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

Pronounced on: 20th May, 2020

+ W.P.(C) 9688/2018 & CM APPLs. 37743/2018, 6445/2019, 9733/2019

RAMJAS SCHOOL ..... Petitioner

Through: Mr. Sunil Gupta, Sr. Adv. with Kamal Gupta, Ms. Pragya Agarwal and Mr. Yudhishter, Advocates.

versus

DIRECTORATE OF EDUCATION ..... Respondents

Through: Mr. Ramesh Singh, SC for GNCTD with Mr. Santosh Kr. Tripathi and Mr. Chirayu Jain, Advs for DOE

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

JUDGEMENT

% 20.05.2020

(Pronounced via Video-Conferencing)

1. To what extent can the Directorate of Education monitor the fixation of fees, by a private unaided school, in a situation in which the land, on which the school is located, has been allotted to the society administering the school without any caveat requiring the school to take prior approval, of the Directorate of Education, before increasing its fees in any academic session?

2. The petitioner would contend that the Directorate of Education (hereinafter referred to as "the DoE") is completely proscribed from

interfering with the manner in which a school, which is not governed by any such 'land clause', fixes its fees, absent any element of profiteering. According to the petitioner, the autonomy, available to a private unaided school, in the management of its affairs, extends to the fixation of its fees, and the DoE cannot arrogate, to itself, the best discretion in that regard. Nor can the DoE, according to the petitioner, opine that the surplus funds, available with a private unaided School, were more than sufficient for the school to manage its affairs and that, therefore, no justification, for increase of fees, by the school, existed. Any such attempt, on the part of the DoE, submits the petitioner, would amount to illegal trespass, by the DoE, into the area of autonomy enjoyed by the school.

3. The DoE would contend, *per contra*, that the power, vested in the DoE, to ensure that Schools do not indulge in commercialisation of education, extends to interfering with the manner in which fees are fixed by the school. Fixation of fees, by the school, in such a manner as would result in collections grossly in excess of the expenses incurred by the school, according to the DoE, may amount to commercialisation of education by the school, and would justify interference by the DoE. The DoE places reliance, in this regard, on Rules 172 to 177 of the Delhi School Education Rules, 1973 (hereinafter referred to as "the DSE Rules") which, according to the DoE, set out the manner in which fees, collected by a School, are to be applied by it. In the event a School is found to be utilising the fees collected by it, in a manner which does not subscribe to the scheme

contained in Rules 172 to 177 of the DSE Rules, the DoE would contend that it has every right to interfere.

4. Reconciliation and resolution of these two extreme stances, and arriving at the exact legal position would require me, in the first instance, to set out, in some detail, the relevant facts.

Facts

5. On land which was allotted by the Land and Development Office (L & DO), the petitioner-School (hereinafter referred to as "the school") came to be established in 1974. It is not in dispute that there was no clause, in any of the documents relating to allotment of land to the petitioner, requiring prior approval of the DoE to be obtained, before increase of fees, by the school. In other words, the petitioner-School was not subject to any 'land clause'. It is also not in dispute that the petitioner is a private unaided school, which receives no aid from the DoE, or from any Governmental authority, and is, therefore, dependent on the fees collected by it, to administer its affairs.

6. The affairs of the petitioner are, undoubtedly, subject to regulatory control by the DoE, and governed by the provisions of 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").

7. The petitioner-School stands recognised by the DoE. Section 17 of the DSE Act deals with fees and other charges to be collected by

Schools. Sub-sections (1) and (2), thereof, deal with aided schools and are, therefore, not applicable to the petitioner. Sub-section (3), which requires the filing of an annual statement of fees by every recognised school, reads as under:

> "(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."

8. The petitioner has sought to impress, on the DoE as well as, later, on this Court, the fact that the only requirement, regarding submission of statement of fees, by an unaided school to the DoE, is to be found in the afore-extracted sub-section (3) of Section 17 of the DSE Act, which only requires the school to file, with the DoE, a full statement of the fees to be levied by the school during the ensuing academic session, before the commencement thereof. The only proscription, contained in the said sub-section, is on a school charging fees in excess of the amount specified in the said statement of fees, which, though not entirely prohibited, would require prior approval of the DoE. There can be no gainsaying that no other clause, requiring prior approval of the DoE, before fixation of fees, or even increase thereof, by an unaided recognised school, is to be found anywhere in the DSE Act or in the DSE Rules.

9. Before proceeding further, it would be appropriate to briefly chart out the evolution of the law, relating to fixation of fees, by

educational institutions which are, and which are not, subject to any 'land clause'.

10. The interlink, between allotment of land at concessional rates for establishment of educational institutions, and the fees charged by educational institutions established on such land, came up for comment, by the Supreme Court, initially in ***U.O.I. v. Jain Sabha, New Delhi***[1]**,** in which the following observations were returned, in para 11 of the report:

> "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."
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> (Emphasis supplied)

[1] **(1997) 1 SCC 164**, rendered by a bench of 2 Hon'ble Judges

11. Educational institutions established on land, sourced from the land-owning agencies at reduced rates, therefore, constitute a category *sui generis*. A clear distinction, between such institutions, and institutions located on land purchased at commercial rates, therefore, stands chalked out as far back as in 1997.

12. The *locus classicus*, insofar as autonomy of educational institutions, in the statutory regime is, unquestionably, the judgement of a Constitution Bench of 11 Hon'ble judges of the Supreme Court in ***T. M. A. Pai Foundation v. State of Karnataka***[2]. Criticising and overruling its earlier judgement, rendered by a Constitution Bench of 5 Hon'ble Judges in ***J. P. Unnikrishnan v. State of A. P.***[3], the Supreme Court, in ***T. M. A. Pai Foundation***[2], opined thus (in paras 35 and 36 of the report):

> "**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.
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> **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

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[2] **(2002) 8 SCC 481**
[3] **(1993) 1 SCC 645**

> 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.

13. ***T. M. A. Pai Foundation***[2], having observed thus, noted that private educational institutions were "a necessity" and that the earlier decision in ***J. P. Unnikrishnan***[3], insofar as it framed a scheme relating to grant of admission and *fixation of fee*, was not correct.

14. ***T. M. A. Pai Foundation***[2] went on to address, in exhaustive detail, the core issue arising before it, viz. the extent to which the affairs of private educational institutions, aided as well as unaided, can be regulated by the government. *Absent profiteering*, the Supreme Court held that the right to establish and administer educational institutions included, within it, the right "to set up a reasonable fee structure". Such a "fee structure", it was observed, "must take into consideration the need to generate funds to be utilised 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". In para 54 of the report, it was held that the "fixing of a rigid fee structure" was an "unacceptable restriction" on the right to establish an unaided educational institution, and could not, therefore, be regarded as "permissible regulation". Thereafter, paras 55 to 57, 61, and 66, of the report went on to hold, thus:

> "**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.*

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61. 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.

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> **66.** 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.*"
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> (Emphasis supplied)

15. The answers, of the Court, to the issues arising in the above case were enumerated, towards the conclusion of the majority opinion (authored by B. N. Kirpal, J., as he then was). While dealing with the issue of whether the statutory provisions, regulating facets of administration, like control over educational agencies, control over governing bodies, conditions of affiliation 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 unaided educational institutions, the Supreme Court held that "fees to be charged by unaided institutions cannot be regulated but no institution should charge capitation fee". Similarly, while examining the sustainability of its earlier view, in ***J. P. Unnikrishnan***[3], the Supreme Court, while holding the scheme, framed by it in the said decision, to be unconstitutional, held, nevertheless, thus:

> "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.*"
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> (Emphasis supplied)

16. ***T. M. A. Pai Foundation***[2], therefore, emphasised, in unequivocal terms, the autonomy of private unaided educational institution, to administer the affairs, free from governmental control, inter alia, in the matter of fixation of their fee structure, subject to the caveat that the institution could not charge capitation fee, or indulge in profiteering. 'Profiteering' was also, in a sense, negatively defined, by holding that "reasonable surplus to meet cost of expansion and augmentation of facilities" would *not* amount to 'profiteering'.

17. 'Capitation fee', though not defined in ***T. M. A. Pai Foundation***[2], refers, conceptually, to charging of a fee in excess of that prescribed by statutory regulations. No such allegation having been levelled against the petitioner, further reference to the concept of 'capitation fee' may conveniently be eschewed.

18. Marked disparity, in the manner in which ***T. M. A. Pai Foundation***[2] was being interpreted, by the Union of India as well as by various State Governments, necessitated reference, of the issue, once again, to a Constitution Bench of the Supreme Court, comprising five Hon'ble judges, which rendered its verdict, on 14th August, 2003, in ***Islamic Academy of Education v. State of Karnataka***[4]. Two questions were framed, by the Supreme Court, as arising for its consideration, of which the first – which, alone, is relevant for us – was "whether the educational institutions are entitled to fix their own fee structure". On this issue, it was opined by the majority, in ***Islamic Academy of Education***[4], that the majority view, in ***T. M. A. Pai***

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[4] **(2003) 6 SCC 697**

Foundation[2] was "very clear". Para-7 of the report in ***Islamic Academy of Education***[4] ruled, in this regard, *inter alia*, thus:

> "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."
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> (Underscoring supplied; italics in original)

19. ***Islamic Academy of Education***[4], therefore, while re-emphasising the right of private educational institutions to determine and maintain their fee structure, keeping in mind the benefit of the institution and of the students for whom it is meant, also underscored the requirement of a *reasonable surplus*, with such institutions, which could be utilised towards advancement of the institution and betterment of the students. Diversion of such surplus, to other

purposes was, however, proscribed. In the matter of determination of the quantum of fees to be charged, ***Islamic Academy of Education***[4], once again, stressed the necessity of preservation of institutional autonomy, free from governmental interference, even while clarifying that the quantum had to be fixed keeping in mind the infrastructure and facilities available, investments made, salaries paid to the teachers and staff, future plans for expansion and/or betterment of the students, and other such considerations. The complete prohibition, on charging of capitation fees, and profiteering, was, however, once again underscored.

20. Significantly, the partially concurring judgement of Sinha, J., in ***Islamic Academy of Education***[4] provided, for the first time, for a definition of "profiteering", to which this judgement shall, presently, advert.

