. Can, then, the DoE seek recourse to the DSE Rules, to justify this action? Mr. Ramesh Singh would seek to do so, basing his submission on Rule 50 and 56 of the DSE Rules.

182. The power to make rules conferred by Section 28 of the DSE Act. Sub-section (1) thereof empowers the Administrator to, with the previous approval of the Central Government, and by previous publication by notification, "make rules to carry out the provisions of the Act". This, by itself, indicates that the DSE Rules cannot be so interpreted as to permit something which the DSE Act does not. I have already opined, hereinabove, that the withdrawal of recognition of the petitioner, by the DoE, and the manner in which the said withdrawal was effected, was not in accordance with any provision of the DSE Act, and could not be stated to be authorised thereby. The inevitable corollary would be that the said decision could not be authorised by any provisions of the DSE Rules, either, as, then, the Rules would be infracting Section 28(1) of the DSE Act and would, to that extent, be *ultra vires*.

183. Strictly speaking, therefore, it would not be necessary to embark into an analysis of the DSE Rules, or of Rule 50 or 56 therein. As the said provisions have been pressed into service by Mr. Singh, however, I would make the requisite allusion thereto.

184. Before doing so, however, it is significant to note that, while sub-section (2) of Section 28 enumerates certain aspects in respect of which the said provision specifically empowers the framing of Rules, withdrawal of recognition of unaided schools is not one of them.

185. Adverting, now, to the DSE Rules, the Show Cause Notice, dated 25th May, 2018 *supra* invokes Rule 56 of the said Rules. Rule 56, which already stands reproduced hereinabove, contemplates, in sub-rule (1) thereof, issuance of a Show Cause Notice, against proposed withdrawal of recognition, in any one of three circumstances. These are (i) if the school ceases to fulfil any requirement of the DSE Act, (ii) if the school ceases to fulfil any of the conditions specified in Rule 50 of the DSE Rules, or (iii) if the school fails to provide any facility specified in Rule 51 of the DSE Rules. The third of these circumstances, clearly, would not apply, there is no allegation that the petitioner failed to provide any facility specified in Rule 51 of the DSE Rules. Insofar as the first and second circumstances are concerned, it is significant that the Show Cause Notice contains the following clear acknowledgement:

> "And whereas, the Hon'ble Supreme Court in the judgement dated 27.04.2004 in the matter of Modern School Vs Union of India & Ors held that *so far as allotment of land by DDA is concerned, suffice it to point out that the same has no bearing with the enforcement of the provisions of the Act and the rules framed thereunder* but indisputable the institutions

> are bound by the terms and conditions of allotment. In the event of such terms and conditions of allotment have been violated by the allottees, the appropriate statutory authorities would be at liberty to take appropriate step as is permissible in law."
>
> (Emphasis supplied)

This single assertion, in the Show Cause Notice is, by itself, more than sufficient to discountenance the reliance, placed by Mr. Ramesh Singh, on the provisions of the DSE Act and the DSE Rules, or the contention that the withdrawal of recognition, of the petitioner, by the DoE, could be justified thereunder. Even otherwise, inasmuch as the DSE Act does not contain any provision which requires an unaided school to obtain prior approval, before increasing its fees, save and except in the case of mid-session increase, it cannot be said that the petitioner had, for want of obtaining any such prior approval, infracted any of the provisions of the DSE Act. There could be no question, therefore, of invocation of Rule 56 of the DSE Rules, either, as the justification for the decision, of the DoE, to withdraw the recognition of the petitioner-School.

186. But how then, Mr. Singh would seek to "ask himself", could the DoE ensure compliance, by the schools, with the "land clause"? As I have already noted hereinabove, paragraph 24 of the judgment in ***Modern School (supra)*** *did not require the DoE to ensure any such compliance, but only to ascertain whether such compliance had taken place, or not and, in the latter eventuality, to act in accordance with the law*. The "law", in that regard, would unquestionably include the provisions of the DSE Act and the DSE Rules. If, therefore, the DSE Act and the DSE Rules did not authorise the DoE to withdraw the recognition of the petitioner, for the perceived default, on its part, in obtaining "prior

approval" of the DoE, before increasing its fees, paragraph 24 or ***Modern School (supra)***, too, could not do so.

187. While ***Modern School (supra)*** did not direct the DoE to ensure compliance, by the schools, with the "land clause", paragraph 18 of the report of the judgment of this Court in ***Justice For All (supra)***, unquestionably, does so. In the said paragraph, this Court directed the DoE to "ensure the compliance of term, if any, in the letter of allotment regarding the increase of the fees by all the recognised unaided schools which are allotted land by DDA". The respondent would, therefore, be justified in contending that it was required to "ensure compliance", by the schools, of the "land clause", where the said clause applied.

188. Apropos the query posed by Mr. Singh, i.e., as to how the DoE could "ensure compliance", by the schools, with the "land clause". Needless to say, such "ensuring" of compliance could not be in a manner for it to the provisions of the statute, or alien to the powers conferred, on the DoE, thereby and thereunder. Indeed, as no such "land clause" finds itself in the DSE Act, the DSE Rules, the statutes would not, quite obviously, provide for the action to be taken in the eventuality of non-compliance with the said clause.

