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

Pronounced on 15th March, 2023

\+ W.P.(C) 3426/2020, CM APPLs. 34615/2022 & 30910/2022

MAHAVIR SR. MODEL SCHOOL AND ANR. ..... Petitioners

Through: Mr. Kamal Gupta, Mr. Sparsh and Mr. Yash Yadav, Advocates.

versus

DIRECTORATE OF EDUCATION ..... Respondent

Through: Mr. Santosh Kumar Tripathi, SC (Civil), GNCTD with Mr. Arun Panwar, Mr. Siddharth Krishna Dwivedi, Mr. Pradeep, Ms. Mahak Rankawat, Mr. Aditya S. Jadhav and Mr. Pradyuman Rao, Advocates for R-DOE.
Mr. Rishikesh Kumar, ASC, GNCTD with Ms. Sheenu Priya and Mr. Muhammad Zaid, Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

J U D G M E N T

SANJEEV NARULA, J.

FACTUAL BACKGROUND

1. On 25th February, 1980, Municipal Corporation of Delhi allotted land to Mahavira Foundation, a society constituted of members of the Jain

community.[1] They established Petitioner No. 1 – Mahavir Sr. Model School as an aided Senior Secondary Private School [*hereinafter*, "***Sr. School***"]. Later upon payment of requisite charges, its status was converted to unaided private school. Subsequently, the Delhi Development Authority, *vide* letter dated 02nd November, 1987, allotted a separate piece of land for establishment of Petitioner No. 2 – Mahavir Jr. Model School, another unaided private school [*hereinafter*, "***Jr. School***"]. This school was founded in the year 1991 for nursery to preparatory education. Both the aforenoted educational institutions [*collectively*, "***Schools***"] function and administer their affairs entirely from the fees collected by them and are not dependent on any aid from the State. They have been accorded minority status since the year 2011, are recognised under the provisions of the Delhi School Education Act, 1973 ["*DSEA*"] and function under the regulatory control of Directorate of Education ["*DoE*"], in accordance with the aforesaid Act and rules framed thereunder.

2. After approving the budget for academic session 2018-19, on 24th March, 2018, the Managing Committee of the Sr. School, submitted a statement of fee to DoE in terms of Section 17(3) of DSEA, setting out class-wise fee structure for said academic year. This fee structure was implemented from 01st April, 2018.

3. On receipt of the statement of fee and on the basis of a complaint/ representation received from few parents of the students studying in the Schools, DoE sent an e-mail on 27th April, 2018 alleging that enhancement

[1] The allotment letter was signed on 23rd February, 1980 by Assistant Commissioner.

of fee by Sr. School was without prior sanction from DoE. The explanation given by the Principal of the Sr. School in reply was not accepted, and DoE passed an order dated 01st May, 2018 holding that Sr. School has been arbitrarily increasing fee under the garb of implementation of 7th Central Pay Commission in breach of the condition of prior sanction entailed in the land allotment letter. The school was directed to "*roll back the fee hike in the school in light of the directions of the Department and refund the increased fee to the parents /guardians of the students, with immediate effect*". Based on the said order, a show-cause notice was also issued on 05th May, 2018. In response, Sr. School clarified that the enhanced fee structure was not motivated by 7th Central Pay Commission, but was fixed keeping in mind the budgetary requirements. It was clarified that land allotment letter dated 02nd November, 1987 pertained only to Jr. School and the Sr. School, which is a separate entity, is not governed by the land clause.

4. Thereafter, DoE issued a notice to the Sr. School on 21st May, 2018, pointing out several discrepancies in the statement of fee and called upon it to furnish its response. In the meantime, Sr. School was directed not to increase its fee till the scrutiny of the statement of fee is completed. In response thereto, on 25th May, 2018, Sr. School provided point-wise clarifications/ explanations. Unconvinced thereby, DoE passed order dated 20th July, 2018, directing the Sr. School to not increase fee/ charges for the academic year 2017-18 and to refund/ adjust the increased fee recovered from students against future fees. The Schools impugned the aforenoted order before this Court [in W.P.(C) 8681/2018] wherein, at the stage of admission itself, leave was granted to Sr. School to approach the DoE

seeking clarifications. Sr. School's detailed representation to DoE, pursuant to the above-noted directions, has been decided by order dated 25th January, 2019, impugned in the present proceedings, which rejects the Schools' proposed fee hike [*hereinafter*, "***impugned order***"].

INTERIM ORDERS

5. On 10th June, 2020, taking note of decision of coordinate bench in ***Ramjas School v. Directorate of Education*** and preliminary submissions of the parties,[2] following order was passed:

> "*11. Keeping in view the above position, in my opinion, the petitioner has made out a prima facie case. The parties will maintain status (sic) quo as of today including status quo regarding enhancement of fee. Any fees already collected or billed by the petitioners contrary to the impugned order would be subject to further directions of the court.*
> *12. Learned counsel for the petitioner confirms that for the academic year 2020-21, no fee enhancement is being made as compared to the fee charged in 2019-2020. The petitioners shall abide by this submission. In case for any reason, the petitioner seeks to enhance the fee for year 2020-21, permission from this court would be taken*."

