



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

PUBLIC INTEREST LITIGATION NO. 61 OF 2024

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Akhil Bharatiya Samajwadi
Adhyapak Sabha & Ors. .. Petitioners
Versus
State of Maharashtra & Ors. .. Respondents

**WITH
PUBLIC INTEREST LITIGATION NO.87 OF 2024**
[transferred from Nagpur Bench bearing PIL/17/2024]

Vaibhav Vyankatrao Kamble
& Ors. .. Petitioners
Versus
The State of Maharashtra & Ors. .. Respondents

ALONG WITH

**ORDINARY ORIGINAL CIVIL JURISDICTION
PUBLIC INTEREST LITIGATION (L) NO. 14887 OF 2024**

Aswini Jitendra Kamble .. Petitioner
Versus
State of Maharashtra & Ors. .. Respondents

**WITH
WRIT PETITION NO. 3317 OF 2024**

Shabbir Gulamgaus Deshmukh .. Petitioner
Versus
Union of India & Ors. .. Respondents

**WITH
PUBLIC INTEREST LITIGATION (L) NO. 15520 OF 2024**

Vidhayak Bharti .. Petitioner
Versus
State of Maharashtra .. Respondent

Mr. Mihir Desai, Senior Advocate with Ms. Devyani Kulkarni and Ms. Sanskruti Yagnik for petitioners in PIL/61/2024.

Ms. Jayna Kothari, Senior Advocate with Ms. Payal Gaikwad, Mr. Deepak Chatap, Mr. Raj Kamble and Ms. Vasudha Chandwani for petitioner in PIL(L)/14887/2024.

Ms. Gayatri Singh, Senior Advocate with Ms. Shreya Mohapatra and Sanjot Shirsath for petitioner in WP/3317/2024.

Mr. Swanand Ganoo with Mr. Tejas S. Bhide for petitioner in PIL (L)/15520/2024.

Ms. Jayna Kothari, Senior Advocate with Mr. Deepak Chatap, Mr. Rushikesh Bhojar for petitioners in PIL/87/2024.

Ms. Jyoti Chavan, Additional GP with Mr. O. A. Chandurkar, Addl. G.P., Ms. G. R. Raghuwanshi, A.G.P. for State – respondent in PIL/61/2024.

Mr. P. P. Kakade, Government Pleader with Mr. O. A. Chandurkar, Additional GP for respondent in PIL No.87 of 2024

Ms. Jyoti Chavan, Addl. G.P. with Smt. Rita Joshi, A.G.P. for the State–respondent in PIL(L)/14887/2024, PIL(L)/15520/2024 and WP/3317/2024.

Mr. Arvind G. Kothari with Ms. Manisha Mane – Bhangale, Ms. Brijal Vora and Mr. Akshay Arora i/b. Parinam Law Associates for respondent Nos. 4 and 5 in PIL/61/2024.

Mr. Arvind Kothari for respondent Nos.6, 7, 18 and 19 in PIL/61/2024.

Mr. Nilesh Patil with Ms. Shraddha Pawar i/by Team Justice League for respondent Nos. 8 to 12 in PIL/61/ 2024.

Mr. Pritesh Burad with Mrs. Madhuri Gamare i/by Pritesh Burad Associates for respondent No. 17 in PIL/61/2024.

Mr. Chaitanya Nikte with Mr. Swapnil Sangle i/by Mr. Prajit S. Sahane for respondent No. 21 in PIL/61/2024.

Ms. Leena Patil for respondent No. 1-(UOI) in WP/3317/2024.

Mr. Ashutosh Mishra for respondent No.3-(UOI) in PIL(L)/15520/2024.

Dr. Milind Sathe, Senior Advocate with Mr. Vikram Trivedi, Ms. Suchitra Valjee, Mr. Varun Nathani, Mr. Himalaya Chaudhary, Ms. Rajvi Shah, Ms. Riyas Vasa i/by Manilal Kher Ambalal & Co. for respondent No.4 in PIL(L)/14887/2024.

Mr. Sharad Gosavi – Director of Primary Education, Pune is present.

