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

% ***Judgment Reserved on***: 27.01.2021
Judgment Pronounced on: 31.05.2021

\+ W.P.(C) 7526/2020

ACTION COMMITTEE
UNAIDED RECOGNIZED PRIVATE SCHOOLS ... Petitioner
Through Mr.Shyam Divan, Sr. Adv. with Mr.Kamal Gupta, Mr.Nipun Jain and Mr.Sparsh Aggarwal, Advs.

versus

DIRECTORATE OF EDUCATION ... Respondent
Through Mr.Ramesh Singh, Standing Counsel with Mr.Gautam Narayan, ASC with Ms.Dacchita Shahi, Adv.

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

1. This writ petition is filed by the petitioner seeking an appropriate writ/ writ of certiorari to quash the orders dated 18.04.2020 and 28.08.2020 passed by the respondent in so far as it prevents private unaided recognized schools/members of the petitioner association from collecting a part of the fees i.e. Annual Charges and Development Fees even beyond the Lockdown period and deferring it till physical opening of the schools.

2. The petitioner is said to be a registered association with approximately 450 private unaided schools functioning in Delhi as its members.

3. It is stated that during the present pandemic the Central Government declared a Lockdown in the entire country during the last week of March 2020 and the schools were closed down physically. However, schools were

directed and encouraged to take up online teaching and learning so that there is no discontinuity in imparting education to the school children.

4. On 17.4.2020, the respondent came out with an order in purported exercise of certain non-existent powers under the Disaster Management Act 2005, Section 17(3) of the Delhi School Education Act *(hereinafter referred to as the 'DSE Act')* and Rule 43 of the Delhi School Education Rules (*hereinafter referred to as 'The Rules')*. Essentially, the said communication directed the schools that no fees except tuition fees shall be charged from the parents, till further orders.

5. On 18.04.2020, immediately thereafter a new impugned order was passed. This order was passed in supersession of the earlier order dated 17.04.2020. Relevant portion of the said order dated 18.04.2020 reads as follows:-

> "Whereas, everyone is aware that the outbreak of Novel Corona Virus (COVID-19) has been declared as Pandemic by WHO and at present, it is a major threat to life and, therefore, a grave matter of concern in the country, being social emergency life situation including Delhi. India is under a 21- day Lockdown with effect from March, 24, 2020 which has been further extended upto 3rd May, 2020 and people are under strict directions to restrain from going out of their homes.
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> Whereas, it is also a fact that in view of the spread of COVID-19, all business/professional/other activities (other than essential ones) have ceased to function as a precautionary measure to contain COVID-19 due to which, some parents, are not in a position to pay the school fee of their wards at increased rates or even at existing rates if demanded on quarterly basis in one go.
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> And whereas, as per the provisions, the tuition fee and annual fee charged from the students, cover all the expenditure to be Incurred on salary, establishment and curricular activities and co-curricular activities.
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> Now therefore in exercise of powers conferred under Section 17 (3) of DSEA 1973 and read with Rule 43 DSEAR 1973 and under other enabling provisions of the Acts and Rules or any other, all heads/managers of private unaided recognized schools of Delhi are hereby directed as follows:
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> "i. No fee, except Tuition fees will be charged from the parents during the lockdown period.
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> ii. Annual and Development Charges can be charged from the parents, on pro rate basis, only on monthly basis after completion of lockdown period.
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> iii. No earmarked levies such as transportation charges will be charged from the parents during the period the schools remains closed."

6. Hence, as per the said order dated 18.4.2020, the Annual and Development charges were to be collected after the Lockdown. It is stressed by the petitioner that there is a distinction between lifting of Lockdown and physical re-opening of the schools.

7. It is stated that thereafter Central Government issued various Notifications lifting the Lockdown, firstly, w.e.f. 1.6.2020. It is stated that pursuant to the lifting of the Lockdown the right of private unaided recognized schools to collect Annual Charges and Development Fees was revived in view of the circular dated 18.4.2020. Hence, it is claimed that various schools started charging Annual Fee and Development Charges.

8. Thereafter on 28.08.2020, the respondent issued the second impugned

order, relevant portion of which reads as follows:

> "Now, therefore, in exercise of the powers conferred under Section 24(3) of DSEA, 1973 and read with Rule 43 of DSEAR, 1973 and other enabling provisions of the above Acts and Rules or any other, all HOS/Managers of the Private Un-aided Recognized Schools of Delhi are hereby directed as under:-
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> 1. To comply with the directions issued vide order dated 18/04/2020 in its totality.
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> 2. If any Private Un-aided Recognized School has charged fees/amount other than the tuition fees in contravention of order dated 18/04/2020, the same shall be refunded or adjusted immediately.
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> 3. It is again reiterated that no amount other than the tuition fee or any increased amount in tuition fee in contravention of order dated 18/04/2020, shall be charged by any Private Un-aided Recognized School.
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> 4. The schools can collect the Tuition fee in accordance to order dated 18-04-2020 as well as the order of Hon'ble High Court dated 24-04-2020 in WPC-2993/2020 titled Naresh Kumar Vs. Directorate of Education & Anr. which is reiterated as under:-
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> > "Before parting with this judgement, we may observe that a similar challenge had come up, before the learned Single Judge of this Court, in WP (C) 2977/2020 (Rajat Vats v. GNCTD), and was dealt with, in paras 7 and 8 of the judgement of the learned Single Judge, thus: "7. Insofar as the tuition fee is concerned, the charging of the same would be justified in view of the fact that almost all the schools are conducting online classes and teachers are discharging their functions by imparting course work over online platforms, checking project work online, correcting papers wherein students have already given

examinations, preparing questions and lessons taught and supervising students to complete the work given etc. There is also a burden on the schools to pay their staff during these months.

The authorities having taken cognisance of the issue and further the matter being one in the policy domain, this Court is not inclined to interfere."

In view of above, all the HOS/Managers of Private Un-aided Recognized Schools to ensure the compliance of above said directions strictly in letter & spirit failing which action shall be taken against the defaulter schools under Section 24 of Delhi School Education Act & Rules, 1973 or other applicable laws."

Hence, the said order sought to clarify that other than the tuition fees no other amount can be charged by the private un-aided recognized schools.