21. This Court had, as far back as on 30th October, 1998, emphasised the right of unaided educational institutions to fix, and levy, their fees, without prior, or later, sanction, of the DoE or of any other governmental authority, in ***Delhi Abhibhavak Mahasangh v. U.O.I.***[5] (hereinafter referred to as ***"Delhi Abhibhavak Mahasangh-I"***). The said decision was carried, in appeal, to the Supreme Court, and the judgement rendered therein (by a bench of three Hon'ble Judges) came to be reported, subsequently, as ***Modern School v. U.O.I.***[6]. Three questions were framed, by the Supreme Court in the

[5] **AIR 1999 Del 124: 1998 SCC OnLine Del 809**
[6] **(2004) 5 SCC 583**

said decision, as arising for its consideration, the first of which directly addresses the issue in controversy herein, and read thus:

> "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?"

The issue, thus framed, acquires especial importance in view of the stand, of the DoE, in the present case, that the impugned Order, dated 18th July, 2017, was issued in exercise of the powers conferred by Section 17(3) of the DSE Act. In examining whether the DoE could, or could not, do so, therefore, ***Modern School***[6] has, inevitably, to serve as a guiding precedent.

22. As in the present case, the stand of the DoE, before this Court in ***Delhi Abhibhavak Mahasangh-I***[5], as well as before the Supreme Court in appeal thereagainst, in ***Modern School***[6], was that the fees, charged by the schools, were excessive and disproportionate in comparison to their requirement, and amounted to 'commercialisation of education' by the schools. Modern School, as the appellant before the Supreme Court, contended, *per contra*, that the Government has no authority to regulate fees payable by students of unaided schools, and that Section 17(3) of the DSE Act only required the management of the unaided school to submit, to the DoE , a full statement of fees leviable during the ensuing academic session. In this connection, the contrast, between Section 17(1) and (2), and Section 17(3), was sought to be highlighted, pointing out that, in the case of aided schools, sub-sections (1) and (2) of Section 17 did permit regulatory control by the Government in the matter of fixation of fees, whereas

unaided schools were excepted from such control, under sub-section (3). In this scenario, "the first point for determination", as encapsulated in para 13 of the decision in ***Modern School***[6] by the Supreme Court, was "whether the Director of Education has the authority to regulate the fees of unaided schools". This, precisely, is the point that arises before this Court in the present litigation, as well.

23. Paras 14 and 15 of the report, which condensed, in a nutshell as it were, the opinion of the Supreme Court, on this issue, and the relevant portion, thereof, may be reproduced as under:

> "**14.** 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.
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> **15.** … 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 para 56) that economic forces have a role to play in the matter of fee fixation. *The institutions should be permitted to make*

> *reasonable profits after providing for investment and expenditure. However, capitation fee and profiteering 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.* This issue was not there before this Court in ***T.M.A. Pai Foundation case [(2002) 8 SCC 481]*** .
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> (Emphasis supplied)

24. The afore-extracted passages, from ***Modern School***[6], even while re-emphasising the autonomy, possessed by unaided schools in the matter of fixing of fees, reiterated that schools were entitled to maintain a reasonable surplus – alternatively termed "reasonable profits after providing for income and expenditure". So long as the institution was not charging capitation fee, and was not 'profiteering', the Supreme Court re-emphasised the principle that the DoE could not tinker with the right of the institution to "reasonable profits after providing for income and expenditure" or, expressed otherwise, "a reasonable surplus".

25. It appears, however, that, even while so holding, the Supreme Court was aware of the possibility of the DoE – or any other Governmental authority – capitalising on the use of the word "reasonable", as a means to override the autonomy, possessed by unaided educational institutions, to fix their fees. Apparently advisedly, therefore, the Supreme Court chose not to leave the expression "reasonable", used in juxtaposition with "surplus" in the

context of Section 17(3) of the DSE Act, open-ended, but went on to clarify, in para 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."
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> (Italics and underscoring supplied)

The authority of the DoE, even under Section 17(3) of the DSE Act is not, therefore, to sit in appeal over the exercise of discretion, by the school, of the manner in which it is to fix its fees, but to ensure that, in so doing, the school does not indulge in "commercialisation of education". Absent such commercialisation, the autonomy, of an unaided school, to fix its fees, under the DSE Act and the DSE Rules, has to be accorded due respect.

26. The word "to", though monosyllabic and consisting of just two letters, is, as used in the afore-extracted passage from the decision in Modern School, of fundamental significance. The Supreme Court has clarified that the authorisation, with the DoE, under Section 17 (3) of the DSE Act, to regulate fees and other charges, charged by the unaided school, is "*to* prevent commercialisation of education". The word "to", etymologically, connotes motive and purpose. The DoE, therefore, while exercising its jurisdiction under Section 17 (3) of the DSE Act, has to keep in view the purpose, for which power has been conferred, on it, to regulate the fee, charged by unaided schools,

which is prevention of commercialisation of education. *Absent such commercialisation*, it may be stated at the cost of repetition, that the DoE cannot arrogate, to itself, *any authority* to sit in appeal over, *or even to regulate*, the fee charged by an unaided school.

27. The next decision of consequence is ***P. A. Inamdar v. State of Maharashtra***[7], rendered by a bench of seven Hon'ble Judges, which was constituted in order to reconcile certain perceived inconsistencies between ***T. M. A. Pai Foundation***[2] and ***Islamic Academy of Education***[4]. It is not necessary to dwell, deep, into the said decision, dealing essentially, as it were, with the right of minority educational institutions to administer their affairs, in the context of Article 30(1) of the Constitution of India; suffice it to note, however, that, even while ceding the authority, of the State, to regulate the affairs of minority educational institutions, the Supreme Court held, in para 121 of the report in ***P. A. Inamdar***[7], as under:

> "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*

[7] **(2005) 6 SCC 537**

> *quantum of fee to be charged, cannot be regulated*. (Para 55***, Pai Foundation [(2002) 8 SCC 481]***)
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> (Italics and underscoring supplied)

In the same vein, para 141 of the report holds that "every institution is free to devise its own fee structure but the same *can be regulated in the interest of preventing profiteering*", and that "no capitation fee can be charged". The power to regulate is, therefore, not unbridled, but is to be exercised *in the interest of preventing profiteering*. Similarly, para 143 of the report opined that "even unaided minority institutions can be subjected to regulatory measures *with a view to curb commercialisation of education, profiteering and exploitation of students*".

28. Also instructive, in this regard, is the decision, by a Bench of three Hon'ble Judges of the Supreme Court, in ***Cochin University of Science and Technology v. Thomas P. John***[8]. This judgement is significant, in that, in paras 11 and 12 of the report, the Supreme Court opined 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*" and 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*". While accepting that an educational institution does not have a *carte blanche* to charge any fee that it chose, the Supreme Court clarified, nevertheless, that "substantial autonomy must be left

[8] **(2008) 8 SCC 82**

to it". Equally, it was emphasised, "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." The finding, of the High Court, that the fixation of higher fee, by the University, for two years, did not have any rational basis, was specifically disapproved by the Supreme Court, which held that this cast, on the University, the onus to explain the fixation of fees by it, the accurate discharging of which would be difficult.

29. Qua unaided schools which are not situated on land to which the 'land clause' applies, therefore, there is uniformity of judicial opinion that the power of the DoE to regulate fees, while undeniable, is limited to ensuring that the school does not indulge in profiteering or charging capitation fees. Absent these two disabling infirmities, the autonomy, of unaided educational institutions to fix their fees, cannot be gainsaid.

Reverting to the facts

30. Consequent on the judgement, of the Supreme Court in ***Modern School***[6], this Court, in its judgement, dated 19th January, 2016 in ***Justice For All v. G.N.C.T.D.***[9], directed the DoE to ensure compliance, by schools situated on land, allotted with the 'land

[9] **227 (2016) DLT 354 (DB) : 2016 SCC OnLine Del 355**

clause', therewith. By way of implementation thereof, Order No F. DE-15/Act-I/WPC-4109/13/6750, dated 19th February, 2016, was issued by the DoE, informing the Heads of all Private unaided recognised Schools, allotted land with the 'land clause', that they were required to seek prior sanction of the DoE for increase in the tuition fee. This was followed by Order No F. DE-15/Act-I/WPC-4109/13/7914-7923, dated 16th April, 2016, directing all such schools, located on land, allotted to them with the 'land clause', to submit proposals, for prior sanction of the DoE, for the increase in tuition fee for the academic session 2016-2017, latest by 31st May, 2016. The opening paras of the aforesaid Order, dated 16th April, 2016, may be reproduced, thus:

> "Government of National Capital Territory of Delhi
> Directorate of Education
> Old Secretariat, Delhi-110054
>
> No. F. DE-15/ACT-I/WPC-4109/Part/13/7914-7923
> Dated: 16-04-2016
>
> **ORDER**
>
> Whereas Hon'ble High Court of Delhi vide judgement dated 19.01.2016 in the Writ Petition No 4109/2013 in the matter of Justice for All versus GNCTD and others has directed the Director of Education *to ensure the compliance of term, if any, in the letter of allotment regarding the increase of the fee by all the recognised unaided schools which are allotted land by DDA*;
>
> And whereas, vide order no F. DD-15/Act-I/WPC-4109/13/6750 dated 19.02.2016, the Directorate of Education informed all the HOSs/Managers of all 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 tuition fee/fee*, about the aforesaid directions of Hon'ble High Court of Delhi;

> 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 the 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 and documents mentioned therein latest by 31st May, 2016. Any incomplete proposal shall be summarily rejected."
>
> (Emphasis supplied)

For the sake of the record, it may be noted that the deadline of 31st May, 2016, stipulated in the aforesaid Order, dated 16th April, 2016, of the DoE, was extended till 31st July, 2016, *vide* subsequent Order dated 3rd June, 2016, also by the DoE.