Mr. Ramdas Dhumal – Desk Officer (Education) Mantralaya, Mumbai is present.

CORAM : DEVENDRA KUMAR UPADHYAYA, CJ. & AMIT BORKAR, J.

RESERVED ON : 11th JULY, 2024
PRONOUNCED ON : 19th JULY, 2024

JUDGMENT (PER : CHIEF JUSTICE)

(A) CHALLENGE:

1. By instituting these petitions under Article 226 of the Constitution of India, some of which are PIL petitions, challenge has been made to the Maharashtra Right of Children to Free and Compulsory Education (Amendment) Rules, 2024 (hereinafter

referred to as the **Amendment Rules**) whereby after Rule 4(5) of the Maharashtra Right of Children to Free and Compulsory Education Rules, 2011 (hereinafter referred to as the **Principal Rules**), a proviso has been added which provides that the Local Authority shall not identify the private unaided schools where Government schools and aided schools are situated within a radius of 1 km of that school, for the purpose of providing 25 per cent admission to the children belonging to disadvantaged groups and weaker sections under the Maharashtra Right of Children to Free and Compulsory Education (Manner of admission of Minimum 25% children in Class-I or Pre-School at the entry level for the children belonging to disadvantaged groups and weaker section) Rules 2013.

2. By the said Amendment Rules notified on 9th February 2024, in addition to appending the impugned proviso to Rule 4(5) to the Principal Rules, a proviso has also been added to Rule 8(2), according to which, no private unaided school which is identified under the proviso to Rule 4(5) of the Principal Rules shall be eligible for reimbursement under Section 12(2) of the Right of Children to Free and Compulsory Education Act, 2009 (hereinafter referred to as the **RTE Act**).

3. In PIL Petition (L) No.15520 of 2024, apart from challenging the Amendment Rules, the communication, dated 6th March 2024 and the Circular issued on 3rd April 2024 issued by the Director of Education (Primary), State of Maharashtra have also been challenged. The said communication and the circular are issued for the purpose of giving effect to the impugned Amendment Rules.

(B) Evolution of law regulating Right of Children to Free and Compulsory Education in its historical perspective:

4. Prior to introduction of Eighty Sixth Constitution Amendment Act 2002 w.e.f. 1st April 2010, Article 45 in Part-IV of the Constitution existed as follows:

"Article 45. Provision for free and compulsory education for children. - *The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of 14 years."*

5. Article 45 which now exists in the Constitution on enactment of Eighty Sixth Constitution Amendment Act w.e.f. 1st April 2010, is as follows:

"Article 45. Provision for early childhood care and education to children below the age of six years. - *The State shall endeavour to provide early childhood care and education for all children until they complete the age*

of six years. the age of 14 years.”

6. By introducing Eighty Sixth Constitution Amendment, sub clause (k) was added to Article 51A which falls in Part-IVA of the Constitution of India. Article 51A(k) of the Constitution of India reads as follows:

"51A Fundamental duties:- *It shall be the duty of every citizen of India -*

a.....

b.....

.....

(k) who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years.”

7. Hon'ble Supreme Court in ***Unni Krishnan J.P. & Ors. Vs. State of Andhra Pradesh & Ors.***¹ observed that the children up-to the age of 14 years have a fundamental right of free education. Thereafter, the Parliament, on realization that one of the directive principles of State Policy contained in Article 45 for providing free and compulsory education to all the children upto the age of 14 years, within ten years from the promulgation of the Constitution, could not be achieved, accordingly enacted the Eighty Sixth Constitution Amendment Act 2002 inserting Article

1 1993(1) SCC 645

21-A, substituting Article 45 and introducing Article 51A(k) in the Constitution. The Eighty Sixth Constitution Amendment Act 2002 is extracted hereunder:

"THE CONSTITUTION (EIGHTY-SIXTH AMENDMENT) ACT, 2002
[12th December, 2002.]

An Act further to amend the Constitution of India.

BE it enacted by Parliament in the Fifty-third Year of the Republic of India as follows:-

1. *Short title and commencement.- (1) This Act may be called the Constitution (Eighty-sixth Amendment) Act, 2002.*

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. *Insertion of new article 21-A.- After Article 21 of the Constitution, the following article shall be inserted, namely:-*

Right to education.-

"21-A. The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine."