9. As noted above, the grievance of the petitioner is that they are not being allowed to charge the full stated fees i.e. not allowed to charge the Annual Charges and Development Fees. It has been elaborated in the writ petition that Annual Charges relates to the following expenses:

1. Hostel running expenses
2. Administrative & General Expenses
3. Rents, rates and taxes
4. Communication Expenses
5. Printing & Stationery
6. Electricity & Water charges
7. Travelling & Conveyance
8. Expenses of teaching & non teaching staff
9. Insurance charges
10. Promotional expenses
11. Remuneration of Auditors (including expenses reimbursed)
12. Repairs & maintenance of Building

13. Depreciation
14. Financial expenses such as interest on loans, loss on sale of fixed assets & investments
15. Other expenses – Write offs and provisions
16. Miscellaneous expenses
17. Legal Expenses.

10. Similarly, the Development Fees pertains to expenditure related to the following:

1. Furniture, Benches
2. Chairs, Wall paneling, Green/Black Boards
3. Computers
4. Projectors
5. Smart Boards/ Touch Panels in classes
6. Water Coolers
7. Air conditioners
8. RO water treatment plant
9. Overhauling of electrical
10. Panels, switches, MCB's
11. Fire safety equipments
12. Fans and lights
13. Changing / repairing of doors and windows
14. Tiles, Lift

11. It is the case of the petitioner that the impugned action of the respondent seeking to curtail the rights of the private unaided recognized schools to fix their own fees and also to restrict the collection thereof to certain heads/amounts is illegal and without any authority or jurisdiction. It is stressed that the Department of Education i.e. the respondent has limited jurisdiction to regulate the fees, i.e. to prevent commercialization and profiteering and that the fundamental rights of the private unaided

educational institutions under Article 19(1)(g) of the Constitution cannot be trampled upon in the present manner. It is pleaded that the impugned action of the respondent to curtail the legitimate income of the private schools is illegal and unconstitutional. The order dated 18.04.2020 read with order dated 28.08.2020 is illegal, arbitrary and unconstitutional and without jurisdiction or authority.

It is further pleaded that the Department of Education instead of seeking to regulate the fees to prevent commercialization and profiteering is being influenced by the dictates of the political establishment. The Department has been rendered as a mere convener of the Government Policies aimed at pleasing the larger vote banks of the constituency of the parents not keeping in mind the larger goals of expansion and development of education in mind.

It is pointed out that there is another direction issued by the respondent i.e. that no fee should be increased by any school during the year 2020-21. This direction is also illegal and *ultra vires* the powers of the respondent. However, the schools have voluntarily decided to comply with the said directions without prejudice to their rights and contentions.

12. The respondent have filed a counter-affidavit. It has been urged in the counter-affidavit that the present petition deserves to be dismissed as the Lockdown is still in operation and, therefore, the circular dated 18.4.2020 read with circular dated 28.8.2020 continues to be in operation. It is further urged that the members of the petitioner association cannot increase the fee without prior approval of Directorate (Education) as mandated by the Supreme Court in ***Modern School vs. Union of India & Ors., 2004 (5) SCC 583.*** It is further pleaded that it is the power of the Regulatory Authority to

check that there is no commercialization of education in any private unaided recognised school. Hence, respondent is authorised to issue directions to private unaided recognised schools in this regard. It is stressed that the schools are bound to comply with the provisions of the 'DSE Act' and 'the Rules' for managing day to day affairs of the school and to follow the orders, notifications and circulars issued by the answering respondent.

It is further pleaded that on account of acute financial pressure and stress on the general public owing to the Pandemic and measures imposed to deal with it having not abated, in such a situation the attempt of the petitioner to burden the parents by seeking to recover amounts presuming that normal physical functioning has resumed is harsh, unfair and unjust. It is further pleaded that schools being charitable institutions cannot indulge in profiteering. Such institutions are expected to extend maximum support to ensure that in such an emergent situation every student has access to proper education by providing them with learning material online without any discrimination and hindrance.

13. It is further stated that the educational institutions are bound to ensure that the students are not harassed by charging any increased Tuition Fee or any other fee under a new head. It is pleaded that some of the schools were, *inter alia,* indulging in malpractices which were inhuman in view of the outbreak of Covid-19. Various examples are sought to be given of the alleged illegal acts of some of the schools, namely:

(i) Increase of fee for the Academic Session 2020-21

(ii) Charging fee from students under various new heads in violation of the directions of the Supreme Court and the respondent.

(iii) Fees being collected on a quarterly basis instead of on a monthly basis.

(iv) Not providing Online learning materials/classes to the students for the Academic Session 2020-21.

(v) Not paying the salary to teaching and non-teaching staff or paying lower salary to the extent of 40-50%.

14. It is further urged that the rationale behind the impugned order dated 18.4.2020 is to ameliorate to the extent possible the financial constraints being faced by parents and to obviate the possibility of a child being denied education due to incapability of parents to defray the school fees. These are interim measures put into place to deal with unprecedented situation caused by COVID-19 Pandemic. Further, it is pleaded that during Lockdown only online teaching facilities are being provided and it is expedient to permit charging of Tuition Fee only to enable the schools to defray expenses towards salary and allowances to the teachers and the staff.

15. It is also claimed that on examination of the fee statements filed by private unaided recognised schools, it was found that in most cases the expenditure on salary and establishment was approximately 40-60 % of the tuition fee charged by the school and in some cases it was upto 70% of the tuition fee charged by the school. Hence, it was expedient for the Schools to continue charging Tuition Fee only, as same would enable the schools to continue imparting education to students in such unprecedented situation caused by the COVID-19 Pandemic.

16. I have heard learned senior counsel for the petitioner and learned standing counsel for respondent. Learned senior counsel for the petitioner has pleaded as follows:

(i) It is stressed that the jurisdiction of Department of Education is to regulate to check commercialization and profiteering by schools. The presumption in law is that unless any school is indulging in commercialization or profiteering, the respondent has no power to prohibit/curtail the collection of fees by any school. Further such a power can be exercised in an individual case if a finding of commercialization or profiteering is recorded. Reliance is placed on judgments of a Co-Ordinate Bench of this court in the case of ***Action Committee Un-aided Recognised Private Schools vs. Directorate of Education & Anr. 2019 SCC OnLine Del 7591*** and the case of ***Ramjas School vs. Directorate of Education***, ***MANU/DE/1331/2020***.

(ii) It is further pleaded that the impugned order dated 28.8.2020 seeks to go back and take a u-turn and renege on the solemn undertaking of the Department of Education contained in order dated 18.04.2020 stating that only tuition fees will be charged till the lockdown period. This is now changed to physical re-opening of the schools. Such orders are wholly contrary to the assurances spelt out in the impugned order dated 18.04.2020.