31. On 15th July, 2016, the DoE issued Order No F. DE-15/ACT-I/WPC-4109/PART/13/10248-10255. The first four paragraphs of the said Order, which are self-speaking in nature, may be reproduced thus:

> "Whereas this Directorate vide orders of even-number dated 16.04.2016 and No F. DE-15/ACT-I/WPC-5256/16/95 2-9359 dated 03.06.2016 sought online proposals of fee increase for prior sanction of the Director of Education, from the Unaided Recognised Private Schools allotted land by the land owning agencies *on the condition of obtaining such prior sanction for fee increase from the Director of Education*, up to 31st July, 2016;
>
> And whereas many Private Unaided Recognised Schools have submitted their online proposals till date which have been scrutinised by this Directorate. On scrutiny of these proposals and documents uploaded by these schools, some discrepancies have been found in the uploaded documents

being 'Incomplete' or 'Illegible' or 'Not in Specified Format';

And Whereas this Directorate has decided to carry out an inspection *of these schools* under section 24 of the Delhi School Education Act, 1973 read with rule 190 of the Delhi School Education Rules, 1973 for the purposes of Scrutiny and Verification of these proposals with the books of accounts and other records maintained by the school by a team of Chartered Accountants from the Empanelled firms of this Directorate vide order of even number dated 3rd June, 2016;

Now, therefore, in terms of the rule 191 of the Delhi School Education Rules, 1973 the Managers/HoS of the schools mentioned in the list attached, are hereby given, advance intimation of the proposal to carry out inspection tentatively from 25th July, 2016 onwards."

(Emphasis supplied)

32. *It is immediately apparent that neither of the above Orders issued by the DoE, i.e., neither the 16th April, 2016 Order, nor the 15th July, 2016 Order, applied to the petitioner, as the petitioner-School was not situated on land, allotted with a 'land clause', requiring the petitioner to obtain prior sanction of the DoE before increasing its fees.*

33. *Vide* communication dated 22nd April, 2016, the petitioner wrote to the Deputy Director of Education, submitting its proposed fee structure for the year 2016-2017, which involved an enhancement of the fee being charged earlier. Approved revised budget estimates, for the year 2015-2016, and budget estimates for the year 2016-2017, were also annexed.

34. The said communication was, however, returned, by the DoE, with the following note, dated 23rd April, 2016, appended thereon:

> "R. I. O. With the remark that proposal for enhancement of fee for the session 2016-17 has to be submitted online *as per the relevant circular dated 16/4/2016* on DoE website."
>
> (Emphasis supplied)

Again, it is apparent that the Officer, who returned the letter, dated 22nd April, 2016, appending, thereon, the afore-extracted remark, erred in treating the petitioner as covered by the Circular, dated 16th April, 2016 *supra*, issued by the DoE, as the petitioner, not being a school to which the 'land clause' applied, was not covered by the said Circular.

35. Inspection, by the auditors of the DoE, consequent on the aforesaid Orders, dated 16th April, 2016 and 15th July, 2016, of the DoE, took place between 25th July, 2016 and 16th August, 2016.

36. Consequent on the aforesaid inspection, the Auditors team of the DoE submitted a Report, dated 24th August, 2016. *It was specifically stated, in the said Report, that the team had interacted with the parents of 67 students of the petitioner-School, but had found no financial irregularities, or any element of commercialisation or profiteering.* Insofar as the proposed fee hike, for the 2016-2017 academic session was concerned, it was observed that no case, warranting a refund of fee collected, was found to exist, as

(i) in some years, though excess fee had been collected, in other years, the fee collected was found to be less than that required by the petitioner-School,

(ii) any surplus, or deficit, in a particular financial year, was adjusted from the General Fund and treated with the petitioner for meeting future exigencies; this was found to be expedient,

(iii) overall, the proposed fee hike was reasonable and desirable, to ensure financial health and adequacy of funds for financial stability of the petitioner-School, except for the proposed hike in Development Fee,

(iv) the total projected income for 2016-2017 was more than the proposed fee hike, and the hike in fee, of ₹ 9.44 crores, compared favourably with the actual income of ₹ 8.41 crores, in the previous financial year,

(v) the estimated revenue expenditure, towards establishment, administrative and educational activities of the petitioner, for 2016-2017, of ₹9.66 crores, was realistic as, in 2015-2016, the petitioner had incurred actual expenses of ₹ 8.17 crores, and

(vi) consequently, the fee hike, in respect of tuition fee and activity fee, for 2016-2017, was justified, as the projected income of ₹ 9.44 crores was matching with the projected expenses of ₹9.66 crores, leaving a small budgeted gap of ₹ 0.22 crores.

The Report, however, termed the proposed hike in Development Fee, of ₹ 1.25 crores, to be unjustified, on the ground that there were sufficient reserves, with the petitioner, to meet the projected development expenditure of ₹ 4.14 crores. The said hike, therefore, it was opined, did not appear to be necessary. Consequently, increased

development fee, if already collected, it was recommended, deserved to be refunded.

37. On 26th December, 2016, the DoE issued Order No F. DE-15/ACT-I/WPC-4109/PART/13/126-130, issuing certain directions to the petitioner. The observations, on merits, as contained in the said Order, would be referred to, immediately hereinafter, in précis; however, it is necessary to reproduce the opening paras of the Order, *in extenso*, thus:

> " WHEREAS, Hon'ble High Court of Delhi vide judgement dated 19.01.2016 in writ petition No 4109/2013 in the matter of Justice for All versus GNCTD and others has directed the Director of Education to ensure *the compliance of term, if any, in the letter of allotment regarding the increase of the fee by all the recognised unaided schools which are allotted land by DDA.*
>
> AND WHEREAS The Hon'ble Court while issuing the aforesaid direction has observed that the issue regarding the liability of Private unaided Schools situated on the land allotted by DDA at concessional rates has been conclusively decided by the Hon'ble Supreme Court in the judgement dated 27.04.2004 passed in Civil Appeal No 2699 of 2001 titled Modern School V. Union of India and others were an Hon'ble Supreme Court in Para-27 and 28 has held as under: –
>
> > "27. … (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*…
> >
> > 28. We are directing the Director of Education *to look into the letters of allotment issued by the Government and ascertain whether they (terms and conditions of land allotment) have been complied with by the schools*…

… *If in a given case, Director finds non-compliance of the above terms, the Director shall take appropriate steps in this regard*."

AND WHEREAS, the Hon'ble Supreme Court in the above said judgement also held that under section 17(3), 18(4) read with rule 173, 170, 175 and 177 of Delhi School Education Rules 1973, Directorate of Education has the authority to regulate the fee and other charges to prevent commercialisation of education.

AND WHEREAS, this Directorate vide order No. F. DE-15/ACT-I/WPC-5256/16/9352-9359 dated 16.04.2016, sought online proposals of fee increase for prior sanction of the Director of Education, from the Unaided Recognised Private Schools, allotted land by the land owning agencies *on the condition of obtaining such prior sanction of fee increase from the Director of Education* up to 31.05.2016 and further extended to 31.07.2016 vide this Directorate's order of even number dated 03.06.2016. This date was further extended to 22.08.2016 vide this Directorate's order of even number dated 03.08.2016 *in compliance of Hon'ble High Court judgement dated 29.07.2016 in the WPC No 6612/2016*.

AND WHEREAS, in response to the above Ramjas School, SECTOR-IV R. K. PURAM NEW DELHI submitted the proposal for increase in fee for the academic session 2016-2017.

AND WHEREAS, the directorate or followed a very rigourous and systematic process of evaluation of the financial statements of the school, in order to a certain whether the proposal of the increase in the academic year 2016-17 is justified or not.

AND WHEREAS, a special inspection of Ramjas School, SECTOR-IV R. K. PURAM NEW DELHI, was conducted under Rule 180 of Delhi School Education Rules, 1973, vide order No. De-15/Act-1/WPC-4109/Pt-2/13/10405 – 10412 dated 22.07.2016.

AND WHEREAS, in order to maintain maximum transparency, it was decided vide circular No. DE-15/Act-1/WPC-4109/Pt-2/13/11267-11274 dated 20.09.2016, to share

> the report of special inspection with the school under Rule 190 (6) of Delhi School Education Rules, 1973. Accordingly the report of special inspection was served upon the school for comments.
>
> AND WHEREAS, the comments of the school and field inspection report were then examined and commented upon by an independent team of accountants and financial experts as a second level check to give expert inputs to the Directorate and after taking into account the comments of the school, the school has been found committing the following financial irregularities and violations:"

The Order, thereafter, proceeds to set out the financial and other irregularities/violations, allegedly committed by the petitioner, as per the "independent team of accountants and financial experts", constituted by the DoE "as a second level check". It recites, further, that the findings, of the said "independent team of accountants and financial experts" "were then analysed by a committee constituted by the Director of Education vide Order No. DE-15/Act-1/WPC-4109/Pt-2/13/11515-11519, dated 04.10.2016, comprising of senior officer and accounts functionaries." The concluding paragraphs of the said Order, based on the analysis thus conducted by the committee, "comprising senior officer and accounts functionaries", constituted by the DoE, of the findings of the "independent team of accountants and financial experts", consequent on the "second level check", read thus:

> " AND WHEREAS, the report of Ramjas School, SECTOR-IV, R. K. PURAM NEW DELHI; was evaluated by the said committee, in the light of the findings of special inspection, Schools comments and evaluation and recommendations by the independent team of accountants and financial experts as a second level check as well as of the provisions of DSEAR, guidelines and circular issued from time to time by this Directorate and recommended that since prima facie there are financial deficiencies/irregularities and

also funds are available with the school to carry on its operations for the academic session 2016-17, the fee hike proposal of the school may not be accepted.

AND WHEREAS, these recommendations along with relevant materials were put before Director of Education for consideration and who after considering all the material on the record has not found the proposal of increase in the fee as submitted by said school, fit for granting sanction and has therefore rejected the same.

Accordingly, it is hereby conveyed that the proposal of fee hike of Ramjas School, SECTOR-IV R. K. PURAM NEW DELHI, has been rejected by the Director of Education. Further, the management of said school is hereby directed under section 24 (3) of DSEAR 1973 to comply with the following directions:

1. Not to increase fee for the session 2016-17, if any amount already charged in view of increase of fee for the session 2016-17, the same shall be refunded to the parents or adjusted in the fee of subsequent months as per convenience of the parents.

2. To inform the parents about refusal of fee hike by the Directorate of Education and publicize through its website, notice board and circular to parents.