3. *Substitution of new article for article 45.- For article 45 of the Constitution, the following article shall be substituted, namely:-*

Provision for early childhood care and education to children below the age of six years.

"45. The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years."

4. *Amendment of article 51A. – In article 51A of the Constitution, after clause (J), the following clause shall be added, namely:-*

"(k) who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years."

*SUBHASH C. JAIN,
Secy. to the Govt. of India."*

8. Thus, by enacting Eighty Sixth Constitution Amendment, a constitutional right under Part-III of the Constitution of India was conferred on all children of the age of 6 to 14 years to receive free and compulsory education. Article 21-A further casts a constitutional obligation on the State to provide free and compulsory education to all children aged between 6 to 14 years in such a manner as the State may determine by making a law and accordingly, the Right of Children to Free and Compulsory Education Act, 2009 was enacted by the Parliament which in terms of the provisions contained in Section 1(3) came into force w.e.f. 1st April 2010 on publication of Notification to the said effect by the Central Government in its official gazette.

9. The RTE Act provided a complete workable statutory scheme for making the children aged between 6 to 14 years realize their fundamental right of receiving free and compulsory education. The provisions of the RTE Act, however, are subject to provisions of Articles 29 and 30 of the Constitution of India, which confer certain rights on the minorities relating to establishing and administering educational institutions by them. Certain provisions of the RTE Act, which are relevant for the purposes of deciding the issues which arise in these petitions,

need to be noted.

Section 2(d) defines "child belonging to disadvantaged group" to mean a child with disability or a child belonging to the Scheduled Caste or Scheduled Tribe or socially and educationally backward class or such other group having disadvantage on account of social, cultural, economical, geographical, linguistic and gender or any other factor, to be specified by the appropriate Government. Section 2(d) is quoted hereunder:

"2. Definitions.—*In this Act, unless the context otherwise requires,—*

(d) "child belonging to disadvantaged group" means a child with disability or a child belonging to the Scheduled Caste, the Scheduled Tribe, the socially and educationally backward class or such other group having disadvantage owing to social, cultural, economical, geographical, linguistic, gender or such other factor, as may be specified by the appropriate Government, by notification; "

Section 2(e) defines the term "child belonging to weaker section" to mean a child belonging to such parent or guardian whose annual income is lower than the minimum limit to be specified by the appropriate Government. Section 2(e) is also quoted hereunder:

"2(e) *"child belonging to weaker section" means a child belonging to such parent or guardian whose annual income is lower than the minimum limit specified by the appropriate Government, by notification;*

Section 2(f) defines "elementary education" which is extracted below:

"2 (f) "elementary education" means the education from first class to eighth class;"

Section 2(h) defines "local authority" to mean a Municipal Corporation or Municipal Council or Zilla Parishad or Nagar Panchayat or Panchayat, that is to say all bodies of local self-governance, both in urban and rural areas. Section 2(h) reads thus:

2(h) "local authority" means a Municipal Corporation or Municipal Council or Zila Parishad or Nagar Panchayat or Panchayat, by whatever name called, and includes such other authority or body having administrative control over the school or empowered by or under any law for the time being in force to function as a local authority in any city, town or village;

Section 2(n) defines "school" to mean any recognized school imparting elementary education and includes; an aided school receiving aid or grants from appropriate Government or the Local Authority, a school belonging to a specified category and unaided school not receiving any aid or grants from the appropriate Government or the Local Authority to meet its expenses. Section 2(n) of the RTE Act is also quoted hereunder:

2(n) "school" means any recognised school imparting elementary education and includes—

(i) a school established, owned or controlled by the appropriate Government or a local authority;

(ii) an aided school receiving aid or grants to meet whole or part of its expenses from the appropriate Government or the local authority;

- (iii) a school belonging to specified category; and*
- (iv) an unaided school not receiving any kind of aid or grants to meet its expenses from the appropriate Government or the local authority;*

Section 3 confers on every child aged between 6 to 14 years including a child belonging to disadvantaged groups or weaker sections in terms of Section 2(d) and (e), right to free and compulsory education in a neighbourhood school till completion of his/her elementary education. Sub Section (2) of Section 3 explicitly provides that no fee or charge or expenses shall be levied from any such child for pursuing and completing the elementary education. Section 3 runs as under:

"3. Right of child to free and compulsory education. —

(1) Every child of the age of six to fourteen years, including a child referred to in clause (d) or clause (e) of section 2, shall have the right to free and compulsory education in a neighbourhood school till the completion of his or her elementary education.