6. Subsequently, Abhibhavak Ekta Sangh – a society of parents of students studying in Sr. School [*hereinafter*, "***the Society***"], applied for impleadment and interim directions to restrain the Sr. School from taking coercive action in respect of enhanced fees for academic sessions 2018-19, 2019-20 and 2020-21, and continuation of the old fee structure.[3] Balancing the interest of parties, following interim directions were issued on 25th May, 2021:

> "*6. In view of the above, a complete stay on the demands raised by the School is not appropriate at this stage. I am of the prima facie view that the order dated 10.06.2020 does not impose a stay on the fee proposed by the School,*

[2] 2020 SCC OnLine Del 1776.
[3] CM APPL. No. 17063/2021.

but on any further enhancement thereof. However, the interests of the parties have to be balanced, having regard to the effect of the pandemic on the livelihood of parents and to the interests of the students in the continuity of their education. The parties are therefore directed as follows, subject to further orders :-

(a) The School will communicate the arrears claimed by it in respect of fees for the period upto May 2021, to the parents of each of the students whose names have been struck off from its records and who have been denied online classes, within one week from today.

(b) The concerned parents will deposit 50% of the arrears claimed by the School within two weeks from today.

(c) The deposit will be made by the parents and accepted by the School without prejudice to their rights and contentions in the present petition, and subject to adjustment of accounts depending upon the result of the petition.

(d) The concerned parents will also file an undertaking before this Court within two weeks from today, to the effect that in the event the School is found entitled to the balance arrears as claimed by it, they will make payment of the same within the time granted by this Court at the appropriate stage.

(e) Subject to the payments being made as aforesaid, the School will restore the names of the students which have been struck off from its rolls and will restore online classes of those students to whom online classes have been denied on the ground of arrears of fees.

(f) As far as current fees are concerned, the School is entitled to recovery of the fees in terms of the applicable guidelines of the DoE. The School will raise invoices accordingly, and the parents will pay the fees from June, 2021 in accordance with the invoices raised by the School.

7. It is made clear that this is an interim arrangement, subject to adjustment as may be directed by the Court. The observations in this order are only for this purpose, and will not prejudice the parties at the hearing of the writ petition."

7. The appeal preferred by the Society [LPA 188/2021] against the aforenoted order was disposed of on 19th December, 2022 without granting any stay.

CONTENTIONS

On behalf of the Schools

8. Mr. Kamal Gupta, counsel for Petitioners, raised following grounds of challenge:

8.1 The Sr. School, being unaided recognised school, is not required to obtain prior or *ex-post facto* approval for increase in their fee structure.

8.2 Considering the damaged infrastructural facilities of the Sr. School, there is a dire need to reconstruct/ upgrade the same. For this purpose, an agreement was executed with an architectural firm on 29th June, 2017, but on account of impugned order, the Sr. School is unable to allocate funds for renovation activities.

8.3 DoE's calculation of surplus available with Petitioner-Schools is outrightly erroneous. It is stated that for academic session 2018-19, a surplus of Rs. 7.91 crores was available with the Schools, however, out of said amount, Rs. 3.2 crore has been set aside towards Depreciation Reserve Fund, which is a pre-condition for charging of development fee, in terms of judgement of the Supreme Court in ***Modern School v. Union of India***.[4] Schools also have current liability amounting to approximately Rs. 50 lakhs (as on 31st March, 2018), which ought to have been deducted from the available funds by DoE as per the Guidance Note on Accounting by Schools issued by ICAI.[5] Further, Schools have not received any amounts from the Mahavira Foundation, and the same has been wrongly added in computation of the surplus.

8.4 It is well-settled that reasonable surplus available with schools can be utilised towards betterment of their facilities as long as the same does not amount to profiteering. There is no allegation of siphoning of funds or commercialisation against Petitioners, and thus, DoE has no authority to interfere with their fee structure. Reliance was placed upon judgements in ***Ramjas*** *(Supra)* and ***Action Committee Unaided Private Schools and Ors.***

[4] (2004) 5 SCC 583.
[5] Bearing No. GN(A)21(2005).

v. Directorate of Education and Ors.[6]

8.5 As per Rule 177(2)(e) of Delhi School Education Rules, 1973 ["*DSER*"], schools are mandated to maintain a Contingency Reserve Fund equivalent to four months' salary; however, DoE has calculated Petitioners' salary reserves on the basis of three months' salary instead of four months, and has thus acted in violation of applicable rules. Reference was also made to report of Justice Anil Dev Singh Committee appointed by the Division Bench of this Court, wherein the committee opined that schools must maintain this fund.

8.6 No opportunity of personal hearing/ representation was afforded to Schools and as such, impugned order was passed in violation of principles of natural justice.

8.7 Objections of a few parents *qua* increase in fee is not a sufficient ground to restrain otherwise eligible schools from revising their fee.[7]

On behalf of DoE

9. Mr. Santosh Kumar Tripathi, counsel for DoE, put forth following contentions in support of the impugned order:

9.1 Impugned order was issued after assessing the statement of fee for academic session 2018-19. Given that Sr. School has sufficient funds for meeting budgeted expenditure for the year 2018-19, its proposal for fee hike has been rightly rejected.