3. To rectify the deficiencies as listed above and submit compliance report within 30 days to DDE concerned.

4. In case of submission of any further proposal for increase in fee for the next academic session, the compliance of the above listed deficiencies/violations duly rectified it must be attached along with the proposal."

38. The petitioner represented, against the aforesaid Order, dated 26th December, 2016, of the DoE, *vide* communication, dated 30th January, 2017, addressed to the Deputy Director of Education-I

(Public School Branch) in the office of the DoE. It was highlighted, in the said representation, that land had not been allotted to the petitioner, by the DDA, with any inbuilt 'land clause' and that, therefore, the entire exercise of applying, on the petitioner, the Orders, dated 16th April, 2016 *supra* and 15th July, 2016 *supra*, issued by the DoE, as well as the consequent inspection of the petitioner, submission of the report by the inspection team, and, finally, the issuance of the aforesaid Order, dated 26th December, 2016, was, *ab initio*, unjustified and null and void. The petitioner emphasised that it was not subject to audit, by the DoE, as proposed in the aforesaid Orders, dated 16th April, 2016 and 15th July, 2016, issued by the DoE, and that it had been pressurised to submit itself thereto. The petitioner emphasised that it was not required to obtain any prior approval, to increase its fee. Besides, on merits, it was submitted that the Report, dated 24th August, 2016, by the inspecting team, had found the proposed increase in tuition fee and activity fee, by the petitioner, to be justified. Reservations had been expressed, by the said Report, only with respect to the increase in Development Fee, proposed by the petitioner. It was submitted that the DoE did not have the jurisdiction to regulate the Development Fee charged by unaided schools and that, as held by this Court in its order dated 19th January, 2016 in WP (C) 4109/2013 (***Justice for All v. G.N.C.T.D.***[10]), unaided schools were entitled to maintain reasonable surplus towards Development Fee. Attention was also invited, in this context, to para 14 of Circular No F. DE./15 (56) Act/2009/778, dated 11th February, 2009, issued by the DoE, which allowed unaided schools to charge up to 15% of the total

[10] **227 (2016) DLT 354**

annual tuition fee as Development Fee, for supplementing resources for purchase, upgradation and the placement of furniture, fixtures and equipment. The said para also clarified that such Development Fee would be treated as capital receipt and that the school would be required to maintain a Depreciation Reserve Fund equivalent to the depreciation charged in the revenue accounts, and collection under the head of Development Fee, along with income generated from the investment made out of the said fund, was to be kept in a separately maintained Development Fund Account. The petitioner submitted that the petitioner-School was 50 years old, and its furniture and fixtures had become totally outdated, requiring urgent upgradation and replacement, so that the petitioner could remain at par with the neighbouring schools. Finally, the representation highlighted the fact that the petitioner was not indulging in any profiteering, and that all expenses were incurred for the benefit of students alone.

39. The petitioner was granted an opportunity of personal hearing, by the DoE, on the aforesaid representation, dated 30th January, 2017, of the petitioner, directed against the Order, dated 26th December, 2016 *supra*, issued by the DoE. On the said occasion, the petitioner submitted a further representation, dated 1st May, 2017, to the DoE, by way of challenge to the Order, dated 26th December, 2016 *supra*. The representation was generally reiterative of the representation dated 30th January, 2017; the petitioner, however, went further and explained, with facts and figures, the justification for the proposed increase, by it, of tuition fee and activity fee.

40. *Vide* the impugned Order No F. DE-15/ACT-I/WPC-4109/PART/13/831, dated 18th July, 2017, the DoE has rejected the representation, dated 30th January, 2017 *supra*, submitted by the petitioner, in response to the order, dated 26th December, 2016, issued by the DoE. The impugned Order is studiedly, and noticeably, silent regarding the submission, of the petitioner that, as a school, the allotment of land to which was not conditioned by any 'land clause', the entire exercise of auditing the petitioner's accounts, inspecting its records and issuance of the Order dated 26th December, 2016, was vitiated *ab initio*. The impugned Order proceeds, instead, to justify the rejection of the proposal, of the petitioner, to increase its fees for the academic session 2016-2017, returning, in the process, the following findings:

> "And whereas, after going through the representations dated 30.01.2017 and submissions made by the school during the hearing held on.12.05.2017 as well as financial statements/budget of the school available with this Directorate, it emerges that:-
>
> The school is having a surplus fund of Rs. 1,18,42,701/- as per the following details :

Particulars	Amount(Rs)
Cash and Bank. balances as on 31,03.16 as per audited Financial Statements	37,33,902
Investment as on 31.03.16. as per audited Financial Statements	12,12,42,543
Total	12,49,76,445
Less: Development Fund as per audited Financial Statements	4,63,02,138
Less: Depreciation Reserve' Fund: as per audited Financial Statements	1,05,11,284
Less: Provision for Gratuity*	3,48,36,745

Less: Provision for Leave Encashment	98,52,301
Available Funds	2,34,63,977
Fees for 2015-16 as per financial statement (We have assumed that. the amount received In 2015-16 will at least accrue in 2016-17)	8,40,95,053
Other Income for 2015-16 as per financial statement	9,27,671
Estimated availability of funds for 2016-17	10,84,86,701
Less: Budget expenses for the session 2016-17.as submitted by school management (revenue)	9,66,44.000
Net Surplus *	1,18,42,701

*The school is 'hereby directed to make earmarked equivalent investments against provision for Retirement Benefits with LIC (or any other agency) within 90 days of the receipt of this order, so as to protect the statutory labilities. And provisions for gratuity and leave encashment should be based on actuarial valuation.

And whereas, in view of the above examination, It is evident that. The school is having sufficient surplus funds even after meeting all the budgeted Expenditure for the financial year 2016-17.

And whereas, as per clause 22 of Order No. F.DE./15 (56) /Act /2009/ 778 dated 11/02/2009, user charges should be collected, on no profit and no loss basis and should be used only for the purpose for which these are collected. Accordingly, the school is advised to maintain separate fund in respect of each earmarked levies charged from, students in accordance with the DSEA & R, 1973 and orders, circulars, etc. issued there under. If there are large surpluses under any earmarked levy collected from the students, the same shall be considered or adjusted for determining the earmarked levy to be charged in the next academic session.

And whereas as per Clause No. 14 of Order No. F.DE./15(56)/ACT/2009/778 dated 11.02.2009, ‘

Development Fee, not exceeding 15% of the total annual tuition. fee, may be charged for supplementing the resources for purchase, up-gradation and replacement of furniture, fixture and equipment. Development Fee, if required to be charged, shall be treated as capital receipt and shall be collected, only if the school is maintaining depreciation reserved fund, equivalent to the deprecation charged in the revenue accounts and the collection under this head along with and income generated from the investment made out of this fund, will be kept in a separately maintained development fund account.' Accordingly, school is advised to maintain separate development fund and utilized the same strictly in accordance with the DSEA & R, 1973 and orders, circulars, etc., issued there under.

And whereas, these recommendations along with relevant materials were put before Director of Education for consideration and who after considering all the material on the record has found that the school is having sufficient surplus funds to meet the financial implications for the financial year 2016-17 and the representation dated 03.02.2017 and subsequent submissions made thereafter in this regard find no merit in respect of sanction for increase in fee and hereby rejected on the basis of above mentioned observations.

Accordingly, It is, hereby conveyed that the representations for fee hike of Ramjas School, Sector-IV, R.K, Puram, New Delhi-110022, has been rejected by the, Director. of Education, Further, the management of said school is hereby directed under section 24(3) of DSEAR 1973 to comply with the following directions:

1. Not to increase fee for the session 2016-17. If, in case, increased fee has already been charged from the parents, the same shall be refunded/ adjusted.

2. Compliance of all the instructions as mentioned in the order dated 26.12.16 will be seen/examined during the scrutiny of fee hike proposal for session 2017-18,if any.

3. In the light of Judgment of ***Modern School Vs Union of India***, the salaries and allowances shall come out from the fees whereas, capital expenditure be a

> charge on the savings. Therefore It ls to be ensured not to include capital expenditure as a component of fee structure to be submitted by the school under section 17(3) of DSEA&R, 1973.
>
> 4. The fee should be utilised as per letter and spirit of Rule 177 of the DSEA &R, 1973 and the judgement of the Hon'ble Supreme Court in the case of Modern School Vs Union of India (2004)."

41. The petitioner has placed, on record, its audited financial statement as on 31st March, 2016, in an attempt to demonstrate that the manner in which the alleged surplus amount of ₹ 1.18 crores, available with it, has been worked out in the impugned Order dated 18th July, 2017, is contrary thereto. This Court does not, however, intend to enter into this exercise of balancing of accounts, for reasons which will become apparent hereinafter.

42. On 17th October, 2017, Order No DE. 15 (318)/PSB/2016/ 19786 was issued by the DoE, consequent on the recommendations, of the 7th Central Pay Commission (CPC) being accepted and implemented in the case of teachers. The 7th CPC recommendations allowed teachers, and other staff, in schools, a considerable increase in their salary and emoluments. The recommendations of the 7th CPC came into effect from first January, 2016, retrospectively. The Order, dated 17th October, 2017, purported to issue guidelines, in the matter of implementation of the recommendations of the 7th CPC, insofar as private unaided recognised schools in Delhi were concerned. As the said Order does not constitute subject matter of challenge in the present proceedings, it is not necessary to examine it in detail. The petitioner refers to the Order, dated 17th October, 2017, only to

contend that, though private unaided schools, not encumbered by the 'land clause', were, under the aegis of the said Order, entitled to increase their fee by up to 22.5%, in order to meet the additional expenditure entailed as a consequence of the requirement of implementation of the 7th CPC recommendations, the petitioner did not do so, and absorbed the said additional expenditure within the "minimal increase in fee" proposed by it for the years 2016-2017 and 2017-2018. This, contends the petitioner, establishes its *bona fides*.

43. For the sake of the record, it may be mentioned that, *vide* a subsequent Order, dated 13th April, 2018, the DoE withdrew the Order, dated 17th October, 2017, in the case of private schools running on land, allotted by the DDA, with the condition of seeking prior sanction of the DoE for increase in fee, i.e., with the 'land clause'. That Order does not, however, concern us, as the petitioner-School is not subject to the 'land clause'.