(2) For the purpose of sub-section (1), no child shall be liable to pay any kind of fee or charges or expenses which may prevent him or her from pursuing and completing the elementary education.

(3) A child with disability referred to in sub-clause (A) of clause (ee) of section 2 shall, without prejudice to the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996), and a child referred to in sub-clauses (B) and (C) of clause (ee) of section 2, have the same rights to pursue free and compulsory elementary education which children with disabilities have under the provisions of Chapter V of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995:

Provided that a child with "multiple disabilities" referred to in clause (h) and a child with "severe disability" referred to in clause (o) of section 2 of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 (44 of 1999) may also have the right to opt for home-based education."

For the purpose of administering the Act and carrying out the provisions of this Act, Section 6 provides for duty of the Government and Local Authority to establish, within such area or limits of neighbourhood, as may be prescribed. Section 6 is quoted hereunder:

"6. Duty of appropriate Government and local authority to establish school.— *For carrying out the provisions of this Act, the appropriate Government and the local authority shall establish, within such area or limits of neighbourhood, as may be prescribed, a school, where it is not so established, within a period of three years from the commencement of this Act.*"

As per Section 7 of the RTE Act, the Central Government and the State Governments have been charged with a concurrent responsibility for providing funds which may be needed for the purposes of implementing the provisions of the Act. As per the scheme contained in Section 7 of the RTE Act, the Central Government has to provide to the State Governments such percentage of expenditure as grant-in-aid as may be determined from time to time in consultation with the State Government. Section 7 is also quoted hereunder:

"7. Sharing of financial and other responsibilities —(1) *The Central Government and the State Governments shall have concurrent responsibility for providing funds for carrying out the provisions of this Act.*

(2) *The Central Government shall prepare the estimates of capital and recurring expenditure for the implementation of the provisions of the Act.*

(3) *The Central Government shall provide to the State Governments, as grants-in-aid of revenues, such percentage of expenditure referred to in sub-section (2) as it may determine, from time to time, in consultation with the State Governments.*

(4) *The Central Government may make a request to the President to make a reference to the Finance Commission under sub-clause (d) of clause (3) of article 280 to examine the need for additional resources to be provided to any State Government so that the said State Government may provide its share of funds for carrying out the provisions of the Act.*

(5) *Notwithstanding anything contained in sub-section (4), the State Government shall, taking into consideration the sums provided by the Central Government to a State Government under sub-section (3), and its other resources, be responsible to provide funds for implementation of the provisions of the Act."*

(6) *The Central Government shall—*

(a) develop a framework of national curriculum with the help of academic authority specified under section 29;

(b) develop and enforce standards for training of teachers;

(c) provide technical support and resources to the State Government for promoting innovations, researches, planning and capacity building."

Section 8 mandates that the appropriate Government shall provide free and compulsory elementary education to every child with a further provision that in case a child is admitted in a school established/owned/controlled or substantially financed by the Government or Local Authority, such children or their parents shall not be entitled to make a claim for reimbursement of expenditure. The explanation appended to Section 8(1)(a) obligates the State Government not only to provide free education but also to ensure compulsory admission, attendance

and completion of such education and also to ensure availability of neighbourhood school as per Section 6 of the RTE Act. It further provides that it shall be the duty of the Government to ensure that children belonging to weaker sections and disadvantaged groups are not discriminated against and prevented from pursuing and completing elementary education. It is also the duty of the appropriate Government to provide necessary infrastructure, teaching staff, learning equipments etc. Section 8 further casts a duty on the Government to ensure a good quality elementary education. Section 8 of the RTE Act is quoted hereunder:

"8. Duties of appropriate Government. —

The appropriate Government shall—

(a) provide free and compulsory elementary education to every child:

Provided that where a child is admitted by his or her parents or guardian, as the case may be, in a school other than a school established, owned, controlled or substantially financed by funds provided directly or indirectly by the appropriate Government or a local authority, such child or his or her parents or guardian, as the case may be, shall not be entitled to make a claim for reimbursement of expenditure incurred on elementary education of the child in such other school.