189. "The land clause" is a creature of contract. It was inserted in the contracts/letters whereby land was allotted, to the schools, by the DDA. It does not, expressly or by necessary implication, seek to source itself to any provision of the DSE Act, of the DSE Rules. It is, therefore, in a way *sui generis*.

190. Being a creature of the contract between the DDA and the schools to which the land had been allotted, the consequence of infraction of the "land clause" would also necessarily have to be traced to the said contract itself. It is not necessary for this Court to enter into this arena, as I am seized only with the issue of the legality, or otherwise, of the impugned Order, passed by the DoE, withdrawing the recognition from the petitioner-School. It appears, however, that the answer to the above poser is to be found in the judgment of this Court in ***Justice For All (supra)*** itself, in the concluding directions, whereby it has been directed that "the Respondent No. 2/DDA shall also take appropriate steps, in accordance with law, in case of violation of such stipulation in the letter of allotment by the unaided schools". In view thereof, it may be a moot point as to whether the DDA can take action, against the School, for violation of the said clause. As already noted hereinabove, I, however, do not propose to venture any opinion on the said issue, as it does not fall for consideration in these proceedings.

191. It has, therefore, necessarily to be held that, in withdrawing the recognition of the petitioner-School, the DoE acted in excess of the authority vested in it, and that the said action cannot be sought to be sustained on the basis of the directions contained, either in ***Modern School (supra)***, or in ***Justice For All (supra)***. Neither of these decisions could be said to have empowered the DoE to take action, against the petitioner, in a manner unknown to the DSE Act or the DSE Rules.

192. Proceeding, now, to the merits of the impugned Order, i.e., to the validity of the objection, by the DoE, regarding non-obtaining, by the petitioner, "prior approval" of the DoE, before enhancing its fees, it would become apparent, from a reading of the discussion hereinabove, and the law laid down by the various decisions cited in that regard, that, in the matter of fixation of fees, the distinction, between the rights of unaided non-minority schools, and unaided minority schools, is practically chimerical. In both cases, the schools are entitled to complete autonomy in the matter of fixation of their fees and management of their accounts, subject only to the condition that they do not indulge in profiteering, and do not charge capitation fee, thereby "commercialising" education. There is no requirement for the school to take "prior approval", of the DoE, before enhancing its fees. The only responsibility, on the School, is to submit its statement of fee, as required by Section 17(3) of the DSE Act. Mr. Gupta is right in his submission that, having done so, the schools could not be expected to wait *ad infinitum*, before the said statement of fees, submitted by them, was examined and verified by the DoE. Any such examination and verification, too, it is clarified, would have to be limited to the issue of whether, by fixing its fees, or enhancing the same, the school was "commercialising" education, either by charging capitation fee or by indulging in profiteering. If, therefore, pending the decision of the DoE on its Statement of Fee, the school decided to commence charging the enhanced fee from the beginning of the next academic session, it cannot be said that the school had, in any manner, infracted the provisions of the DSE Act or the DSE Rules.

193. The impugned Order dated 6th December, 2018 contains no allegations, against the petitioner of "commercialisation" of education, by profiteering or charging capitation fee. *A fortiori*, the impugned Order, in withdrawing the recognition of the petitioner-School on the ground that it has not obtained "prior approval" of the DoE before increasing its fees, is completely unsustainable, on facts as well as in law.

194. In ***St. Columba's School (supra)***, the Order, dated 18th December, 2013, and the Notification, dated 30th December, 2013, issued by the Hon'ble Lieutenant Governor, which were challenged, directed private unaided minority schools to admit children, belonging to the Economically Weaker Sections (EWS), to the extent of 20% at the entry level and to provide free ship to them till the completion of the school education. One of the submissions, advanced by the respondent, to justify the issuance of the said Notification in the Order was that land had been provided, to the school, at concessional rates, because of the sponsorship by the DoE, which carried, with it, the obligation to admit students belonging to the EWS category. The following passage, from the judgment of the Constitution Bench of the Supreme Court in ***Pramati Educational & Cultural Trust v. U.O.I., (2014) 8 SCC 1***, was relied upon, by a learned Single Judge of this Court, adjudicating the above controversy:

> "Under Article 30(1) of the Constitution, all minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice. Religious and linguistic minorities, therefore, have a special constitutional right to establish and administer educational schools of their choice and this Court has repeatedly held that the State has no power to interfere with

> the administration of minority institutions and can make only regulatory measures and has no power to force admission of students from amongst non-minority communities, particularly in minority schools, so as to affect the minority character of the institutions."