9.2 As per clause 15 of the land allotment letter dated 02nd November, 1987, any change in fee structure of the Schools must be in accordance with

[6] (2009) 10 SCC 1.
[7] Petitioners relied on ***DAV College v. Laxminarayan Mishra***, (2014) 14 SCC 69.

the DSEA and DSER; Schools ought not to have increased their fee without prior permission of DoE.

9.3 Schools' allegation of violation of principles of natural justice is baseless as personal hearing was held on 18th January, 2019 and all additional documents submitted by them were taken into consideration, prior to issuance of impugned order.

9.4 The proposed fee hike is contrary to principles pertaining to School Fund provided in Section 18 of DSEA and Rules 172 to 177 of DSER. Thus, proposed fee hike amounts to profiteering and is impermissible as per judgement of the Supreme Court in ***Modern School*** *(Supra).*

9.5 In terms of provisions of DSER, DoE is authorised to undertake or direct audit of accounts and statement of fee maintained by the Schools. The total funds available with the Schools amount to Rs. 16,17,42,904/- [Rs. 9,67,96,759/- with Sr. School and Rs. 6,49,46,324/- with Jr. School] and the resultant surplus amounts to Rs. 7,91,24,168/- [Rs. 2,19,81,079/- with Sr. School and Rs. 5,71,43.088/- with Jr. School]. Accumulation of such surplus or capitalising of school fee by private unaided recognised schools constitutes commercialisation of education.

9.6 'Surplus' if any, is justifiable only when the same is 'reasonable' and 'incidental' in nature, meant for development of the institution. For this, reliance was placed upon Rule 177 of DSER and decisions in ***TMA Pai Foundation and Ors. v. State of Karnataka and Ors.***[8] and ***Modern School*** (*Supra*).

9.7 In addition to the safeguards under DSEA, report of the Justice Santosh Duggal Committee is also a guiding factor in utilisation of collected

fees. Per the Committee's report, a development fund fee of maximum ten percent of total tuition fee can be charged and treated as a capital receipt to be used for depreciation and consequent upgradation of furniture, fixtures, machinery, and equipment, subject to the institution maintaining a Depreciation Reserve Fund. Charges over and above the same would constitute capitation fee. The concept of development fund has been accepted and implemented by the GNCTD and Schools are bound to follow it.

9.8 The judgement in ***Ramjas School*** *(Supra)* is per incuriam and in ignorance of the judgements of the Supreme Court in ***Modern School*** *(Supra)* and ***Union of India v. Moolchand Khairaiti Ram Trust.***[9] In ***Moolchand Khairaiti Ram Trust*** (*Supra*), it was held that Government can impose new conditions, even if the same were not mentioned in the terms of lease, keeping in view the larger interest of public. ***Ramjas School*** *(Supra)* has been assailed by DoE in LPA No. 488/2022 and is pending consideration.

9.9 As per ***Modern School*** *(Supra)*, generally accepted accounting principles ["*GAAP*"] are the guiding principles of accountancy to be followed for charitable societies running on no-profit basis, and the same would apply to private unaided recognised schools such as the Petitioners. The Chartered Accountant's certificate submitted by Petitioners was also not in compliance with applicable principles.

9.10 Due to increase in fee, students in Schools are being made to unfairly bear the expense of expansion of the school premises, such as creation of

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[8] (2002) 8 SCC 481.
[9] (2018) 8 SCC 321.

senior classes and other facilities, which they have not assented to at the time of taking admission.[10]

On behalf of the Society

10. Mr. Amit Gupta, counsel for the Society, supported the submissions advanced by Mr. Tripathi and argued that the impugned order calls for no interference and the parents should not unnecessarily be burdened with continuous and repeated fee hikes.

ANALYSIS

11. The present case brings forth a classic tussle between autonomy of private schools in fixation of fees and the extent of governmental control thereon, an issue which routinely engages this Court. DoE asserted that notwithstanding the status of 'private unaided school', no fee can be fixed without their prior permission. The Schools on the other hand, contended that they enjoy freedom in management of their affairs, which includes fixation of the fees. In that light, what lays for consideration before this Court is whether in passing the impugned order, the DoE has acted in excess of its jurisdiction vested under DSEA and DSER or any other extant rules/ regulations, thereby impinging upon the autonomy of Petitioner-Schools in determination of their fee structure for the academic year 2018-19.

[10] The DoE placed reliance on following judgements in support of its contentions:
a. ***Delhi Abhibhavak Mahasangh v. Union of India & Ors.,*** AIR 1999 Delhi 124.
b. ***Justice For All v. Government of NCT of Delhi & Ors.,*** 2016 SCC OnLine Del. 355.
c. ***Justice for All v. Government of NCT of Delhi & Ors.*** 227 (2016) DLT 354.
d. ***Action Committee Unaided Private School and Others v. Directorate of Education and Ors.,*** 2021 SCC OnLine Del 2744.

12. When it comes to fixation of fee, DoE asserts its regulatory control relying on the provisions of DSEA as well as conditions accompanied with allotment of lands to schools, which is typically referred to as a 'land clause'. The said clause, in the context of fee hike, implies incorporation of stipulations pertaining to proposed changes to the fee structure, making it obligatory to seek prior approval from DoE. Thus, for adjudication of the present case, it is imperative for the Court to first determine whether the Schools are subjected to this condition and depending on the outcome, decide whether Schools are prohibited from raising their fees, without obtaining prior approval from DoE.