44. Various communications, from the DoE, to the petitioner, followed, requiring the petitioner to clarify whether it had, or had not, increased its fee for the year 2016-2017. The petitioner responded, on 27th July, 2018, informing that it had increased its fee, for the years 2016-2017 and 2017-2018, by 10%, as there was no clause, in the lease deed, whereby land was allotted to the petitioner, requiring the petitioner to obtain prior permission of the DoE, before increasing its fees.

45. The petitioner invites, in this context, attention to Order No. F. One (1)/DNWB/PB/2018/882, dated 6th August, 2018, issued by the DoE, which merits reproduction, *in extenso*, thus:

"GOVERNMENT OF NATIONAL CAPITAL TERRITORY
OF DELHI
DIRECTORATE OF EDUCATION
DISTRICT NORTH WEST-B, FU-BLOCK, PITAMPURA,
DELHI-34
Ph. No. 011-27348917
E-mail address: ddnwb2010@gmail.com

No. F. 1(1)/DNWB/PB/2018/882 Dated:- 6/8/18

ORDER

Pursuant to the office order No. DE-15/ACT-I/WEC-4109/Part/13/7914-23 dated 16.04.16 issued by the Director of Education, which is in compliance to the Hon'ble High Court of Delhi vide judgement dated 19.01.16 in the WP (C) No 4109/2013 in the matter of Justice for All Vs GNCT of Delhi & Ors and vide order No. DE/15/ACT-I/WPC-4109/13/6750 dated 19.02.16 issued by Dte. of Education, all the HOS/Manager(s) of Unaided Private Recognised Schools under District North West (B) (running on the land allotted by DDA/L&DO & Ors.), were directed to ensure compliance of terms & conditions, if any, in the land allotment letter regarding increase of fees by Recognised Unaided Private Schools.

In compliance to the above directions, all the HOSs/Managers of Private Unaided Recognised Schools under District North West (B), allotted land by the land owning agencies *on the condition of seeking prior approval of Director of Education for increase of fees*, were directed not to hike the fees without seeking the prior approval of Director (Edn) and strictly follow the guidelines issued by the Department to this effect in its true spirit, vide this office order dated 16.04.16.

In spite of clear-cut directions issued by the DoE and District, a number of complaints are being received from

different corners/forums against some Private Unaided Recognised Schools under this district that the schools have increased and charged the exorbitant hiked fees from its students despite not having the prior approval of Director (Edn), which is illegal.

The action on the part of the school authorities defying the directions of DoE of charging hiked fees without seeking the prior approval of the Competent Authority, has been viewed seriously at the highest level.

Therefore, all the HOS/Manager(s) of Unaided Private Recognised Schools under this district, running on the land allotted by land owning agencies *subject to the condition of seeking prior approval of the Competent Authority for increase in fees*, are hereby directed to ensure that the school has not hiked any fees under any head or under any name from 2016-2017 till date, without explicit approval of HQ/District office. In case, the school has hiked the fees during any of the academic session i.e. w.e.f. 2016-17 till 2018-19 without obtaining the prior approval of the Competent Authority, the HOSs of such schools are hereby directed to immediately refund the same to the concerned students without any further delay, in the first instance and submit the explanation to this effect to the office of undersigned latest within a week's time.

(SHASHI BALA SAINI)
DEPUTY DIRECTOR OF EDUCATION
DISST. NORTH WEST (B)"

(Emphasis supplied)

Thus, points out the writ petition, the DoE, as late as on 6th August, 2018, acknowledged the fact that prior approval, of the DoE, for increasing fees, was required to be obtained only by schools, which had been allotted land, by the land owning agency, incorporating a condition to the said effect.

46. Aggrieved, the petitioner is before this Court, praying that a writ of certiorari be issued, quashing the impugned Order, dated 18th July, 2017, issued by the DoE.

Rival Contentions

47. Submissions, on behalf of the petitioner, have been addressed by Mr. Sunil Gupta, learned Senior Counsel, whereas the DoE has been represented by Mr. Ramesh Singh, learned Senior Standing Counsel (Civil). Detailed written submissions have also been filed, by both sides, on more than one occasion.

48. The petitioner assails the impugned Order, on the ground of competence as well as on merits. The petitioner has sought to contend that the DoE had no authority or the jurisdiction to sit in appeal over the proposal, by the petitioner, to increase its fees, save and except to the extent of ensuring that the petitioner did not indulge in charging of capitation fee, or in profiteering. The entire exercise of inspecting the petitioner's premises, auditing the accounts, and passing, ultimately, of the Order dated 26th December, 2016 *supra*, it is sought to be submitted, was based on an erroneous assumption that the petitioner was covered by the Orders dated 16th April, 2016 *supra* and 15th July, 2016 *supra*, issued by the DoE. On merits, too, the petitioner has sought to contend that the increase in fee, on its part, was justified, and that, as an unaided recognised school, the petitioner was entitled to some degree of autonomy, regarding the fixation of its fees, which could not be made subject to approval by the DoE. In this context, the

petitioner highlights the fact that there is no finding, by the DoE, against the petitioner, either in the Order dated 26th December, 2016, or in the impugned Order, dated 18th July, 2017, of the petitioner indulging in charging of capitation fee or profiteering.

49. The petitioner has contended, further, that no copies, of the report of the "independent team of accountants and financial experts", which carried out a "second level check", into the Report, dated 22nd July, 2016, of the special inspection committee, or of the subsequent report, of the committee of "senior officer and accounts functionaries", constituted, by the DoE, *vide* Order dated 4th October, 2016 *supra*, were ever provided to it. As such, it is submitted that the Order, dated 26th December, 2016 – and, consequently, the impugned Order dated 18th July, 2017, whereby the petitioner's representation against the said Order was rejected – suffer from violation of the principles of natural justice. In this context, the petitioner also highlights the fact that the impugned Order, dated 18th July, 2017, does not address the issues raised by the petitioner in its various representations, to the DoE, including the issue of jurisdiction, of the DoE, to sit in appeal, over the enhancement of fees, by the petitioner, in the first place.

50. Without prejudice, the petitioner points out that, except for Development Fee, the Report, dated 22nd July, 2016, of the statutory inspection team (appointed by the DoE itself, under Rule 180 of the DSE Rules), that had inspected the petitioner's premises, found the proposed hike in fee, by the petitioner-School, to be legitimate and justified. Significantly, points out the petitioner, the Orders, dated 26th

December, 2016, and 18th July, 2017, do not find any particular fault with the recommendations of the statutory inspection committee. Development Fee, submits the petitioner, is outside the pale of the regulatory jurisdiction of the DoE. That apart, it is contended that, as per ***Modern School***[6], development fee is required to be 15% of the tuition fee. If, therefore, the proposed increase in tuition fee was found to be justified, so would, submits the petitioner, the proposed increase in development fee.

51. Detailed submissions have also been advanced, by the petitioner, both in writing as well as during the course of oral arguments by learned Senior Counsel, regarding the merits of the impugned Order, dated 18th July, 2017, and the manner in which the alleged surplus of ₹ 1,18,42,701/–, has been worked out. The petitioner points out, in this regard, that, inexplicably, the alleged surplus, with the petitioner, as per the DoE, fell, from the figure of ₹ 8,45,05,819/–, in the Order, dated 26th December, 2016 *supra*, to ₹ 1,18,42,701/–, in the impugned Order dated 18th July, 2017. This, even by itself, submits the petitioner, is manifest of the arbitrary manner in which the DoE was examining the proposal, of the petitioner, to increase its fees for the 2016-2017 academic session.

52. Maintenance of a reasonable surplus, to meet its expenses and ensure proper upkeep of the school, it is submitted, was permissible, as held in ***T. M. A. Pai Foundation***[2] as well as ***Islamic Academy of Education***[4]. The finding of surplus, with the school, therefore, it is submitted, even if it were to be treated as correct on facts, could not

constitute a legitimate basis to reject the petitioner's proposal to increase its fees for the oncoming academic session.

53. The respondent-DoE, in its counter affidavit, has, apart from pleading laches and delay, placed reliance on Section 17 of the DSE Act, contending that the said provision proscribes schools from levying any fee, or collecting any charges or receiving any other payments, except those specified by the DoE. (In fact, Mr. Ramesh Singh commenced his arguments by contending that the present case did not involve any issue of "prior approval", by the petitioner, for increasing its fees, but was concerned with the exercise, undertaken by the DoE, in accordance with Section 17(3) of the DSE Act.) Further, the DoE refers to Section 18 of the DSE Act, and Rules 172 to 177 of the DSE Rules, read with the Circulars, issued by the DoE, from time to time, which, according to the counter affidavit, permits tuition fee to be charged only to govern the establishment cost and curricular activity cost, with other costs being covered by "annual charges". Development fee, it is pointed out, may be charged only for purchase and replacement of furniture, fixtures and equipment. It is further pointed out that, as per the DSE Act and DSE Rules, earmarked levies were to be used only for the purposes for which they were earmarked, and that, too, in a no-profit no-loss basis. Rule 177 of the DSE Rules, contends the respondent, permits amounts leftover, after utilising the fee, in the first instance, for making payment and allowances and other benefits admissible to the employees, to be utilised for other purposes. The DSE Rules, contends the respondent, permits utilisation, of the leftover/incidental amount, towards capital expenditure, but does not permit the school to charge fees or other

charges as a dedicated/earmarked amount towards incurring capital expenditure. [The petitioner has sought to refute this contention by relying on the decisions in ***Islamic Academy of Education***[4], ***Modern School***[6] and ***Delhi Abhibhavak Mahasangh v. G.N.C.T.D.***[11] (hereinafter referred to as "***Delhi Abhibhavak Mahasangh-II***") which, according to the petitioner, permit fixation of fees keeping in mind capital expenditure of the school.] The DoE also places reliance on the circular dated 16th April, 2016, which requires schools to exhaust the possibility of utilising existing funds/reserves to meet any shortfall in payment of salary and allowances, as a consequence of increase of salary and allowances of employees.

54. Mr. Ramesh Singh, learned Senior Standing Counsel appearing for the DoE contended that the petitioner, having itself sought the prior approval of the DoE, in its communication dated 16th April, 2016 *supra*, wherewith the petitioner had submitted its proposed enhancement of fee, it did not lie in the mouth of the petitioner, now, to contend that, before enhancing their fees, prior approval of the DoE was not required.