(iii) It is further stated that in terms of the communication dated 18.04.2020 lockdown came to be lifted in June-July 2020. Hence, the schools were permitted to charge Annual Charges and Development Fee w.e.f. 01.06.2020.

(iv) It is pleaded that even after lifting of the lockdown continuance of the prohibition to charge Annual Charges and Development Fees is illegal,

disproportionate and violates Article 14, 19(1)(g) read with Article 19(6) of the Constitution.

(v) It is further pleaded that the impugned act of the respondent is highly discriminatory, unjust and unfair to the petitioners. The school fees are sought to be curtailed. However, no other expenses in any walk of life are sought to be curtailed for the benefit of the very same parents whom the government is pampering by blocking the rights of the petitioners to collect legitimate fees. There has been no respite given by the respondent to the same parents for payment of taxes, property tax, insurance premiums, interest on bank rates, road tax, registration tax, etc. More importantly even for hundreds of private colleges affiliated to Guru Gobind Singh Indraprastha University run by the said respondent GNCT of Delhi, such colleges have not been prevented/prohibited by the respondent from charging the full fees. It is pleaded that such colleges have not only charged the entire full fees for the year 2020-2021 but have also increased their fee in terms of the order/permission from Govt. of NCT of Delhi.

(vi) Reliance is also placed on judgment of the Division Bench of the Bombay High Court in the case of ***Association of Indian Schools & Anr. vs. State of Maharashtra, MANU/MH/0701/2020*** to plead that there is no power vested in the state Government under the Disaster Management Act 2005 for interfering with the fees structure of private un-aided schools.

(vii) It is further pleaded that the respondent cannot drive the petitioner's schools to collapse in the manner that is being sought to be done.

17. Learned standing counsel for the respondent has pleaded as follows:

(i) He states that the respondent has power of regularisation, imposition and fixation of fees in view of Sections 3, 17(3), 18(3), 18(4) and 24 of the

DSE Act. Reliance is also placed on Rules 43, 172 to 177 of the Rules. Reliance is placed on the judgment of the Division Bench of this court in the case of ***Delhi Abhibhavak Mahasangh vs. Union of India & Ors***, ***1999(49) DRJ 766(DB)*** to support the above contentions. Reliance is also placed on the judgement of the Division Bench of this court in the case of ***Delhi Abhibhavak Mahasangh vs. Union of India & Ors***, ***2002(62) DRJ 818(DB)***.

(ii) Learned counsel has stressed that the statute as applicable to Delhi, namely, DSE Act was dealt with by the Supreme Court in the case of ***Modern School v. Union of India & Ors.***(supra) and it is that judgment which is applicable to Delhi.

(iii) It has been urged that the Annual Charges and Development Fees are not being spent and hence cannot be charged. It is pleaded that only 40 to 70 per cent of the tuition fees is being used to meet salary etc. and hence there is no occasion or need for the petitioners to charge, Annual Charges and Development Fees.

(iv) It has been stressed that during the lockdown period the schools are physically shut. The purpose for Annual Charges and Development Fees are not being met for this period and the same cannot be charged.

(v) It has further been urged that Delhi has a statutory provision to regulate and control the schools. They are the relevant and guiding factors. They impose reasonable restrictions. It is pleaded that there were unprecedented circumstances and hence unprecedented regulations have been put in force.

(vi) I may note that the respondent- Directorate of Education in the written submission has stressed that under ordinary circumstances, the respondent

has powers to issue a general circular of the present nature. The said powers can be said to be available in view of sections 3 and 24 of the DSE Act and Rule 43 of the Rules.

18. I may also note that the written submission clearly notes as follows:

> "A reading of circular reveals that neither the fee fixed or the components thereof have been interdicted in any manner and all that has been done is to delay the collection of Annual Charges and Development Fees for the present keeping in view the prevailing economic situation and the interest of the students."

Hence, it is the stand of the respondent that the collection of Annual Charges and Development Fees have merely been postponed. It was stressed that for the time being, this is subject to further directions that the respondent may pass in future.

19. In the rejoinder learned senior counsel for the petitioner has stressed as follows:

(i) It has been stressed that there is no source of power of the respondent to issue the impugned orders.

(ii) It is pleaded that Sections 3, 17, 18 and 24 of the DSE Act and Rules 172, 174, 175, 176-180 of the Rules do not bestow any power on the respondent to issue the impugned orders.

(iii) It has further been stressed that the impugned orders are only being issued for political calculations and political purposes for vote bank politics. The member schools of the petitioner are soft targets and are needlessly being harassed by the present impugned orders.

20. I may note that after the judgment was reserved in this case, the Supreme Court in a matter which relates to somewhat similar facts as the present case passed a judgment titled as ***Indian School, Jodhpur & Anr. vs.***

State of Rajasthan & Ors., 2021 SCC OnLine SC 359. That matter pertains to among others, an order passed by the State of Rajasthan dated 28.10.2020. The schools could only charge tuition fees with a reduction of 30%-40% of the tuition fees of the last academic session. The Supreme Court struck down the said order but directed that the schools cut the fees by 15 % in view of the fact that certain expenses would not be incurred by the schools when the schools are physically shut.

21. I may first look at the statutory and legal position regarding the powers of the respondent to regulate and control the fee structure which is charged by private recognised un-aided schools. Reference may be had to Sections 3, 17(3), 18(3), 18(4) and 24 of the DSE Act, 1973 which read as follows:

> "**3. Power of Administrator to regulate education in schools**.—(1) The Administrator may regulate education in all the schools in Delhi in accordance with the provisions of this Act and the rules made thereunder.
>
> (2) The Administrator may establish and maintain any school in Delhi or may permit any person or local authority to establish and maintain any school in Delhi, subject to compliance with the provisions of this Act and the rules made thereunder.
>
> (3) On and from the commencement of this Act and subject to the provisions of clause (1) of article 30 of the Constitution, the establishment of a new school or the opening of a higher class or the closing down of an existing class in any existing school in Delhi shall be subject to the provisions of this Act and the rules made thereunder and any school or higher class established or opened otherwise than in accordance with the provisions of this Act shall not be recognised by the appropriate authority.
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17. **Fees and other charges—**

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

18. **School Fund-**

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

(a) fees,

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

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

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

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

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

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

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

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

(a) stoppage of aid,
(b) withdrawal of recognition, or
(c) except in the case of a minority school, taking over of the school under section 20."