WHETHER THE SCHOOLS ARE GOVERNED BY A 'LAND CLAUSE', IF SO, TO WHAT EFFECT?

13. The impugned order and DoE's submissions relied upon clause 15 of land allotment letter dated 02nd November, 1987 which specifies that Jr. School shall not increase the rates of tuition fees without prior sanction of the DoE, and shall follow the provisions of DSEA and DSER and other instructions issued from time to time. This fact is not controverted, and therefore, Jr. School is governed by a land clause.

14. However, despite the significant difference in the status of Sr. School, DoE emphasised that the land clause contained in the allotment letter dated 2nd November 1987 is also applicable to them. This is an incorrect understanding. The aforesaid letter pertains to 0.238 acres of land at Gujranwala Town that was allocated for the 'Jr. School', and not the 'Sr. School'. The Sr. School was established on 2.79 acres of land situated at

Sangam Park, G.T. Road as per letter dated 25th February, 1980, and initially functioned as an aided school before transitioning into an unaided one. Neither of the parties have presented the letter that contains the terms and conditions governing operations of the Sr. School as an unaided school; nonetheless, DoE's assertion that Sr. School is obligated to obtain prior sanction, based on the land allotment letter of 02nd November, 1987, is plainly misconceived. The aforesaid communication explicitly applies exclusively to the Jr. School, and does not impose any obligation on the Sr. School. Furthermore, it is pertinent to note that the Sr. School has been in operation since 1983, which predates the issuance of said land allotment letter in 1987, further evidencing that Sr. School is not governed by the land clause.

15. Adverting now to DoE's argument that State can introduce new conditions in the land allotment letter taking strength from ***Moolchand Khairaiti Ram*** *(Supra)*. In the said case, the Supreme Court upheld addition of a provision in the lease deed requiring hospitals to provide free treatment to patients from economically disadvantaged backgrounds because the land was leased to the hospitals for charitable reasons, and was subject to the policies and regulations under which the grant was given. In the current dispute, lands allotted to the Mahavira Foundation were not designated for charitable purposes, but for establishment of unaided private schools, which entitles them autonomy in fee fixation, subject to certain restrictions which will be discussed later in the judgment. Thus, if the land allotment letter governing operations of Sr. School as an unaided private school did not contain a land clause, imposition of a new condition by the regulatory

authorities would be inconsistent, arbitrary and unreasonable. While private schools and charitable organisations may share some similarities, they cannot be equated with each other as they have fundamentally different objectives, funding models, and regulatory frameworks. It would be an exaggeration and a misreading of the law to argue that all private unaided schools are charitable organisations. Nonetheless, DoE has not imposed a fresh condition in Sr. School's allotment letter, but has relied on a purported pre-existing condition, which is not applicable to the Sr. School. Therefore, the judgement in ***Moolchand Khairaiti Ram*** *(Supra)* is of no avail to DoE.

Provisions under the DSEA *qua* fee hike

16. Since DoE has been unable to prove that Sr. School was bound by a land clause, the Court will now proceed to assess whether there is any obligation under the DSEA or DSER which makes it obligatory for the Sr. School to seek sanction before increasing their fees. Section 17(3) of DSEA requires that before commencement of each academic session, the manager of every recognised school, which includes an unaided school, shall file a full statement of fees to be levied by the school during the ensuing academic session. No unaided school is permitted to charge fee higher than the one set out in the statement of fee during that academic session, except with the prior approval of the Director. Thus, if there is no land clause, unaided schools are not mandated to obtain prior approval from the DoE for modifying their fee structure, but are only expected to submit a statement of fees as per Section 17(3). This provision was enacted to ensure transparency in schools' financial operations and introduce accountability in utilisation of surplus funds towards betterment of both, the school as well as the students.

However, language of the provision does not suggest obtaining prior approval for levying fee disclosed in the statement of fee. Once the statement is filed, the bar on charging fee more than what is specified in the statement of fee, without DoE's consent, sets in. Section 17(3) of DSEA contemplates prior approval from DoE only if the school seeks to impose fee in excess of the structure specified in statement of fees during an academic session, and not otherwise. Therefore, the Court cannot read any condition for private unaided schools to seek prior approval from DoE before modification of fee arrangement in Section 17(3).

WHETHER THE PROPOSED HIKE IN FEE BY THE SCHOOLS AMOUNTS TO PROFITEERING OR COMMERCIALISATION

17. Even though there is no provision found under the DSEA that requires unaided schools to seek prior permission from DoE before fee hike, yet, DoE exercises regulatory control emanating from Sections 17(3) and 18(3) and (4) of DSEA and the DSER. However, while regulating the fee structure, DoE does not act as an appellate body. It is not vested with the power to analyse the correctness of discretion exercised by the school, but is entitled to ensure that the school does not indulge in commercialisation of education. The bounds of regulatory jurisdiction are limited and restricted, as expounded by the judicial precedents noted hereinafter.