55. Reliance has also been placed, by the DoE, on the judgement of the Supreme Court in ***Modern School***[6], which holds that commercialisation of education is prohibited.

56. The DoE contends, further, that Section 18(4) of the DSE Act, read with Rules 172 to 175, and 177 of the DSE Rules, as also Section 17(3) of the DSE Act, authorise the DoE to regulate the fees and other

[11] **ILR (2011) Supp (4) Delhi 247**

charges of schools, to prevent commercialisation of education. This power, contends the respondent, is relatable to Section 17(3) of the DSE Act. While admitting, in para 32 of the counter affidavit, that the DoE has the power and duty, under the DSE Act, and the DSE Rules, to ensure that schools do not profiteer, and that there is no commercialisation of education, the DoE goes on to state, in the same para, that "it is respondent's administrative discretion as to when to scrutinise the proposal of fee hike", which "may be triggered on the basis of a complaint by an aggrieved parents/students or like in the present case, may be carried out *suo motu".*

57. Insofar as the right, of the petitioner-School, to maintain a reasonable surplus, was concerned, Mr. Singh submits that, while the said right cannot be gainsaid, the surplus had to be incidental, and reasonable, and not intentional, resulting in commercialisation of education. The DoE, he submits, could not be asked to surrender its right to regulate the proposed fee hike, even in the case of unaided schools not governed by the 'land clause', so as to ensure that education was not commercialised. In this context, Mr. Singh submitted that

> (i) utilisation of surplus had to be in accordance with Rule 177 of the DSE Rules and the guidelines of the DoE, which required such surplus to be first charged towards payment of salaries to the teachers and staff of the school, including the arrears arising on account of implementation of the seventh CPC recommendations,

(ii) earmarked funds could be utilised only for the purpose for which they were earmarked, and could not be appropriated to other heads, artificially created by the school,

(iii) capital expenditure could not be part of the fee structure and

(iv) till the stage of its utilisation, development fee was also regulated by the DoE; charging of exorbitant development fee resulted in artificial surplus.

58. Dealing with the recommendations of the statutory inspection team, the DoE submits that no mandate, had been given to the said team, to give its recommendations. The recommendations of the said Committee, as submitted, it is contended, were not in terms of Section 18 of the Act and Rules 172 to 177 of the DSE Rules. The DoE has also sought to justify submitting the said report to second and third level checks. Mr. Ramesh Singh submitted that the DoE had taken a conscious decision to shelve the report, submitted by the Committee appointed under Rule 180 of the DSE Rules, and had, on 6th December, 2016, taken a decision to examine the matter with the assistance of a Chartered Accountant.

59. Detailed submissions, justifying the manner in which the alleged surplus, with the petitioner-School, has been worked out, by the DoE, in the impugned Order, dated 18th July, 2017, have also been placed on record.

60. Mr. Ramesh Singh also contended that the conduct of the petitioner did not justify grant, of any relief, it, in exercise of the

equitable jurisdiction vested in this Court by Article 226 of the Constitution of India, as the petitioner had, instead of challenging the impugned Orders with due promptitude, endeavoured, instead, to breach the Orders and to move this Court only when the DoE had, in view of the said breach, threatened to withdraw recognition from the petitioner-School. The show cause notice, threatening withdrawal of recognition, he points out, had been issued on 21st August, 2018, and the writ petition was filed on 30th August, 2018.

61. Courts, exhorts Mr. Singh, should, moreover, be slow to interfere with decisions of regulatory bodies, relying, for the purpose, on the decisions in ***G. L. Sultania v. S.E.B.I.***[12] and ***Kerala State Electricity Board v. S. N. Govinda Prabhu & Bros.***[13].

Analysis

Legal position emerging from the decisions cited hereinabove re. power of DoE to regulate fees of unaided schools not governed by any 'land clause'

62. The decisions, cited earlier in the course of this judgement, make the position, regarding scope of interference, by the DoE, with fixation of fees, by an unaided educational institution – specifically, an unaided school – clear, beyond any shadow of doubt. I may hasten to clarify, here, that we are concerned, in the present case, with a school, located on land, the documents of allotment in respect whereof do not contain any 'land clause', requiring prior approval, of the DoE,

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[12] **(2007) 5 SCC 163**
[13] **(1986) 4 SCC 198**

to be obtained before fees are increased. The issue of whether schools, encumbered by such a 'land clause' would require prior permission, of the DoE, before increasing fees, in any academic session, is presently *in seisin* before a Division Bench of this Court. The present writ petition does not concern such schools. The petitioner is a school, admittedly located on land, the documents of allotment in respect whereof *do not* contain any clause, requiring prior approval to be obtained, by the petitioner, from the DoE, before hiking its fees in any academic session.

63. Nothing expressed in this judgement, therefore, should be read as an opinion regarding schools which are subject to such a 'land clause'.

64. ***T. M. A. Pai Foundation***[2] holds that there is no reason to take away the choice, from private unaided educational institutions, in matters, *inter alia*, of selection of students and fixation of fees, so long as no profiteering took place. For this reason, it reversed the earlier decision, in ***J. P. Unnikrishnan***[3], which framed a scheme relating to grant of admission and fixation of fee, by unaided educational institutions. The latitude, in the matter of fixation of fee, by unaided educational institutions, was highlighted, in ***T. M. A. Pai Foundation***[2], as being in the nature of a legal and practical necessity, and any instance on fixing of a rigid fee structure, by such institutions, as an "unacceptable restriction". Para 56 of the report clearly held that, if the institution did not choose to seek any aid from the Government, "it (had) to be left to the institution … to determine the scale of fee that it can charge from the students". This was reiterated,

towards the conclusion of the same para, by holding that "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." Even so, it was held, "the Government (could) provide regulations that will ensure excellence in education, while forbidding the charging of capitation fee and profiteering by the institution". "Profiteering", it was explained, was running of an institution with the object of making of profit. Prohibition on profiteering did not, however, it was clarified, inhibit the institution from earning a reasonable revenue surplus. Autonomy and non-regulation of the school administration, in respect of the fee to be charged, it was opined, was in general public interest.

65. ***Islamic Academy of Education***[4] echoed the above view, by emphasising the necessity of preservation of institutional autonomy of unaided educational institutions. It was clarified, however, that the "reasonable surplus", which the institution was at liberty to earn, had necessarily to be utilised towards advancement of the institution and betterment of the students, and could not be diverted to other purposes.

66. ***Modern School***[6]**,** once again, emphasised the autonomy enjoyed by unaided educational institutions in the matter of determination of their fee structure. Such institutions, it was held, were entitled "to plan their investment and expenditure so as to generate profit". "Commercialisation of education" was, however, expressly proscribed. This was further clarified, in para 15 of the report, by stating that, while unaided educational institutions were

"permitted to make reasonable profits after providing for investment and expenditure", "capitation fee and profiteering were… forbidden". The power of the DoE, to regulate fees of unaided educational institutions, it was expressly stated, in para 17 of the report, was "*to prevent commercialisation of education*". This decision, again, indicates that, absent commercialisation of education, by way of charging of capitation fee, or profiteering, regulation of the fee structure of unaided educational institutions, by the DoE, was impermissible.

67. ***P. A. Inamdar***[7] reiterated, yet again, the ***Pai***[2] principle, that "the essential ingredients of management including … the quantum of fee to be charged, cannot be regulated", by the DoE, in respect of unaided educational institutions. Para 141 of the report clarifies, further, that "every institution is free to devise its own fee structure, but the same can be regulated in the interest of preventing profiteering", and "no capitation fee can be charged".

68. ***Cochin University of Science and Technology***[8], though it dealt with higher educational institutions, held that an educational institution "chalks out its own program year-wise on the basis of the projected receipts and expenditures and for the court to interfere in this purely administrative matter would be impinging excessively on this right". The decision to fix fees, based on projected income and expenditure was, therefore, recognised, by the Supreme Court, as a "purely administrative matter", of the institution concerned, with which even in judicial interference was disapproved.

69. In the opinion of this Court, therefore, there are no grey areas, insofar as the scope of the power, and authority, of the DoE, to interfere with the fixation of fees, by an unaided educational institution, is concerned. That the DoE does exercise some degree of control, cannot be gainsaid; after all, unaided educational institutions are not islands unto themselves. The regulatory power of the DoE, however, exists *solely* for the purpose of prevention of commercialisation of education, by such unaided institutions. This legal position is, in fact, expressly acknowledged in the Order dated 26th December, 2016, of the DoE itself, which clearly states, in the very third paragraph, that "Directorate of Education has the authority to regulate the fee and other charges *to prevent commercialisation of education"*. "Commercialisation of education", according to the Supreme Court, would relate to cases where the institution either charges capitation fees, or indulges in profiteering. A conjoint and holistic reading of the authorities, cited hereinbefore, discloses that the Supreme Court has not conceptualised "commercialisation of education", insofar as the concept applies to unaided educational institutions, as a specie different, or distinct, from charging of capitation fees, and profiteering. Rather, in the case of such institutions, "commercialization of education" constitutes a distinct genus, consisting of capitation fee and profiteering, as the two distinct species identified and isolated by the Supreme Court. In the case of unaided educational institutions, it is only where they are found to be charging capitation fees, or indulging in profiteering, that they could be held to be guilty of commercialising education, and not otherwise.

70. What, then, is 'profiteering'? The definition of the expression was accorded the imprimatur of the Supreme Court, for the first time, through the concurring judgement of S. B. Sinha, J., in ***Islamic Academy of Education***[4], which are adopted, with approval, the definition of 'profiteering', as contained in Black's Law Dictionary, being "taking advantage of unusual or exceptional circumstances to make excessive profits". Having adopted, with approval, the said definition, Sinha, J., went on to hold that statutory authorities could exercise regulatory power, over an unaided educational institution, "with a view to ensure that (the) educational institution is kept within its bounds and *does not indulge in profiteering or otherwise exploiting its students financially*".