22. Rules 175, 176, 177 and 180 of the Delhi School Education Rules, 1973 read as follows:

"**175. Accounts of the school how to be maintained**
The accounts with regard to the School Fund or the Recognised Unaided School Fund, as the case may be, shall be so maintained as to exhibit, clearly the income accruing to the school by way of fees, fines, income from building rent, interest, development fees, collections for specific purposes, endowments, gifts, donations, contributions to Pupils' Fund and other miscellaneous receipts, and also, in the case of aided schools, the aid received from the Administrator.

176. Collections for specific purposes to be spent for that purpose

Income derived from collections for specific purposes shall be spent only for such purpose.

177. Fees realised by unaided recognised schools how to be utilized

(1) Income derived by an unaided recognised schools by way of fees shall be utilised in the first instance, for meeting the pay, allowances and other benefits admissible to the employees of the school:

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

(a) award of scholarships to students;
(b) establishment of any other recognised school, or
(c) assisting any other school or educational institution, not being a college, under the management of the same society or trust by which the first mentioned school is run.

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

(a) pension, gratuity and other specified retirement and other benefits admissible to the employees of the school;
(b) the needed expansion of the school or any expenditure of a developmental nature;
(c) the expansion of the school building or for the expansion or construction of any building or establishment of hostel or expansion of hostel accommodation;
(d) co-curricular activities of the students;
(e) reasonable reserve fund, not being less than ten per cent, of such savings.

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

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

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180. Unaided recognised schools to submit returns
(1) Every unaided recognised private school shall submit returns and documents in accordance with Appendix II.
(2) Every return or documents referred to in sub-rule (1), shall be submitted to the Director by the 31st day of July of each year.
(3) The account and other records maintained by an unaided private school shall be subject to examination by the auditors and inspecting officers authorised by the Director in this behalf and also by any officers authorised by the Comptroller and Auditor General of India."

23. I may now look at the settled position regarding the powers of the respondent to control, alter or modify the fees structure of the said schools. Reference may be had to the judgment of the Constitution Bench of the Supreme Court in the case of ***T.M.A. Pai Foundation and Ors. Vs. State of Karnataka & Ors.***, **2002 (8) SCC 481**. The relevant portion of the same read as follows:

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

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52. There cannot be a better exposition than what has been observed by these renowned educationists with regard to autonomy in education. The aforesaid passage clearly shows that the governmental domination of the educational process must be resisted. Another pithy observation of the Commission was that State aid was not to be confused with State control over academic policies and practices. The observations referred to hereinabove clearly contemplate educational institutions soaring to great heights in pursuit of intellectual excellence and being free from unnecessary governmental controls.

53. With regard to the core components of the rights under Articles 19 and 26(*a*), it must be held that while the State has the right to prescribe qualifications necessary for admission, private unaided colleges have the right to admit students of their choice, subject to an objective and rational procedure of selection and the compliance with conditions, if any, requiring admission of a small percentage of students belonging to weaker sections of the society by granting them freeships or scholarships, if not granted by the Government. Furthermore, in setting up a reasonable fee structure, the element of profiteering is not as yet accepted in Indian conditions. The fee structure must take into consideration the need to generate funds to be utilized for the betterment and growth of the educational institution, the betterment of education in that institution and to provide facilities necessary for the benefit of the students. In any event, a private institution will have the right to constitute its own governing body, for which qualifications may be prescribed by the State or the university concerned. It will, however, be objectionable if the State retains the power to nominate specific individuals on governing bodies. Nomination by the State, which could be on a political basis, will be an inhibiting factor for private enterprise to embark upon the occupation of establishing and administering educational institutions. For the same reasons, nomination of teachers either directly by the department or through a service commission will be an unreasonable inroad and an unreasonable restriction on the autonomy of the private unaided educational institution.

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

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.(emphasis added)

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65. The reputation of an educational institution is established by the quality of its faculty and students, and the educational and other facilities that the college has to offer. The private

> educational institutions have a personality of their own, and in order to maintain their atmosphere and traditions, it is but necessary that they must have the right to choose and select the students who can be admitted to their courses of studies. It is for this reason that in *St. Stephen's College case* [(1992) 1 SCC 558] this Court upheld the scheme whereby a cut-off percentage was fixed for admission, after which the students were interviewed and thereafter selected. While an educational institution cannot grant admission on its whims and fancies, and must follow some identifiable or reasonable methodology of admitting the students, any scheme, rule or regulation that does not give the institution the right to reject candidates who might otherwise be qualified according to, say, their performance in an entrance test, would be an unreasonable restriction under Article 19(6), though appropriate guidelines/modalities can be prescribed for holding the entrance test in a fair manner. Even when students are required to be selected on the basis of merit, the ultimate decision to grant admission to the students who have otherwise qualified for the grant of admission must be left with the educational institution concerned. However, when the institution rejects such students, such rejection must not be whimsical or for extraneous reasons."

24. Reference may be now had to the judgment of the Supreme Court in the case of ***Modern School vs. Union of India & Ors.***, ***(Supra)***. In that case one of the issues raised was "Whether the Director of Education (respondent herein) 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 Supreme Court held as follows:

> "13. The first point for determination is whether the Director of Education has the authority to regulate the fees of unaided schools.
>
> 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.

15. As far back as 1957, it has been held by this Court in the case of *State of Bombay* v. *R.M.D. Chamarbaugwala* [AIR 1957 SC 699] that education is *per se* an activity that is charitable in nature. Imparting of education is a State function. The State, however, having regard to its financial constraints is not always in a position to perform its duties. The function of imparting education has been to a large extent taken over by the citizens themselves. In the case of *Unni Krishnan, J.P.* v. *State of A.P.* [(1993) 1 SCC 645] looking to the above ground realities, this Court formulated a self-financing mechanism/scheme under which institutions were entitled to admit 50% students of their choice as they were self-financed institutions, whereas rest of the seats were to be filled in by the State. For admission of students, a common entrance test was to be held. Provisions for free seats and payment seats were made therein. The State and various statutory authorities including the Medical Council of India, University Grants Commission, etc. were directed to make and/or amend regulations so as to bring them on a par with the said Scheme. In the case of *T.M.A. Pai Foundation* v. *State of Karnataka* [(2002) 8 SCC 481] the said scheme formulated by this Court in the case of *Unni Krishnan* [(1993) 1 SCC 645] was held to be an unreasonable restriction within the meaning of Article 19(6) of the Constitution as it resulted in revenue shortfalls making it