Extent of Regulatory control of DoE

18. In ***Unni Krishnan, J.P. and Ors. v. State of Andhra Pradesh and***

Ors.,[11] the Supreme Court recognised the necessity of private unaided institutions to charge fee higher than Government and State-aided ones, and balanced the conflicting interests by holding that the Government can impose restrictions to check levying of capitation fees, profiteering and commercialisation of education. Later, in ***T.M.A. Pai*** *(Supra)*, an eleven-judges bench of the Supreme Court observed that the essence of private unaided institutions is the autonomy that they possess in management and administration of their affairs, and upheld the right of such institutions to set up a reasonable fee structure for betterment of amenities so that more students can take admissions. However, being mindful of rising trends of commercialisation of education, the majority view, penned by the Chief Justice B.N. Kirpal, struck a fine balance in the following words:

> " *53. With regard to the core components of the rights under Article 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 of conditions, if any, requiring admission of a small percentage of students belonging to weaker sections of the society by granting them feeships 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*** *[…]*
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> *54. The right to establish an educational institution can be regulated; but such regulatory measures must, in general, be to ensure the maintenance of proper academic standards, atmosphere and infrastructure (including qualified staff) and the prevention of mal-administration by those in charge of management.* ***The fixing of a rigid fee structure, dictating the formation and composition of a government body, compulsory nomination of teachers and staff for appointment or nominating students for admissions would be unacceptable restrictions****.*
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> **xxx-xxx**

[11] (1993) 1 SCC 645.

> *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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> [Emphasis Supplied]

19. While the opinion of the judges constituting the bench in ***TMA Pai*** *(Supra)* differed on certain aspects, it was unanimous to the effect that governmental bodies can take appropriate measures to ensure that there is no profiteering or charging of capitation fee. However, at the same time it was held that a rational fee structure and reasonable surplus for furtherance of education is permissible. What amounts to capitation fee was explained by Hon'ble Justice S.S.M Quadri as under:

> "*263. The sine qua non of a good and efficient administration is that it is fair and transparent. Therefore, it will be in the fitness of things and in the interest of good administration of the minority educational institutions (whether aided or unaided) to frame their own regulations in regard to admission of students to various courses taught in their institutions, notify fees to be charged and concessions provided for poor students, like granting total and/or half exemption from payment of fees, scholarships, etc., service conditions of teachers and non-teaching staff and other allied matters. This will inspire confidence in both the State and its agencies as well as the public and the student community. The most damaging allegation against non-Government educational institutions is charging of capitation fee which has become the talk of the town throughout the length and breadth of the country. So much so that the term 'capitation fee' has become synonymous with crime. The concept of capitation has its origin in taxation; earlier there used to be capitation tax per person****. Educational institutions, it is stated, oblige guardians/students to pay, in addition to the notified fees, varying amounts depending upon the courses in which admission is sought: such amounts are nothing but per capita collection for admission to a given course in an educational institution and can properly be termed as capitation fee. This is reprehensible and cannot be tolerated.*** *Now, in view of the majority judgment*

> *different institutions may notify different fee for the same course and the same institution may notify different fees structure for different courses. If the evil of collection of capitation fee is done away with by the private educational institutions (both non-minority and minority) much of the controversy about intervention by the State and complaints by citizens could be avoided.* ***Collection of capitation fee being the worst part of maladministration can properly be the subject-matter of regulatory control of a State.*** *Receiving donations by an educational institution, unconnected with admission of students, could not obviously be treated as an equivalent of collection of capitation fee.*"
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> [Emphasis Supplied]

20. The decision in ***T.M.A. Pai*** *(Supra)* was interpreted differently by several State Governments which resulted in filing of multiple petitions before various High Courts as well as the Supreme Court. Accordingly, matters were placed before a bench of five-judges for clarification of doubts and anomalies arising from ***TMA Pai*** (*Supra*). Thus came ***Islamic Academy of Education v. State of Karnataka***,[12] wherein the Supreme Court revisited the view expressed in ***T.M.A. Pai*** *(Supra)* and stressed on the need for maximum autonomy of the institutions, restricting the governmental control only to prevent profiteering, commercialisation, and capitation fees. Relevant portion(s) thereof read as under:

> "*133.* ***The fee structure, thus, in relation to each and every college must be determined separately keeping in view several factors including, facilities available, infrastructure made available, the age of the institution, investment made, future plan for expansion and betterment of the educational standard etc****. The case of each institution in this behalf is required to be considered by an appropriate Committee. For the said purpose, even the book of accounts maintained by the institution may have to be looked into. Whatever is determined by the Committee by way of a fee structure having regard to relevant factors some, of which are enumerated hereinbefore, the management of the institution would not be entitled to charge anything more...****While fixing the fee structure the Committee shall also take into consideration, inter alia, the salary or remuneration paid to the members of the faculty and other staff, the investment made by them, the infrastructure provided and plan for future development, of the institution as also expansion of the educational institution. Future planning or improvement of*

[12] (2003) 6 SCC 697.

facilities may be provided for. An institution may want to invest in an expensive device (for medical colleges) or a powerful computer (for technical college). These factors are also required to be taken care of. *The State must evolve a detailed procedure for constitution and smooth functioning of the Committee.*

135. While this Court has not laid down any fixed guidelines as regard fee structure, in my opinion, ***reasonable surplus should ordinarily vary from 6% to 15%, as such surplus would be utilized for expansion of the system and development of education****...*