Explanation.—The term "compulsory education" means obligation of the appropriate Government to—

(i) provide free elementary education to every child of the age of six to fourteen years; and

(ii) ensure compulsory admission, attendance and completion of

elementary education by every child of the age of six to fourteen years;

- (b) ensure availability of a neighbourhood school as specified in section 6;*
- (c) ensure that the child belonging to weaker section and the child belonging to disadvantaged group are not discriminated against and prevented from pursuing and completing elementary education on any grounds;*
- (d) provide infrastructure including school building, teaching staff and learning equipment;*
- (e) provide special training facility specified in section 4;*
- (f) ensure and monitor admission, attendance and completion of elementary education by every child;*
- (g) ensure good quality elementary education conforming to the standards and norms specified in the Schedule;*
- (h) ensure timely prescribing of curriculum and courses of study for elementary education; and*
- (i) provide training facility for teachers.”*

Similar duties have been cast on the Local Authority under Section 9 of the Act. Apart from providing elementary education, the appropriate Government has also been obligated by the RTE Act to provide pre-school education to the children upto the age of 3 years and to make necessary arrangements therefor. Section 9 reads thus:

9. Duties of local authority.—*Every local authority shall—*

- (a) provide free and compulsory elementary education to every child:*

Provided that where a child is admitted by his or her parents or guardian, as the case may be, in a school other than a school

established, owned, controlled or substantially financed by funds provided directly or indirectly by the appropriate Government or a local authority, such child or his or her parents or guardian, as the case may be, shall not be entitled to make a claim for reimbursement of expenditure incurred on elementary education of the child in such other school;

- (b) ensure availability of a neighbourhood school as specified in section 6;*
- (c) ensure that the child belonging to weaker section and the child belonging to disadvantaged group are not discriminated against and prevented from pursuing and completing elementary education on any grounds;*
- (d) maintain records of children up to the age of fourteen years residing within its jurisdiction, in such manner as may be prescribed;*
- (e) ensure and monitor admission, attendance and completion of elementary education by every child residing within its jurisdiction;*
- (f) provide infrastructure including school building, teaching staff and learning material;*
- (g) provide special training facility specified in section 4;*
- (h) ensure good quality elementary education conforming to the standards and norms specified in the Schedule;*
- (i) ensure timely prescribing of curriculum and courses of study for elementary education;*
- (j) provide training facility for teachers;*
- (k) ensure admission of children of migrant families;*
- (l) monitor functioning of schools within its jurisdiction; and*
- (m) decide the academic calendar.*

Section 12 casts certain responsibilities on the schools and the teachers including the duty to provide free and compulsory education. Section 12 of the RTE Act runs as under:

12. Extent of school's responsibility for free and compulsory education.—

(1) For the purposes of this Act, a school,—

(a) specified in sub-clause (i) of clause (n) of section 2 shall provide free and compulsory elementary education to all children admitted therein;

(b) specified in sub-clause (ii) of clause (n) of section 2 shall provide free and compulsory elementary education to such proportion of children admitted therein as its annual recurring aid or grants so received bears to its annual recurring expenses, subject to a minimum of twenty-five per cent.;

(c) specified in sub-clauses (iii) and (iv) of clause (n) of section 2 shall admit in class I, to the extent of at least twenty-five per cent. of the strength of that class, children belonging to weaker section and disadvantaged group in the neighbourhood and provide free and compulsory elementary education till its completion:

Provided that where a school specified in clause (n) of section 2 imparts pre-school education, the provisions of clauses (a) to (c) shall apply for admission to such pre-school education.