difficult for the educational institutions. Consequently, all orders and directions issued by the State in furtherance of the directions in *Unni Krishnan case* [(1993) 1 SCC 645] were held to be unconstitutional. This Court observed in the said judgment that the right to establish and administer an institution included the right to admit students; right to set up a reasonable fee structure; right to constitute a governing body, right to appoint staff and right to take disciplinary action. *T.M.A. Pai Foundation case* [(2002) 8 SCC 481] for the first time brought into existence the concept of education as an "occupation", a term used in Article 19(1)(*g*) of the Constitution. It was held by majority that Articles 19(1)(*g*) and 26 confer rights on all citizens and religious denominations respectively to establish and maintain educational institutions. In addition, Article 30(1) gives the right to religious and linguistic minorities to establish and administer educational institution of their choice. However, 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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17. In the light of the judgment of this Court in the case

of *Islamic Academy of Education* [(2003) 6 SCC 697] the provisions of the 1973 Act and the Rules framed thereunder may be seen. The object of the said Act is to provide better organisation and development of school education in Delhi and for matters connected thereto. Section 18(3) of the Act states that in every recognised unaided school, there shall be a fund, to be called as Recognised Unaided School Fund consisting of income accruing to the school by way of fees, charges and contributions. Section 18(4)(*a*) states that income derived by unaided schools by way of fees shall be utilised only for the educational purposes as may be prescribed by the Rules. Rule 172(1) states that no fee shall be collected from any student by the trust/society running any recognised school; whether aided or unaided. That under Rule 172(2), every fee collected from any student by a recognised school, whether aided or not, shall be collected in the name of the school. Rule 173(4) *inter alia* states that every Recognised Unaided School Fund shall be deposited in a nationalised bank. Under Rule 175, the accounts of Recognised Unaided School Fund shall clearly indicate the income accruing to the school by way of fees, fine, income from rent, income by way of interest, income by way of development fees, etc. Rule 177 refers to utilisation of fees realised by unaided recognised school. Therefore, Rule 175 indicates accrual of income whereas Rule 177 indicates utilisation of that income. Therefore, reading Section 18(4) with Rules 172, 173, 174, 175 and 177 on one hand and Section 17(3) on the other hand, it is clear that under the Act, the Director is authorised to regulate the fees and other charges to prevent commercialisation of education. Under Section 17(3), the school has to furnish a full statement of fees in advance before the commencement of the academic session. Reading Section 17(3) with Sections 18(3) and (4) of the Act and the Rules quoted above, it is clear that the Director has the authority to regulate the fees under Section 17(3) of the Act.

(emphasis supplied)

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26. To sum up, the interpretation we have placed on the

provisions of the said 1973 Act is only to bring in transparency, accountability, expenditure management and utilisation of savings for capital expenditure/investment without infringement of the autonomy of the institute in the matter of fee fixation. It is also to prevent commercialisation of education to the extent possible."

25. Reference may also be had to the judgment of the Division Bench of this Court in case of ***Justice for All vs. Govt. of NCT of Delhi & Ors., 2016 SCC OnLine Del. 355***. That was a case in which a public interest litigation was filed seeking a direction that no private unaided school in Delhi which has been allotted land of DDA should enhance fees without prior sanction of the Directorate of Education. The Division Bench held as follows:-

> "16. In para 56 of the said judgment, the Division Bench has culled out the points answered by the Supreme Court in Modern School v. UOI (supra) and Action Committee Unaided private schools v. DOE, Delhi (supra) and the same may be usefully extracted hereunder:
>
> > "56. A conjoint reading of the judgments of the Supreme Court in Modern School (supra) as well as review petitions in the case of Action Committee Unaided Pvt. Schools (supra) would clearly demonstrate that the three points formulated are answered as under:
> >
> > 1) DoE has the Authority to regulate the quantum of fee charged by unaided schools under Section 17(3) of the 1973 Act. It has to ensure that the schools are not indulging in profiteering.
> >
> > 2) The direction of DoE that no fees/funds collected from parents/students shall be transferred from the Recognized Un-aided Schools Fund to the society or trust or any other institution, was valid. However, it could be transferred under the same society or trust,

which aspect is clarified in the review petition.

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

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

26. I may note that an SLP filed against the above judgment being SLP No. 8026/2016 was dismissed by the Supreme Court on 23.01.2017.

27. Reference may also be had to the recent judgment of the Supreme Court in the case of ***Indian School, Jodhpur & Anr. vs. State of Rajasthan & Ors. (supra)***. The Supreme Court on the powers of the State Government to regulate fees held as follows:-

"107. As such, it is not open to the State Government to issue directions in respect of commercial or economic aspects of legitimate subsisting contracts/transactions between two private parties with which the State has no direct causal connection, in the guise of management of pandemic situation or to provide

“mitigation to one” of the two private parties “at the cost of the other”. This is akin to - rob Peter to pay Paul. It is a different matter, if as a policy, the State Government takes the responsibility to subsidise the school fees of students of private unaided schools, but cannot arrogate power to itself much less under Article 162 of the Constitution to issue impugned directions (to school Management to collect reduced school fee for the concerned academic year). We have no hesitation in observing that the asservation of the State Government of existence of power to issue directions even in respect of economic aspects of legitimate subsisting contracts/transactions between two private parties, if accepted in respect of fee structure of private unaided schools, is fraught with undefined infinite risk and uncertainty for the State. For, applying the same logic the State Government may have to assuage similar concerns in respect of other contractual matters or transactions between two private individuals in every aspect of life which may have bearing on right to life guaranteed under the Constitution. That would not only open pandora's box, but also push the State Government to entertain demands including to grant subsidy, from different quarters and sections of the society in the name of mitigating measures making it financially impossible and unwieldy for the State and eventually burden the honest tax payers - who also deserve similar indulgence. Selective intervention of the State in response to such demands may also suffer from the vice of discrimination and also likely to impinge upon the rights of private individual(s) — the supplier of goods or service provider, as the case may be. The State cannot exercise executive power under Article 162 of the Constitution to denude the person offering service(s) or goods of his just claim to get fair compensation/cost from the recipient of such service(s) or goods, whence the State has no direct causal relationship therewith.