*137. Profiteering has been defined in Black's Law Dictionary, Fifth edition as****: "Taking- advantage of unusual or exceptional circumstances to make excessive profits."***

138. ***With a view to ensure that an educational institution is kept within its bounds, and does not indulge in profiteering or otherwise exploiting its students financially, it will be open to the statutory authorities and in its absence by the State to constitute an appropriate body, till appropriate statutory regulations are made in that behalf.***

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213. 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***"

[Emphasis Supplied]

21. In ***P.A. Inamdar and Ors. v. State of Maharashtra and Ors.***,[13] a bench of seven judges of the Supreme Court extensively discussed ***TMA Pai*** (*Supra*) and reiterated the legal position holding that "*if capitation fee and profiteering is to be checked, the method of admission has to be regulated so that the admissions are based on merit and transparency and the students are not exploited. It is permissible to regulate admission and fee structure for achieving the purpose just stated.*"

22. The judgements discussed above have extensively elucidated the interplay between self-governance of private unaided educational institutions in their management and administration and the extent of governmental supervision that is permissible. However, this discussion would be deficient without reference to the verdict in ***Modern School*** *(Supra)* which discusses the width and scope of DoE's jurisdiction in regulating the amount of fees charged by unaided schools. Therein, the Apex Court emphasised that unaided schools have the right to a reasonable surplus for the growth and advancement of the institution and DoE has the authority to regulate the fees and other charges to prevent commercialisation of education. If a private unaided school is not involved in the commercialisation of education, it should be allowed to decide its fee structure, and its autonomy under the DSEA should be respected and upheld.

Understanding the Impugned Order: Unpacking the Legal Issues at Stake

23. This brings us to the grounds of challenge to the impugned order. Schools have alleged breach of the principles of natural justice due to denial

[13] (2005) 6 SCC 537.

of opportunity to respond to the allegations. This principle of *audi alteram partem* is the cornerstone of procedural fairness and is vital to ensure a just and equitable outcome in any legal process. It has been contended that the impugned order was issued without prior notice of proposed disallowances. There is no convincing response to this contention. The Court is of the view that purported inconsistencies mentioned in the impugned order should have been revealed to the Schools before passing of the impugned order, giving them adequate opportunity to respond. Adherence to this principle would make the decision-making process fair, transparent and would preclude bias or prejudice from influencing the outcome of a case. Thus, DoE must ensure that the schools are provided all relevant material and information, including the basis for any objections or concerns raised by the regulatory authorities, while scrtunising the statement if fee. This would allow the schools to present their stand in a meaningful way. That said, in the opinion of the Court, instead of remanding the matter back to DoE at this juncture, it would be appropriate to evaluate the validity of the impugned order on its own merits.

Re: findings qua the Jr. School

24. During the first round of litigation between the parties, this Court directed the Sr. School to seek clarification from the DoE on their concerns. The impugned order reflects DoE's decision based on the clarifications. However, it is pertinent to note that while DoE's earlier order dated 20th July, 2018 [assailed in W.P.(C) 8681/2018] pertained only to fee hike by Sr. School, the DoE, in the garb of deciding the representation for clarifications, has issued the impugned directions in respect of both Sr. School as well as

Jr. School. They have exceeded their authority by passing directions in respect of Jr. School, when they were scrutinising the statement of fee of Sr. School.

25. During the hearing, it has also emerged that the *lis* pertaining to condition of prior approval from DoE for schools operating under caveat of land clause is pending before the Division Bench of this Court.[14] Therefore, the Court shall refrain from adverting to the regulatory control of DoE over fixation of fees by the Jr. School. However, for the reasons noted above, since the whole exercise of assessment of Jr. School's accounts in the impugned order was unwarranted, the findings *qua* Jr. School cannot sustain and are set aside.

Re: findings of surplus and availability of sufficient funds

26. The fundamental rationale for rejection of Petitioners' request is the existence of surplus and adequacy of funds at the Schools' disposal. This is discernible from the following extract of the impugned order:

> " ***After detailed examination of all the material on record and considering the clarification submitted by the school, it was finally evaluated/ concluded that:***
>
> *The total funds available for the year 2018-2019 amounting to INR 9,67,96,579 and INR 6,49,46,324 out of which cash outflow in the year 2018-2019 is estimated to be INR 7,48,15,500 and INR 78,03,236 in respect of Mahavir Senior Model School and Mahavir Junior Model School respectively. This results in net surplus of INR 2,19,81,079 and INR 5,71,43,088 for Mahavir Senior Model School and Mahavir Junior Model School respectively.*
>
> **xxx-xxx**
>
> *Per the estimated expenses for FY 2018-2019 submitted by Mahavir Senior Model School along with statement of Fees u/s 17(3) of DSEA, 1973, the school had estimated the total expenditure during FY 2018-2019 of INR 9,44,60,500*

[14] LPA 230/2019.

(including capital expenditure of INR 12,05,000 against development fee). This budgeted expense of FY 2018-2019 has been adjusted with the amount of capital expenditure (to be incurred against development fund), provision of retirement benefits (considered separately in table above), and depreciation (non-cash expense), and net expense of INR 7,48,15,500 has been considered in table above. Further in respect of Mahavir Junior Model school, against the total expenditure of INR 1,14,21,270 reported in the provisional financial statements for FY 2017-2018, net amount of INR 78,03,236 has been considered after the adjustment of provision of retirement benefits (considered separately in table above), provision for reserve fund (considered separately in table above) and depreciation (non-cash expense), as budgeted expenses for FY 2018-2019 were not separately submitted by the school.