(2) The school specified in sub-clause (iv) of clause (n) of section 2 providing free and compulsory elementary education as specified in clause (c) of sub-section (1) shall be reimbursed expenditure so incurred by it to the extent of per-child-expenditure incurred by the State, or the actual amount charged from the child, whichever is less, in such manner as may be prescribed:

Provided that such reimbursement shall not exceed per-child-expenditure incurred by a school specified in sub-clause (i) of clause (n) of section 2:

Provided further that where such school is already under obligation to provide free education to a specified number of children on account of it having received any land, building, equipment or other facilities, either free of cost or at a concessional rate, such school shall not be entitled for reimbursement to the extent of such obligation.

(3) Every school shall provide such information as may be required by the appropriate Government or the local authority, as the case may be.

10. Thus, as per the afore-quoted provisions of the RTE Act, a school established/owned/controlled by the Government or the Local Authority has to provide free and compulsory education to all children admitted therein. Similarly, the schools which are aided by the Government or the Local Authority have been mandated to provide free and compulsorily elementary education to such proportion of children admitted therein as its annual recurring aid or grants so received bears to its annual recurring expenses, subject to minimum of 25%. Section 12 also provides that schools belonging to a specified category in terms of Section 2(n)(iii) and unaided school not receiving any kind of aid or grants shall also admit the children in class-1 to the extent of 25% of the strength of that class of children belonging to weaker sections and disadvantaged groups in the neighbourhood and provide free and compulsorily elementary education to them till its completion. Similar provisions have been made for schools of all categories as defined in Section 2(n) of the RTE Act for pre-school education as well. Sub Section (2) of Section 12 provides for reimbursement of the expenditure incurred by the schools which are unaided to the extent of per-child-expenditure incurred by the State or the actual amount charged from the

child, whichever is less.

11. Apart from providing the afore-quoted provisions for free and compulsorily elementary education to children aged between 6 to 14 years and pre-school education by all types of schools defined in Section 2(n) of the RTE Act, provisions have also been made to maintain the norms and standards of school, constitution of School Management Committee for each school, preparation of school development plan, terms and conditions of the services of teachers, maintenance of pupil-teacher ratio and various other measures for creating appropriate atmosphere to provide education to younger children. Such measures as given in the RTE Act include prohibition of deployment of teachers for non educational purposes, filling up vacancies of the teachers, prohibition of private tuition by teachers, monitoring of child's right to education, constitution of National/State Advisory Council and penal provision in case any school or institution is found charging capitation fees etc.

12. Thus, the journey to ensure free and compulsorily education to the children upto the age of 14 years which commenced in the year 1950 on adoption of our Constitution which contained in Article 45 one of the directive principles of

the State Policy, still continues. The right to free and compulsory education was entrusted by Article 45 to the State for making an endeavour to provide early childhood care and education for all children till they complete the age of six years, however, with the pronouncement of the Hon'ble Supreme Court in ***Unni Krishnan (supra)***, it was first recognized as a fundamental right of every child aged upto 14 years. On realizing that the goal of Directive Principles of State Policy as contained in Article 45 could not be achieved, the Parliament, firstly enacted Eighty Sixth Constitution Amendment and thereafter the RTE Act, 2009 conferring right to receive free and compulsory education on all children upto the age of 14 years. The Act provides a mechanism and casts certain duties and responsibilities to be discharged by all concerned to ensure that every child realises its fundamental right enshrined in Article 21-A of the Constitution of India. Such duty has been mandated to the State i.e. appropriate Government and the Local Authorities, both in urban and rural areas.

13. The RTE Act preceded introduction of Article 21-A of the Constitution of India, which came into effect w.e.f. 1st April 2010 and is included in Part – III of the Constitution i.e. in the Chapter

containing the Fundamental Rights. Though the right conferred by Article 21-A and Section 3 of the RTE Act is almost absolute without any ambiguity, however, the manner in which such fundamental right is to be realised by the children upto the age of 14 years, is to be determined by the State by making the law. Such law, as observed above, has been enacted by the Parliament by promulgating the RTE Act which though contains the basic principles governing realisation of right to education by the children upto the age of 14 years, however, enables the appropriate Government to make rules for carrying out the provisions of the said Act.