108. It is one thing to say that the State may regulate the fee structure of private unaided schools to ensure that the school Management does not indulge in profiteering and commercialisation, but in the guise of exercise of that power, it cannot transcend the line of regulation and impinge upon the

autonomy of the school to fix and collect "just" and "permissible" school fees from its students. It is certainly not an essential commodity governed by the legislation such as Essential Commodities Act, 1955 empowering the State to fix tariff or price thereof. In light of consistent enunciation by this Court including the Constitution Bench, that determination of school fee structure (which includes reduction of fixed school fee for the relevant period) is the exclusive prerogative of the school Management running a private unaided school, it is not open to the Legislature to make a law touching upon that aspect except to provide statutory mechanism to regulate fees for ensuring that it does not result in profiteering and commercialisation by the school Management. Ex-consequenti, the State Government also cannot exercise power under Article 162 of the Constitution in that regard.

109. Notably, the direction given in the impugned order to the school Management is to collect only specified percentage of annual tuition fees on the assumption that the schools will not be required to complete the course for the academic year 2020-21. This assumption has been rebutted by the appellants by relying on the instructions issued by the concerned Board indicating to the contrary. In any case, that does not extricate the school Management from incurring recurring capital and revenue expenditure including to pay their academic and non-academic staff their full salary and emoluments for the relevant period. For, no corresponding authority is given to the school Management to deduct suitable amount from their salaries. Thus, the effect of the impugned order is to reduce school fees determined under the Act in absence of authority to do so including under the Act of 2016. Further, on the face of it, the direction given is inconsistent with the provisions of the stated Act. To put it tersely, the impugned order issued is in respect of matters beyond the power of the State Government - to regulate the fee structure for ensuring that the school Management does not indulge in profiteering and commercialisation. Accordingly, the impugned order dated 28.10.2020 cannot be sustained even in reference to executive power under Article 162 of the Constitution."

28. Regarding the power of the respondent DOE to control and regulate the fee structure of Recognized Unaided Schools, the ratio of a catena of judgments of the Supreme Court and of this court was summed up by a Co-ordinate Bench of this court in the case of ***Action Committee Unaided Recognized Private Schools vs. Directorate of Education & Anr.,*** (supra). In that case, the impugned order pertained to implementation of the recommendations of the 7th Central Pay Commission. The court after going through a catena of judgments including the judgments in the case of ***Union of India & Anr. vs. Jain Sabha, New Delhi & Anr, (1997) 1 SCC 164***; ***T.M.A. Pai Foundation v. State of Karnataka***(supra); ***Delhi Abhibhavak Mahasangh vs. Union of India & Ors.***(supra); ***Modern School vs. Union of India & Ors.***(supra); ***P.A. Inamdar & Ors. vs. State of Maharashtra & Ors.***, ***(2005) 6 SCC 537;*** and ***Delhi Abhibhavak Mahasangh vs. Govt. of NCT of Delhi & Ors., 2011 SCC OnLine Del 3394*** spelt out legal position of the powers of the D.O.E. as follows:-

> "94. A holistic and conjoint reading of the above directions, with the earlier decision in T.M.A. Pai (supra), would make it clear that the Supreme Court could not have intended the implementation of its directions to have been undertaken either de hors the provisions of the DSE Act and the DSE Rules, or in the teeth of the Pai pronouncement. T.M.A. Pai (supra) conferred complete autonomy, on private unaided schools, in the matter of fixation of their fees. The only limitation - if one may call it that - to the sweep of this right is in the stipulation that the fees fixed should not be in the form of capitation, or amount to profiteering. Absent these interdictions, it is clearly not open to the DoE to entrench on the territory of the schools, insofar as the matter of fixation of their fees is concerned.
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129. In sum and substance, therefore, the position that emerges, is this: The right to establish, and administer, unaided educational institutions, is essentially absolute, and bureaucratic and governmental interference, therewith, has necessarily to be minimal. Among the facets of this right is the right to set up a fee structure, which included determination of the quantum of fee to be charged by it. Regulation, of the right to establish and administer educational institutions by the Government was, however, permissible, to ensure excellence in education and prevent maladministration. Such regulation could govern, for example, the quality of teachers (by prescribing minimum qualifications for appointment), the courses and curricula of study, and the existence of requisite and sufficient infrastructure. It could not, however, trespass into the arena of administration, complete discretion, in respect whereof, had to be left to the institution and those who managed it. Maintenance of a reasonable revenue surplus, for augmentation of the institution and its facilities, and for the betterment of the students studying therein, was perfectly in order. While, therefore, a reasonable profit could be earned by the institution, after providing for investment and expenditure, profiteering, and charging of capitation fee, was entirely impermissible, and the Government could introduce regulations to ensure that this did not happen. The Government could not, however, fix a rigid fee structure, for unaided educational institutions.

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

knowledge, it would be treated as indulging in "profiteering". Earning of profit is, however, by itself, not "profiteering".”

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

29. Reference may also be had to the judgment of the Coordinate Bench of this court in the case of ***Ramjas School vs. Directorate of Education(supra)***. The issue in that case was as 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. The Co-ordinate Bench held as follows:

“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, 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".

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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, as well as all its sequel, expressly proscribe."

The court concluded as follows:-

"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"

30. What follows from the above judgments of the Supreme Court and of this court is that the scope of power and authority of the DOE to interfere with the fixation / collection of fees by unaided educational institutions is well defined. The DOE does exercise control for the purpose of prevention of commercialisation of education by such unaided institutions only. It is to ensure that a recognized unaided school does not indulge in collection of capitation fees or profiteering. Generating a reasonable surplus to augment its facilities and for other such purposes is a legitimate act which cannot be faulted with.

31. As noted above, the Supreme Court in the case of ***Islamic Academy of Education & Anr. vs. State of Karnataka & Ors., (2003) 6 SCC 697*** in a concurring judgment by Justice S.B. Sinha 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".

32. Other than the above power of the respondent, the private unaided

schools have complete autonomy in the matter of fixation of their fees. Such schools have the power to fix just school fees.

33. Learned Standing Counsel for the respondent had heavily relied upon the judgment of the Division Bench in the case of ***Delhi Abhibhavak Mahasangh vs. UOI & Ors., 1999 (Supra)*** and judgement of the Division Bench of the court in the case of ***Delhi Abhibhavak Mahasangh vs. Union of India & Ors***, ***2002 (Supra))*** to plead that the respondent has powers to regulate the fees structure of such schools.