In view of the above examination of the statement of fee for academic session 2018-2019 and subsequent submissions and representations of the school, it is evident that the school has sufficient funds for meeting all the budgeted expenditure for the financial year 2018-2019.

ii. The directions issued by the Directorate of Education vide circular no. 1978 dated 16 Apr 2010 states "All schools must, first of all, explore and exhaust the possibility of utilising the existing fund/ reserves to meet any shortfall in payment of salary and allowances, as a consequence of increase in the salary and allowance of the employees. A part of the reserve fund which has not been utilized for years together may also be used to meet the shortfall before proposing a fee increase." The school has sufficient funds to carry on the operation of the school for the academic session 2018-2019 on the basis of existing fees structure[...]"

27. DoE has examined the adequacy of funds mentioned in the Schools' statements of fee by categorising them under several heads, and then concluded that there was a surplus of Rs. 5,71,43,088/- with the Jr. School and Rs. 2,19,81,079/- with the Sr. School. On the basis of these accumulated reserves, DoE has rejected the enhanced fee structure. Petitioner-Schools have contested the basis of DoE's calculations and both parties have submitted comparative charts of available funds. However, Court need not inspect the arithmetic workings supporting the figures, which is purely factual in nature, and would confine its scrutiny to the conclusions set forth in the impugned order to determine if the same fall within the scope of DoE's jurisdiction.

28. The statement of fee submitted by the Sr. School to increase its fees could have been rejected if the school was found to be indulging in 'commercialisation of education'. This expression encompasses two elements – charging of capitation fees and profiteering by the Sr. School. The term 'capitation fee' does not have a fixed definition, but typically refers to collecting an amount that exceeds what is permitted by law. In the instant case, there is no allegation that the Schools have charged capitation fees, thus the Court need not probe into this issue.

29. Next, comes the issue of whether accumulation of surplus funds amounts to profiteering. Firstly, this allegation has been made for the first time before the Court in response to the petition. Secondly, DoE's accusation of 'commercialisation of education' is premised on mere presence of "sufficient funds to carry on the operation of the school". Thus, vital questions that emerge for consideration are (*a*) whether mere availability of a surplus disqualifies the Schools from increasing their fees, and (*b*) whether DoE has the power to determine the adequacy of funds available with the Schools in absence of finding of profiteering. The answers to both of these questions must be given in the negative for reasons set out below.

30. DoE's power to scrutinise the accounts and other records of private unaided schools finds its source in Section 17(3) of the DSEA (examined hereinabove) r/w Rule 180(3) of the DSER. Under Rule 180(3), accounts and other records maintained by an unaided private school shall be subject

to examination by the auditors and inspecting officers authorized by the Director. The Act and Rules specify, in no uncertain terms, that DoE has the authority to seek and examine the accounts of schools. This regulatory power must however, be exercised within the precincts of the law explained in the aforenoted judicial precedents. Schools are entitled to maintain a reasonable surplus for expansion of the system and development of education. Increase in fee to generate funds for expansion and betterment of educational/ infrastructural facilities, as is the case with the Sr. School, is permissible in law. It is important for private unaided schools to maintain a surplus for the purpose of further development and honing of their educational facilities and services. The accumulation of surplus funds is essential for the long-term sustainability and growth of the school which enables them to invest in better infrastructure, equipment, and resources. Private unaided schools may need to invest in building or improving infrastructure, such as construction of new classrooms, libraries, laboratories, sports facilities or technology upgrades, such as new computers, tablets and software. These increments are generally sourced from the surplus funds and enable the school to stay up-to-date with the latest technologies and provide quality education to its students. Thus, the process of fixation of fee for any given academic year entails consideration of a multitude of factors such as salaries and remunerations to be paid to teaching and non-teaching staff, cost of running the establishment, investments, infrastructure as well as future plans for expansion and development of the institution. Since the unaided schools are entirely dependent on the fee collected by them, they would obviously like to earmark funds for specific purposes and therefore, planning and maintaining

a surplus *per se* cannot be construed as commercialisation of education. It is only if such funds are being used purely for commercial gain, rather than for improvement and development of the school, can it be construed as a form of commercialisation of education.