71. The DoE has filed, with its counter-affidavit, a tabular statement, setting out the remarks, of the DoE, regarding the particulars of various heads of expenses of the petitioner. Note 6, in the said tabular statement, alleges that the accumulation, by the petitioner, of "reserve of development fund … by collecting development fee *more than its requirement* for purchase, upgradation and replacements of furniture and fixtures and equipment" was "nothing but the profiteering done by the school over the years". In the entire record before us, there is no other reference, to the petitioner indulging in "profiteering". The afore-quoted reference to "profiteering", too, figures in the remarks, filed by the DoE before this Court, regarding the various heads of expenses of the petitioner, and *not* in the impugned Order, dated 18th July, 2017, *or* the Order, dated 26th December, 2016, which it purported to uphold. There is no

allegation, in either of the said Orders, to the effect that the petitioner indulged in charging of capitation fee, or in profiteering.

The impugned Order, dated 18th July, 2017

72. The writ petition, before this Court, contains a single prayer, i.e., to quash the Order, dated 18th July, 2017, of the DoE. It is no part of the function of a writ court, to enter into general jurisprudential discussions, divorced from the *lis* before it. Writ courts, it has been held in ***V. K. Majotra v U.O.I.***[14], "would be well advised to decide the petitions on the points raised in the petition", and this Court has no intention, in the present case, to depart from this exordium.

73. Before adverting to the specifics of the impugned Order dated 18th July, 2017, I deem it appropriate to refer to the submission, advanced by Mr. Ramesh Singh, to the effect that the issue of "prior approval" was foreign to the dispute in the present case, in which the DoE had merely exercised the jurisdiction vested, in it, by Section 17 (3) of the DSE Act. The submission, though ingenious, is, on its face, an argument of desperation, which has merely to be urged to be rejected. The very first paragraph, of the impugned Order, dated 18th July, 2017, refers to the preceding Order, dated 26th December, 2016, of the DoE. The opening paras of the Order, dated 26th December, 2016 – which have been reproduced, in extenso, in para 37 *supra* – clearly indicate that the DoE was examining the proposal, of the petitioner, for increasing its fees in the oncoming 2016-2017 academic

[14] **(2003) 8 SCC 40**

session, *under the impression that, by virtue of clause to the effect, in the documents whereunder land was allotted to the petitioner, the petitioner was required to obtain prior approval of the DoE, before increasing its fees*. The exercise was, therefore, clearly one, which was being undertaken in compliance with a clause which, erroneously, the DoE assumed to be existing, in the documents, whereby land was allotted to the petitioner. Section 17(3) of the DSE Act, which deals with an entirely different dispensation, and has nothing to do with the enforcement of the "prior approval" clause, contained in land allotment documents, never played any part of the deliberations in the present case. The invocation, by Mr. Ramesh Singh, therefore, of Section 17 (3) of the DSE Act, has necessarily to be regarded as an afterthought, unsupported by the recitals in the Orders, dated 26th December, 2016, and 18th July, 2017, issued by the DoE. One is reminded, inevitably, of the following passage, from ***Mohinder Singh Gill v. Chief Election Commissioner***[15] which has, with the passage of time, become *locus classicus*:

> "The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, *its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise.* Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J. in ***Commr. of Police, Bombay v. Gordhandas Bhanji, AIR 1952 SC 16***:
>
> > "*Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his*

[15] **(1978) 1 SCC 405**

> *mind, or what he intended to do.* Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."
>
> Orders are not like old wine becoming better as they grow older."
>
> (Emphasis supplied)

74. Interestingly, the "directions", issued by the DoE *vide* the impugned Order, dated 18th July, 2017 include, *inter alia*, a direction "not to include capital expenditure as a component of fee structure *to be submitted by the school under section 17(3) of DSEAR, 1973*." This, additionally, serves to indicate that the impugned Order, dated 18th July, 2017, was not issued under Section 17(3) of the DSE Act.

75. The submission, of Mr. Ramesh Singh, to the effect that the impugned Order was issued by the DoE in exercise of the powers vested in it by Section 17(3) of the DSE Act is, therefore, rejected.

76. There is, accordingly, merit, in the submission of Mr. Sunil Gupta, learned Senior Counsel, that the entire exercise conducted against his client, in the present case was, *ab initio*, null and void, being initiated on the basis of the Orders, dated 16th April, 2016 *supra*, and 15th July, 2016 *supra*, of the DoE, neither of which applied to the petitioner, as the allotment of land, to the petitioner, was not conditional on fulfilment, by the petitioner, of any 'land clause', requiring the petitioner to obtain prior approval of the DoE before increasing its fee for the ensuing academic session. *Ex facie*, the

entire exercise of subjecting the petitioner to audit and inspection, resulting in the "shelved" report of the statutory committee (constituted under Rule 180 of the DSE Rules), and the post mortem, of the said report, first by the "independent team of accountants and financial experts" and, thereafter, by the committee comprising "senior officer and accounts functionaries" constituted by the DoE *vide* order dated 4th October, 2016, followed by the issuance, by the DoE, of the Orders dated 26th December, 2016 and 18th July, 2017 (the latter being impugned herein), owed its genesis to a misconception that the petitioner was subject to a 'land clause' and, therefore, stands vitiated *ab initio*. Even on this sole ground, the present writ petition deserves to succeed.

77. Adverting, now, to the impugned Order, dated 18th July, 2017 itself, it is possible to compartmentalise the Order into three distinct sections. The impugned Order commences by noting the fact of issuance of the earlier Order, dated 26th December, 2016, the representation, by the petitioner-School, thereagainst, and grant of personal hearing to the petitioner-School. It proceeds, thereafter, to "analyse" the submissions made by the petitioner. This analysis is divided into three sections, the first of which is titled "Financial discrepancies", the second "other discrepancies", and the third, though untitled, dealing with the alleged "surplus fund" available with the petitioner-School. The first section sets out three "financial discrepancies", which merely requires the petitioner to comply with the recommendations, made in that regard, and record its assurance, that it would do so. The second section, dealing with "other

discrepancies", too, records the submission, of the petitioner, that the discrepancies would be rectified, and contemplates compliance therewith, at the time of next fee increase proposal. The controversy, before this Court, is concerned, essentially, with the third section of the impugned Order, which alleges that the petitioner had, with it, "a surplus fund of ₹ 1,18,42,701/-", and provides a tabular statement in that regard. Having observed thus, the impugned Order proceeds to record a finding that "the school (was) *having sufficient funds* even after meeting all the budgeted expenditure for the financial year 2016-17". Thereafter, the impugned Order proceeds to issue certain directions, to the petitioner, to maintain separate funds for earmarked levies, avoid diversion thereof, and to maintain a separate development fund, before concluding thus:

> " And whereas, these recommendations along with relevant materials were put before The Director of Education for consideration and who after considering all the material on record has found that *the school is having sufficient surplus funds to meet the financial implications for the financial year 2016-17* and the representation dated 03.02.2017 and subsequent submissions made thereafter in this regard find no merit in respect of sanction for increase in fee and hereby rejected on the basis of the above-mentioned observations.
>
> Accordingly, it is hereby conveyed that the representations for fee hike of Ramjas School, Sector-IV, R. K. Puram, New Delhi-110022, has been rejected by the Director of Education."
>
> (Emphasis supplied)

The concluding "directions" follow.

78. On the face of it, the DoE has, in issuing the impugned Order dated 18th July, 2017, exceeded the jurisdiction vested in it. As

already noted hereinabove, there is no finding, in the impugned Order, to the effect that the petitioner has charged capitation fee, or indulged in profiteering. Neither, for that matter, does the impugned Order accuse the petitioner of "commercializing" education. The sole ground, on which the impugned Order rejects the petitioner's request for permission to increase its fee during the 2016-2017 academic session, is that the surplus allegedly available with the petitioner, of ₹ 1,18,42,701/-, was *sufficient* to meet the petitioner's projected expenses for 2016-2017. This, in the opinion of this Court, was an exercise which the DoE was not competent, legally, to undertake. Absent any charging of capitation fee, profiteering, or, therefore, commercialization of education by the petitioner, the DoE could not adjudicate on the *sufficiency* of the petitioner's available resources, vis-à-vis its projected expenses. The *quantum of fee to be charged* is an element, of its administrative functioning, over which the autonomy, of the unaided educational institution which receives no funds from the Government and survives on its fees for sustenance, cannot be compromised. The DoE could not, therefore, have rejected the petitioner's request for enhancement of its fees on the ground that the moneys, allegedly available with it, were *sufficient*. The DoE, thereby, sat in appeal over the subjective decision, of the petitioner, regarding the quantum of fees that it proposed to charge; an exercise which ***T. M. A. Foundation***[2], as well as all its sequelae, expressly proscribe.

79. The ground for rejecting the petitioner's proposal, to increase its fees during the 2016-2017 academic session is, therefore, untenable in law.

80. The directions, contained in the impugned Order, dated 18th July, 2017 are, consequently, equally untenable. As the rejection, by the DoE, of the petitioner's proposal for increasing its fees, during the 2016-2017 academic session, has been found to be legally unsustainable, the direction, in the impugned Order, to the petitioner, not to increase its fees for the said academic session, is also incapable of enforcement. The further direction, to the petitioner, to comply with all instructions mentioned in the order dated 26th December, 2016, too, cannot sustain, as the Order, dated 26th December, 2016, is premised on the assumption that the petitioner is subject to the 'land clause'.

81. Direction 3, as contained in the impugned Order, dated 18th July, 2017, is in the form of an advisory, to be complied with *in futuro*, at the time of submission, by the school, of its annual statement of fees, under Section 17(3) of the DSE Act. The impugned order having been issued on 18th July, 2017, this direction could operate only in respect of the statement, under Section 17 (3), to be submitted for the 2017-2018 academic session. Inasmuch as this Court is, in the present proceedings, not examining the correctness, or otherwise, of the statement of fees, submitted by the petitioner, under Section 17(3) of the DSE Act, for the 2017-2018 academic session, no opinion, regarding the said Direction, is expressed herein.