34. The Division Bench of this court in the case of ***Delhi Abhibhavak Mahasangh vs. Union of India & Ors***., ***1999 (supra)*** had also noted as follows:-

> "41. Besides Section 4 of the Act which deals with grant of recognition it has to be kept in view that the Administrator under Section 3 is empowered to regulate education in all schools in Delhi in accordance with the provisions of the Act and Rules made thereunder. It has to be read in the Act and the Rules that power of the Administrator to regulate education includes the power to curb commercialisation. Thus, if it is found that the fee and other charges are wholly unreasonable and exhorbitant and amount to commercialisation, it would be the duty of the Administrator to step in and check such an activity before taking the extreme step of withdrawal of recognition and other harsh steps. The Director of Education is the delegatee of the Administrator. In this view the interpretation sought to be placed upon Section 17 of the Act, by Mr. Jaitley and Mr. Subramaniam to show lack of power to regulate fee looses much of its significance. With reference to Section 10 of the Act which deals with the salaries of the employees, it was contended on behalf of the schools that the said provision only envisages that private schools shall not pay less salary etc. to their employees as compared to the employees of the corresponding status in the schools run by the Government and thus the private recognised schools could pay

> higher salaries and, therefore, they could generate higher revenue. There cannot be any quarrel with this proposition. We have no hesitation in accepting that higher salary etc. can be paid to the employees of the private recognised schools and contention to the contrary urged on behalf of Mahasangh has no merit. Therefore, the private schools can generate higher revenue. We are not suggesting that the private recognised schools cannot charge higher fee. However, what cannot be done is that the private recognised schools in the garb of power to generate higher revenue to pay higher salaries to the employees, cannot levy unreasonably exhorbitant amounts towards fees and charges. The right to pay higher salary does not mean right to pay unreasonably exhorbitant amount. What is such an amount would depend upon facts of each case.

35. Hence the Division Bench in the above judgment had reiterated that the Administrator has power to regulate education which includes the power to curb commercialization. If it is found that the fees and other charges are wholly unreasonable and exhorbitant and amount to commercialisation, then it would be the duty of the Administrator to step in and check such activities.

36. I may note that against the above judgment an appeal was filed before the Supreme court being the case of ***Modern School vs. Union of India & Ors.(supra).*** The findings of the Supreme Court in the aforenoted judgment of ***Modern School vs. Union of India & Ors.(supra)*** have already been spelt out above.

37. Reference may also be had to the second judgment of the Division Bench of this court in the case ***Delhi Abhibhavak Mahasangh vs. Union of India & Ors., 2002 (supra)***. Relevant portion reads as follows:

> "The said Act seeks to regulate fixation of not only tuition fees by the management of the school but also other categories of

fees. Each category of fees levied upon the students serves different purposes.

By reason of the impugned order, not only the schools have been authorized to collect development fees but thereby stringent measures have been taken to see proper utilization thereof. The right of the school to expend the money from the fund created for one purpose for other purposes has been curbed.

We do not see any justifiable ground to arrive at a conclusion that the impugned order violates and modalities of the statute or the directions issued by this Court."

38. It is clear that the reliance on the above judgments by the learned counsel for the respondent is misplaced. There is no observation to the contrary in this judgment which allows the respondent to regulate and control the power of collection of fees other than fees which results in commercialisation or exploitation. The power of the respondent DOE is for prevention of commercialisation of education. Clearly in the absence of a finding of commercialisation of education or exploitation the respondent cannot indefinitely cut down the established fees or restrain a said school from collecting a portion of the existing fees.

39. Now coming to the facts of the present case. Lockdown was imposed in the end of March, 2020. The impugned order dated 18.04.2020 was issued by the respondent preventing levy of Annual Charges and Development Fees on the ostensible ground that there is a lockdown going on being an emergency like situation. The order also claims that charitable trusts, societies or NGOs are extending their support voluntarily to deal with the war like situation. Examples are stated of some private unaided schools

violating the provisions of the DSE Act and rules. It also notes that on account of the closure of schools the expenditure on co-curricular activities, sports activities, transportation and other development related activities is almost nil. Thus, the order exercises power under Section 17(3) of the DSE Act and Rule 43 of the Rules to direct that no fees except tuition fees will be charged from the parents during the lockdown. Annual and Development Charges can be charged from the parents on pro rata basis only on monthly basis after completion of the lockdown period.

40. Reliance of the respondent on Section 17(3) of the DSE Act and Rule 43 of the Rules in the present facts is misplaced. As noted above, Section 17(3) of the DSE Act provides that the manager of every recognized school before commencement of an academic session shall file with the Director a full statement of fees to be levied by the school. Further, during the academic session, no fees in excess of the fees specified by its manager in the statement shall be charged. There is no fee being increased by the schools in the present case. On the contrary, what the respondent are doing is an across the board cut in the fees that the schools in question can charge. Section 17(3) of the DSE Act has no relevance to the facts of this case.

41. Similarly, Rule 43 provides that the Administrator may in the interest of the school education issue instructions in relation to any matter not covered by the Rules which he may deem fit. The said rule has to be necessarily read co-jointly with the DSE Act. It does not give any power to the respondent to indefinitely reduce any portion of fees legitimately being charged by schools across the board for an indefinite period as is being sought to be done by the impugned act.

42. Further, does the act of charging the usual Development Fees or

Annual Charges in the present facts tantamounts to profiteering by the schools in question?

43. The powers of the Directorate of Education to regulate fees have been spelt out above. To repeat, the power to regulate the fees exists for the purpose of prevention of commercialization of education by private recognized unaided schools only. The power is to be exercised to ensure that there is no charging of capitation fees or profiteering by any of the private recognized unaided schools.

44. I may only note that the different categories of fees that the private recognized unaided schools can charge in Delhi have been spelt out in the judgment of the Division Bench of this court in the case of ***Delhi Abhibhavak Mahasangh vs. Union of India & Ors***., ***2002 (Supra).*** The first category of fees explained was admission fee / caution money, the second category was tuition fee which was to cover standard cost of establishments including provisions for D.A., bonus, terminal benefits and all expenditure of revenue nature concerning extra -curricular activities. The third category was annual charges. These charges were to be so determined as to be sufficient to cover all expenditure of a revenue nature not included in the second category besides the overheads and expenses on playgrounds, sports equipment, gymnasium, cultural and other curricular activities as distinct from curricular activities of the schools. In addition, the schools could also levy a development fee as a capital receipt not exceeding 10 per cent of the annual tuition fees for supplementing the resources for purchase, upgradation and replacement of furniture, fixture and equipment.