31. In the present case, DoE has recomputed surplus available with Schools and held that the same is sufficient to meet their needs and thus, denied them the right to increase the fee. This approach adopted by the DoE, in the opinion of the Court, is incorrect and impermissible. Determination of what constitutes a 'reasonable' surplus would depend on various factors such as the size of the school, the level of infrastructure and facilities provided, salaries of the staff and the overall financial position of the school. In their statement of fee, Sr. School has incorporated a detailed chart of estimated expenses expected to be incurred in the academic session 2018-19 as also the income generated by them. Therefore, there is transparency in their financial operations and they can be held accountable for utilisation of funds. They have mentioned that the management intends to restructure and revitalise the school plant at an estimated cost of Rs. 12 crores, and have even entered into a contract with an architect for said purpose. Since the Court would not like to sit in appeal over this issue, it has refrained from examining the veracity of the figures mentioned therein, yet considerable merit is found in Mr. Gupta's submission that Sr. School, operative since 1983, would require funds for reconstruction and allied activities. DoE must remember that unaided schools possess autonomy in their administration, including, autonomy to envision and plan for its growth and expansion; they cannot impose their own subjective opinion of what is sufficient amount for

schools to have in order to meet their aims and objectives. In the instant case, the audited balance sheets and material provided by the Schools have been reworked without a valid explanation. The audited balance sheets of private unaided schools are important documents that reflect their financial position and performance. These documents provide a clear and transparent picture of school's economic status and help in assessing whether the school has sufficient resources to meet its expenses and whether a fee hike is justified. DoE cannot act as an appellate body and reject the said financial documents, in absence of any evidence to show that the accounts were not prepared in accordance with applicable accounting standards or were rejected by the tax authorities. Pertinently, an objection *qua* format of return and documents submitted by the Schools was raised by DoE; however, in response to said query, the Schools had clarified that they are following the prescribed format. In the impugned order, there is no adverse remark on this issue. Therefore, the DoE has undertaken the exercise of reworking the balance sheets without disclosure of justifiable reasons, or a finding of profiteering or commercialisation of education. This exercise reflects DoE's subjective opinion, without any objective criteria, making the entire exercise arbitrary and unreasonable. The right of unaided schools to determine fee to be charged from students cannot be faltered purely only on account of presence of reasonable surplus in their books of account. DoE could have examined the veracity of surplus figures presented by the Schools, but in order to deny enhancement of fee, they must, on credible basis, determine that the school has indulged in commercialisation of education, profiteering or levying of capitation fee. The School Managing Committee had carefully undertaken the exercise of deciding the budget for concerned academic year

and sans a finding of profiteering or commercialisation of education, the DoE has acted in excess of its powers and impinged upon the autonomy of schools, protected by law, in rejecting Sr. School's proposed fee hike.

32. *Vide* the impugned order, Schools have also been directed to ensure that salaries and allowances are paid from the fees. The grounds of refusal, as enumerated in the impugned order, do not mention that the Schools have faulted in payment of salaries to their teaching and other administrative staff. Therefore, there is no basis for DoE to direct diversion of funds towards payments of salaries and allowances of concerned employees. On this count as well, DoE has exceeded their jurisdiction.

CONCLUSION AND DIRECTIONS

33. The primary obligation to provide education lies with the State, and it is their responsibility that every child has access to education. Participation of private unaided schools has been permitted out of necessity, since the State is unable to perform its function adequately. As the schools perform public function, State's regulatory control is essential to ensure that schools operate within the parameters of the DSEA and do not engage in commercialisation or profiteering. Therefore, there needs to be a collaborative effort between private unaided schools and the regulatory authorities to maintain a balance between the right to charge fees and the need for regulatory control to ensure the quality and affordability of education. Private unaided schools must maintain transparency and accountability in their financial operations, while regulatory authorities must ensure transparency and accountability in their regulatory actions. They

must ensure that the surplus generated is utilised for the improvement and development of the school and their students.

34. In the instant case, since the Sr. School is not operating under a land clause, the scope of DoE's control over any proposed increase in its fee is limited to preventing commercialisation of education, profiteering, and imposition of capitation fees. The DoE has not provided any evidence to suggest that the Sr. School has engaged in any of the above activities or that there is any other violation of DSEA or DSER or other relevant rules and regulations that would prohibit them from increasing their fee. In absence of the above requirement, availability of surplus and sufficiency of funds are not valid grounds to deny the school the right to the increase their fee. As far as the Jr. School is concerned, since it falls within the purview of land clause contained in the land allotment letter, it shall increase its fees in accordance with law. Nonetheless, since the statement of fees dated 28th March, 2018 and the previous DoE order dated 20th July, 2018 were applicable only to the Sr. School, the DoE was not authorised to evaluate the financial status of the Jr. School and issue directions to it *via* the impugned order.

35. Accordingly, the present petition is allowed with following directions:

35.1 Impugned order dated 25th January, 2019, is set aside.

35.2 Mahavir Sr. Model School shall be entitled to increase their fee in terms of the statement of fees dated 28th March, 2018 submitted to DoE, under Section 17(3) of DSEA.

35.3 Mahavir Jr. Model School shall be entitled to enhance their fee structure in accordance with law.

35.4 Balance arrears recoverable from the concerned parents, in terms of order dated 25th May, 2021, shall be paid to the Sr. School within a period of four weeks from today. For this purpose, Sr. School shall communicate the outstanding dues to such parents within two weeks from today.

36. With the above directions, the petition is disposed of.

CM APPL. 17063/2021 (*for impleadment*)

37. Applicant – Abhibhavak Ekta Sangh asserted itself as a registered society comprising of more than 300 parents of wards studying in the Sr. School. They seek to join the present proceedings to espouse their grievances pertaining to Sr. School's alleged continuous demands for increased fees.

38. Although the Society has not been formally impleaded, they were permitted to intervene and as noted above, heard through their counsel. In light of the above, instant application is disposed of.

SANJEEV NARULA, J

MARCH 15, 2023
AS