82. This Court also finds substance in the submission, of Mr. Sunil Gupta, regarding infraction, by the DoE, of the principles of natural justice. The Order, dated 26th December, 2016, of the DoE, is completely silent, regarding the findings of the statutory inspection committee, constituted under Rule 180 of the DSE Rules. For no apparent reason, whatsoever, the DoE chose not to act on the said report and, instead, invited comments from an "independent team of accountants and financial experts as a second level check". The report, and the findings, of this "independent team", consequent to the said "second level check" were never shared with the petitioner; neither was the petitioner co-opted in the said proceedings, or afforded any opportunity by the said "independent team". The DoE, however, apparently chose not to rest content even with the findings of the said "independent team", but subjected those findings to further analysis by a *third* committee, constituted *vide* Order dated 4th October, 2016, "comprising of senior officer and accounts functionaries". The justification for this "third level check" is, again, not forthcoming from the record. Needless to say, the petitioner was not included in the deliberations, even by this committee, or afforded any opportunity by it. The findings of this "third" committee were also never shared with the petitioner and, in fact, have not even been placed on record before this Court. Adverse findings, arrived against the petitioner, following such a procedure, cannot sustain the scrutiny of law for an instant. There has been complete abandonment, by the DoE, of the most fundamental principles of natural justice and fair play, while passing the Order, dated 26th December, 2016 which has, as an inexorable consequence, to perish.

83. This Court is constrained to note, here, a somewhat disquieting feature of the present case. The recital of facts, hereinabove, can leave no manner of doubt, regarding the misguided nature of the exercise, conducted by the DoE against the petitioner, as the petitioner was not allotted land, subject to any condition of having to obtain prior approval, of the DoE, before enhancing its fees. The first error appears to have been committed, by the DoE, while appending the note, on the petitioner's representation dated 22nd April, 2016, requiring the petitioner to submit its proposed fee enhancement, in accordance with the Circular, dated 16th April, 2016, *supra*, of the DoE, without noting the fact that the said Circular did not apply to the petitioner-school. When, on 30th January, 2017, the petitioner brought, to the notice of the Deputy Director of Education, the fact that the exercise, being conducted against the petitioner, was misguided, as the petitioner was not subject to any 'land clause' the DoE ought to have ceased the persecution of the petitioner, at that very point. Instead, it is extremely disturbing to note that, at all stages thereafter, the DoE has chosen to ignore the fact that the petitioner was not subject to any 'land clause' and that, therefore, the Orders, dated 16 April, 2016 *supra*, and 15th July, 2016 *supra*, of the DoE, did not apply to it. The petitioner, for its part, repeatedly brought, to the notice of the DoE – *inter alia*, *vide* letter dated 1st May, 2017 and email dated 23rd July, 2018 – the fact that no 'land clause' applied to it. The responses, by the DoE, however, make no reference thereto. Astonishingly, the Order, dated 26th December, 2016 *supra*, as well as the impugned Order, dated 18th July, 2017 *supra*, of the DoE, are also completely silent on this aspect.

84. In thus turning a blind eye to the fact that the petitioner had not been allotted land with any accompanying 'land clause' and that, therefore, the Orders, dated 16th April, 2016 and 15th July, 2016, of the DoE, did not apply to it, the DoE has, this Court is constrained to observe, been less than fair to the petitioner, and has compelled the petitioner to undergo a needless litigative exercise. This Court expresses its undisguised anguish, at the manner in which the DoE has acted, in the present case, qua the petitioner, but forbears from saying anything further.

85. In fact, in the face of the Order, dated 6th August, 2018 (extracted, *in extenso*, in para 45 *supra*), it can hardly lie in the mouth of the DoE to contend that the impugned actions, against the petitioner-School, were justified. The said Order expressly prohibits hiking fees, from 2016-2017 till date, by "Unaided Private Recognised Schools … running on the land allotted by the land owning agencies subject to the condition of seeking prior approval of the Competent Authority for increase in fees". Admittedly, no such condition attached to the allotment of land, to the petitioner. How, therefore, the DoE is insisting that the petitioner could not have hiked its fees, in 2016-2017, without the prior approval of the DoE, or otherwise seeking to defend the impugned actions, is completely inexplicable.

86. Apparently conscious of this glaring lacuna, in the acts of the DoE in the present case, Mr. Ramesh Singh sought to salvage the situation by abandoning, entirely, the issue of 'prior approval' and the

'land clause' by attempting to submit that the impugned exercise, conducted by the DoE, was relatable, not to the land clause, but to Section 17 of the DSE Act. This, however, as this Court as already observed hereinabove, is a *volte face* which, at this late stage, cannot be countenanced.

87. Even on merits, the reliance, by Mr. Ramesh Singh, on Section 17(3) of the DSE Act, is fundamentally misconceived, and is contrary to the express wordings of the said provision itself. Sub-sections (1) and (2) of Section 17, as already noted hereinbefore, concern aided schools, and are not relevant. Section 17(3) of the DSE Act may, for ready reference, be reproduced, thus, at the cost of repetition:

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

Section 17(3), therefore, proscribes the charging, by a school, of fees in excess of those *specified by it in the statement, submitted by the school to the DoE* under the said sub-section. The sub-section does not contemplate obtaining of any approval, of the Director, before charging, by the school, of fees *as per the statement of fees submitted by it*. In fact, the express subjection, of the charging of fees, by the school, *in excess of the fee specified in the statement submitted under Section 17(3)*, excludes, by necessary implication, such subjection, where the fee charged is *within the figure contained in the said statement*. Prior approval of the Director is, therefore, required only if

the school desires to charge fees in excess of those contained in the statement submitted under Section 17(3). Besides the fact that there is no such allegation, against the petitioner, the invocation of Section 17(3), by the DoE, is clearly misguided, as the said sub-section does not stipulate obtaining of prior approval of the DoE, as a precondition before charging fees *in accordance with the statement submitted by the school under the said sub-section*.

88. In the case of any unaided school, therefore, the DoE may, even under Section 17(3), disapprove the increase of fees, if any, by the school, if such increase results in commercialization of education, by charging of capitation fees, or by profiteering. Even if, in the manner in which the school has worked out the funds available with it, in its statement of fees, the DoE finds any glaring error, resulting in the school having any surplus with it, the proposal to enhance the fees can be rejected, by the DoE only by returning a finding that, in view of the said surplus, the increase of fees, as proposed by the school, would amount to "profiteering" (as defined in ***Islamic Academy of Education***[4]). *Sufficency* of the amount available with the school cannot constitute a ground to reject the proposed fee hike. If, for example, therefore, the unaided school, in the statement of fees submitted by it, claims to have suffered (hypothetically) a loss of ₹ *x*, and intends, therefore, to enhance its fees to ₹ *y*, and the DoE, on examining the statement, finds that, in fact, the school has not suffered a loss, but has earned a profit of ₹ *z*, the DoE would have to go a step further, and find, as a positive fact, that, in the face of the profit of ₹ *z*, already being earned by the school, allowing it to hike its fees to ₹ *y*

would amount to "profiteering". Absent such a finding, the DoE cannot direct the unaided school not to increase its fees. This for the simple reason that earning of a reasonable surplus, by every unaided school, is always permissible, and *becomes illegal only where the surplus earned, along with the differential increase on account of fee hike, results in profiteering* and, consequently, commercialization of education. Having, therefore, found the school to, in fact, be in possession of surplus funds, the DoE has to proceed a step further and address the question – if, in the face of such existing surplus, the school is allowed to hike its fees as proposed, would it amount to profiteering? *In the case of an unaided school*, it is only where the answer, to this poser, is in the affirmative, that the DoE can convey its disapproval; not otherwise.

89. The reliance, by Mr. Ramesh Singh, on Section 18 of the DSE Act, and Rules 172 to 176 of the DSE Rules, is also misconceived. These provisions related to utilisation of the funds of the school, and have nothing to do with submission by the school, of the statement of the fees to be charged, by it, in the oncoming academic session. Misutilisation of funds, by a School, may have its own repercussions; that, however, is an issue foreign to the controversy, before this Court in the present writ petition.

90. This Court has deliberately refrained from entering into the merits, or correctness, of the finding, in the impugned Order dated 18th July, 2017, to the effect that the petitioner had, with it, surplus funds of ₹ 1,18,42,701/- as, in the opinion of this Court, it was not open to

the DoE to substitute its own view, regarding the sufficiency of the funds available with the petitioner-School, over the estimation arrived at by the petitioner itself, in the absence of any positive evidence of commercialisation of education by the petitioner, by charging of capitation fees or indulging in profiteering. Neither, in the opinion of this Court, would be appropriate for it to embark on such an exercise. The subjective satisfaction of an unaided educational institution, regarding fixation of its fees, and maintenance of surplus, is to be accorded due respect and, absent any element of profiteering, is not amenable to review, either by the DoE, or by this Court.

91. In the case of an unaided educational institution, the DSE Act, and the DSE Rules, do not contemplate obtaining of prior approval, of the DoE, before enhancement of fees, by the unaided educational institution. All that Section 17(3) requires, is for the school to submit, to the DoE, the statement of the fees, which it intends to charge in the ensuing academic session. It is only if the school intends to charge fees in excess of the figure submitted to the DoE under Section 17(3), that prior approval of the Director is required.

Conclusion

92. Resultantly, the impugned Order, dated 18th July, 2017, issued by the DoE, is quashed and set aside, to the extent of Directions 1 and 2 therein, with consequential relief to the petitioner. It is clarified that, in the case of an unaided school, which has not been allotted land, by

the land owing agency, subject to the condition that prior approval of the DoE is required to be obtained before increasing its fees,

(i) the school would not be required to obtain any such prior approval, before increasing its fees in any ensuing academic session, and

(ii) the DoE would have the jurisdiction to interfere, with the statement of fees submitted by such school under Section 17(3) of the DSE Act, only by returning a positive finding that, in the light of the existing financial position of the school, the proposed increase in fee would result in profiteering, and, thereby, in commercialization of education, and not otherwise.

93. The rejection, by the DoE, of the proposal, of the petitioner-School, to increase its fees, during the 2016-2017 academic session, is, therefore, held to be illegal. All actions taken against the petitioner, consequent to the impugned Order, dated 18th July, 2017, also stand quashed.

93. The writ petition stands allowed, in the aforesaid terms, with no orders as to costs.

94. Pending applications, if any, do not survive for consideration, and are disposed of accordingly.

C. HARI SHANKAR, J.

MAY 20, 2020
HJ