14. The rules, thus framed by the State Government or even by the Central Government are only to subserve the main purpose for which the RTE Act has been enacted and accordingly, while framing the rules, the appropriate Government, under Section 38 of the RTE Act or even the Central Government under Section 35 of the RTE Act, cannot be unmindful of the purpose and object for which the RTE Act and Article 21-A in Part III of the Constitution of India have been enacted by the Parliament.

15. The State Government, in exercise of its powers conferred on it under Section 38 of the RTE Act, has framed rules known as Maharashtra Right of Children to Free and Compulsory Education Rules, 2011 which provides various provisions for giving effect to the RTE Act. The Principal Rules contain definition clause in Rule 2 which defines certain terms including the term "neighbourhood school". Rule (m) of Principal Rules defines "neighbourhood school" thus;

"(m) "Neighbourhood school" means a school in respect of children in classes I-V, a school shall be established as far as possible within a distance of one km of the neighbourhood and has a minimum of 20 children in the age group of 6 to 11 years available and willing for enrollment in that school and in classes VI-VIII, a school shall be established as far as possible within a distance of 3 kms of the neighbourhood and which has not less than 20 children in class 5th of the feeding primary schools, taken together, available and willing for enrollment in that school."

16. The Government of Maharashtra has framed another set of rules for providing for procedure for admission in class-1 and pre-school for at least 25% of the strength, of the children belonging to disadvantaged groups and weaker sections of the society. The said rules are known as the Maharashtra Right of Children to Free and Compulsory Education (Manner of admission of Minimum 25% children in Class I or Pre-school at the entry level for the children belonging to disadvantaged

groups and weaker section) Rules, 2013 (hereinafter referred to as the **2013 Rules**).

17. In terms of Rule 1.1 of the 2013 Rules, in its coverage, the Rules include the schools defined in Section 2(n)(iii) and (iv) i.e. the schools belonging to some specified category and unaided schools which do not receive any kind of aid or grant from the Government or the Local Authority. As per Rules 3.1 every school needs to be put a notice for giving effect to at least 25% admission to children of disadvantaged and weaker sections at the entry level. Such notice shall publish the information relating to total number of seats, number of seats available for the children belonging to disadvantaged and weaker sections of the society, the period during which application can be made by such children seeking admission and other necessary information. The Rules, thus, provide a complete mechanism for making 25% admission of the children belonging to disadvantaged groups and weaker sections in such schools.

(C) Nature and purport of the impugned Amendment Rules 2024 notified on 9th February 2024:

18. Having noticed above the entire constitutional/statutory

regime governing right to free and compulsory education to the children upto the age of 14 years which has evolved over a period of time, we may now notice the nature and purport of the amendment brought by the impugned Notification, dated 9th February 2024.

19. The said Notification has been issued by the State Government, in exercise of its powers under Section 38 of the RTE Act for inserting the proviso to Rule 4(5) of the 2011 Rules and another proviso to rule 8(2) of the Rules 2011. Rule 4 of Rules 2011 provides that the State Government / Local Authority shall establish neighbourhood schools within the area or limits to meet certain criteria given therein according to which in respect of the children in class-I to V, a school shall be established as far as possible within a distance of 1 km of the neighbourhood. Similarly, it further provides that in respect of Class-VI to VIII, a school shall be established within a distance of three kms. Rule 4(5) provides that the Local Authority shall designate a neighbourhood school for every settlement or area and shall make this information known to the public. Rule 4 of the 2011 Rules is quoted hereunder:

"4. Areas or limits for the purposes of section 6.-

(1) *The State Government or the Local Authority, as the case may be, shall establish neighbourhood schools within the areas or limits to meet the following criteria, namely :-*

(a) In respect of children in classes I-V a school shall be established as far as possible within a distance of one kilometer of the neighbourhood and has a minimum of 20 children in the age group of 6 to 11 years available and willing for enrollment in that school; and

(b) In respect of children in classes VI-VIII, a school shall be established as far as possible within a distance of three kilometers of the neighbourhood and which has not less than 20 children in class 5th of the feeding primary schools, taken together, available and willing for enrollment in that school.