45. The break-up of expenses related to Annual Charges have been elaborated above and the sub heads are not disputed. It broadly includes the

following expenses:

1. Hostel running expenses
2. Administrative & General Expenses
3. Rents, rates and taxes
4. Communication Expenses
5. Printing & Stationery
6. Electricity & Water charges
7. Travelling & Conveyance
8. Expenses of teaching & non teaching staff
9. Insurance charges
10. Promotional expenses
11. Remuneration of Auditors (including expenses reimbursed)
12. Repairs & maintenance of Building
13. Depreciation
14. Financial expenses such as interest on loans, loss on sale of fixed assets & investments
15. Other expenses – Write offs and provisions
16. Miscellaneous expenses
17. Legal Expenses.

46. Similarly, the break-up of expenses related to Development Fees have been stated above and relate to the following expenditure:

1. Furniture, Benches
2. Chairs, Wall paneling, Green/Black Boards
3. Computers
4. Projectors
5. Smart Boards/ Touch Panels in classes
6. Water Coolers
7. Air conditioners
8. RO water treatment plant
9. Overhauling of electrical
10. Panels, switches, MCB's
11. Fire safety equipments
12. Fans and lights

13. Changing / repairing of doors and windows
14. Tiles, Lift

47. The issue that arises is that the schools are not physically open, can it be said that the expenses under the above heads are not being incurred by the private unaided recognized schools? In my opinion, a bare perusal of the heads of expenses clearly demonstrates and shows that most of the expenses are not correlated or connected with the actual physical opening of the schools for the students. Expenses like rents, taxes, travelling, conveyance, insurance charges, remuneration of auditors, repair and maintenance of building and maintenance of equipment, furniture and fixture are all expenses which will continue to be incurred by the schools irrespective of the physical shut down. In case, the said repairs and expenses are not done, it is bound to cause damage to the building, infrastructure and functioning of the schools.

Further, it cannot be said that the school building is completely shut. The building would remain functional for administrative reasons and even, depending on facts and circumstances of the case, for conducting online classes, etc.

48. No doubt, the expenses under some of the heads will drop in the absence of actual full physical opening of the schools, namely, expenses like, electricity, water, stationery, etc.

49. There is no finding recorded by the impugned orders that the collection of Annual Charges and Development Fees tantamounts to profiteering or collection of capitation fees by private unaided recognized schools. A perusal of the impugned orders does not show that the entire body of private unaided recognized schools has indulged in profiteering or

charging of capitation fees by seeking to collect Annual Charges and Development Fees in the stated facts and circumstances.

50. As noted, the private recognized unaided schools are clearly dependent only on the fees collected to cover their salary, establishment and all other expenditure on the schools. Any regulations or order which seek to restrict or in-definitely postpone their powers to collect normal and usual fees as is sought to be done by the impugned orders is bound to create grave financial prejudice and harm to the schools. Reference may be had to the observations of the Division Bench of this court in the case of ***Naresh Kumar vs. Director of Education & Anr., MANU/DE/0977/20220*** where the Division Bench noted as follows:-

> "..... Money does not grow on trees, and unaided schools, who received no funds from the Government, are entirely dependent on fees, to defray their daily expenses. ....."

51. The respondent in the facts and circumstances has no power to indefinitely postpone the collection of Annual Charges and Development fees, as is sought to be done. The impugned acts are prejudicial to the said Schools and would cause an unreasonable restriction in their functioning. In the above facts and circumstances, clearly the impugned orders dated 18.04.2020 and 28.08.2020 issued by the respondent to the extent that they forbid the petitioner/postpone collection of Annual Charges and Development Fees are illegal and *ultra vires* the powers of the respondent stipulated under the DSE Act and the Rules. The orders to that extent are quashed.

52. The fact remains, as noted above, that the schools are affecting some savings on account of the fact that the school are presently physically shut.

The Supreme Court has already dealt with the stated issue. The directions as passed by the Supreme Court in the case of ***Indian School, Jodhpur & Anr. vs. State of Rajasthan & Ors.(supra)*** would clearly apply to the present case *mutatis mutandis*. Relevant para of the said judgment reads as follows:-

> "128.Ordinarily, we would have thought it appropriate to relegate the parties before the Regulatory Authority to refix the school fees for the academic year 2020-21 after taking into account all aspects of the matter including the advantage gained by the school Management due to unspent overheads/expenses in respect of facilities not availed by the students. However, that course can be obviated by the arrangement that we propose to direct in terms of this judgment. To avoid multiplicity of proceedings (as school fee structure is linked to school-school wise) including uncertainty of legal processes by over 36,000 schools in determination of annual fee structure for the academic year 2020-21, as a one-time measure to do complete justice between the parties, we propose the issue following directions:
>
> (i) The appellants (school Management of the concerned private unaided school) shall collect annual school fees from their students as fixed under the Act of 2016 for the academic year 2019-20, but by providing deduction of 15 per cent on that amount in lieu of unutilised facilities by the students during the relevant period of academic year 2020-21.
>
> (ii) The amount so payable by the concerned students be paid in six equal monthly instalments before 05.08.2021 as noted in our order dated 08.02.2021.
>
> (iii) Regardless of the above, it will be open to the appellants (concerned schools) to give further concession to their students or to evolve a different pattern for giving concession over and above those noted in clauses (i) and (ii) above.

(iv) The school Management shall not debar any student from attending either online classes or physical classes on account of non-payment of fees, arrears/ outstanding fees including the installments, referred to above, and shall not withhold the results of the examinations of any student on that account.

(v) If any individual request is made by the parent/ward finding it difficult to remit annual fees for the academic year 2020-21 in the above terms, the school Management to consider such representation on case-to-case basis sympathetically.

(vi) The above arrangement will not affect collection of fees for the academic year 2021-22, as is payable by students of the concerned school as and when it becomes due and payable.

(vii) The school Management shall not withhold the name of any student/candidate for the ensuring Board examinations for Classes X and XII on the ground of non-payment of fee/arrears for the academic year 2020-21, if any, on obtaining undertaking of the concerned parents/students."

53. The above directions given in paras (i) to (vii) will apply to the petitioner schools *mutatis mutandis*. However, clause (ii) has to be modified. The amount payable by concerned students will be paid in six monthly installments w.e.f. 10.06.2021.

54. The petition stands disposed of accordingly. Pending applications, if any, also stand disposed of.

JAYANT NATH, J.

MAY 31, 2021/st/v/rb