Taking a leaf, as it were, from the above extracted passage from ***Pramati Educational & Cultural Trust (supra)***, this Court proceeded to hold, in paragraph 5 of the judgment, that "as the Constitution Bench has held that even after amending the Constitution, the State cannot abrogate the rights of the minorities to establish and administer schools of their choice, then *by a covenant in a lease deed,* Government certainly cannot appropriate the right to nominate non-minority EWS students to minority school*."* In the circumstances, this Court opined that "the Constitutional mandate will prevail *de hors any alleged provision in the lease deed."*

195. I have already noted, hereinbefore, that the submission of Mr. Ramesh Singh, to the effect that the protective umbrella, of Article 30(1) of the Constitution of India only extended to ensuring that the minority status of institutions established by minorities, would remain preserved, is not strictly correct and that the said Article not only preserves the minority status of such institutions, but also preserves their autonomy to establish and administer themselves, and manage their affairs, a core ingredient, whereof, was the right to fix their fees. It would not, therefore, be permissible to the respondents to enforce, against a minority institution, any covenant, in the deed whereunder land was allotted to it, in such a manner as to abrogate the fundamental right of such institution, as conferred by Article 30.

196. In view of the above, it becomes unnecessary for me to adjudicate on the controversy of whether land had, or had not, in fact, been allotted to the petitioner at concessional rate. Even if it were to be assumed that the land allotted to the petitioner was at concessional rate, that would not justify the issuance of the impugned Order dated 6th December, 2018.

197. ***Mount Carmel School (supra)*** – filed by the petitioner before this Court in the instant case – sought quashing of a Notification, dated 7th January, 2017, issued by the DoE, to the extent applied to the petitioner, and for reading down Condition No. 20 of the allotment letter issued by the DDA, with an attendant declaration that the said clause could not override the constitutional rights of the petitioner. The clauses, in the said Notification, with which the petitioner claimed to be aggrieved, required the school to offer admission to students residing within 1 km, failing which the students residing within 1 to 3 km, and, failing that, to students residing within 3 to 6 km, of the school, before opening admission to students residing beyond the said distance. Specifically in respect of minority schools, the Notification, while acknowledging the right of minority schools to reserve seats for students belonging to the minority concerned, directed that the remaining unreserved seats would be treated as Open/General seats, and admission to these seats would be conducted on the basis of the "neighbourhood" limits, to which reference has already been made hereinabove. The vexing Clause 20 of the allotment letter, whereunder land was allotted to the petitioner, prohibited the petitioner from refusing admission "to the residents of the locality". These clauses, the petitioner sought to contend, infringed the right

available to it under Article 30 (1) of the Constitution of India, to which any clause in the lease deed would necessarily have to subjugate itself. This Court, adjudicating the controversy, placed reliance on the decision in ***Ahmedabad St Xavier's College (supra)***, observing that, in the said decision, it had been categorically held that "minorities based on religion have the right to establish and administer educational institutions imparting general secular education within the meaning of Article 30 of the Constitution of India. It was also noted that the 11-Judge bench of the Supreme Court had, in ***T. M. A. Pai (supra),*** held that unaided private schools were entitled to maximum autonomy with regard to admission of students at the school level, and that "autonomy and non-regulation of the school administration in the right of appointment, admission of the students *and the fee to be charged* will ensure that more such institutions are established." Further, it was noted that ***Pramati (supra)*** held that the power, under Article 21-A of the Constitution, could not extend to making of law which would abrogate the right of minorities to establish and administer schools of their choice. The DoE had, in the said case, advanced a submission that the impugned Notification only sought to enforce a contractual term, which constituted a waiver of the fundamental right of the schools. This argument, too, was negatived, relying, *inter alia*, on the earlier decision of this Court in ***Modern School (supra)***. The matter was reiterated, in this decision, with greater emphasis, in the following words:

> "Consequently, this Court is *prima facie* of the view that *the State cannot enforce the contract of a covenant in the lease deed/allotment letter in violation of the fundamental right guaranteed under Article 30 of the Constitution*, as it constitutes a basic feature of the Constitution."
>
> (Emphasis supplied)

198. Though the above observations were entered, by this Court, at the interlocutory stage and are, therefore, necessarily *prima facie* in nature, they represent, in my opinion, the correct legal position.

Conclusion

199. For all the above reasons, the impugned Order, dated 6th December, 2018, issued by the DoE, whereby the recognition of the petitioner-School has been withdrawn, cannot sustain the scrutiny of the law, and deserves, therefore, to be set aside.

200. It is ordered accordingly.

201. The writ petition is therefore allowed, with no order as to costs.

A Postscript

202. It is, probably, too much to expect that the omega to the controversy in this case will stand written with this pronouncement. If eleven Hon'ble Judges of the highest court of the land, the exercise of their collective wisdom, and the classic exposition of the law, as it emerged therefrom in the form of ***T. M. A. Pai (supra)***, could not still the waters, my humble effort is hardly likely to do so. I can only, therefore, close with the fond – perhaps too fond? – hope that, some day, calm would descend on the issue, and the educational edifice of our country

would get down to doing what it was created, and intended, to do from the beginning – which is the dissemination of education, and the bringing forth, for the eons to come, of a generation enlightened and illumined with the light of knowledge and learning.

C. HARI SHANKAR, J

MARCH 15, 2019/HJ