(2) *The State Government may suitably alter the minimum distance specified in sub-rule (1) in cases of hilly areas or areas that are not easily accessible and make available the schools run by the Government or Local Authority for the children having no facility of further elementary education in their schools in such areas.*

(3) *For children from small hamlets, as identified by the State Government or local authority, where no school exists within the area or limits of neighbourhood school specified under sub-rule (1) and for children falling within the purview of 4(1)(a), the State Government or local authority shall make adequate arrangements such as free transportation, residential facilities and other facilities, for providing elementary education in the school, in relaxation of the limit specified under sub-rule (1).*

(4) *In areas of greater population density (urban and semi-urban areas), the State Government or the local authority shall establish more than one neighbourhood school, having regard to the number of children in the age group of 6-14 years in the said area.*

(5) *The Local Authority shall designate a neighbourhood school for every settlement or area and shall make this information known to the public.*

(6) *In respect of children with disabilities (as defined in Equal opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996), which prevent them from accessing the school the State Government or Local Authority having regard to their number shall make appropriate and safe transportation arrangements for them to attend school and complete elementary education.*

(7) (a) *The Government or the Local Authority shall ensure that no child is barred from going to school for any reason and that there is*

no hindrance to his or her completing the elementary education on the ground of linguistic, social or cultural differences;

(b) the migratory children shall be enrolled in a school if the school having appropriate medium of instruction is available in that neighbourhood school;

(c) if the appropriate medium of instructions is not available in the neighbourhood school then, the transportation facilities for attending the school, or a seasonal residential hostel and other facilities shall be provided by the Local Authority."

20. It is to the afore-quoted Rule 4(5) that a proviso has been added by the impugned Amendment Rules which states that the Local Authority shall not identify the private unaided school for the purpose of making admission of children belonging to disadvantaged groups and weaker sections of the society to the extent of 25% of the strength of the school where the Government schools and aided schools are situated within the radius of 1 km of that school. In other words, in terms of the impugned Amendment Rules, no unaided school shall be required to make admission of 25% students belonging to disadvantaged and weaker sections of the society in case any Government or aided school is situated within the radius of 1 km of that school. It is to be noticed that prior to the impugned Amendment Rules, every school as defined under Section 2(n) (iii) and (iv) of the RTE Act was required to be identified by the local authority for the purpose of providing benefit of admission

to the extent of 25% of the total strength of the school to the students belonging to disadvantaged groups and weaker sections of the society irrespective of the distance at which such unaided schools were situated from the Government schools/aided schools. Thus, on enforcement of the impugned Amendment Rules 2024 only those unaided schools in the neighbourhood shall have an obligation to make admission to the extent of 25% strength from amongst the children belonging to disadvantaged and weaker sections of the society which are situated outside the radius of 1 km from the Government or aided school. To put it differently, if the distance between a Government / aided school and unaided school is less than 1 km such unaided school will remain outside the purview of 2011 Rules and consequently, outside the purview of the RTE Act. Such exclusion of unaided schools, as a matter of fact, is being challenged by the petitioners in these petitions by urging, *inter alia*, that it is *ultra vires* not only the provisions of RTE Act but also *ultra vires* Articles 21-A, 15 and 21 of the Constitution of India.

21. Addition of another proviso has been made by promulgating the Amendment Rules in Rule 8(2) according to which a private unaided school which falls under the newly

added proviso to Rule 4(5) shall not be eligible for reimbursement under sub section (2) of Section 12 of the RTE Act. Thus, the proviso appended to Rule 8(2) is only a consequence of a proviso appended to Rule 4(5) of the 2011 Rules.

(D) Contentions of rival parties:

(D1) Submission/arguments made on behalf of the petitioners:

22. Argument on behalf of the petitioners in this bunch of the petitions has been led by Ms. Jayna Kothari, learned Senior Advocate, who has submitted that the impugned Amendment Rules 2024 are *ultra vires* the provisions of Section 12 of the RTE Act for the reason that though Section 12(1)(c) does not contain any condition such as the condition of distance from neighbourhood or any other condition of distance so far as statutory duty of the schools specified in Section 2(n)(iii) and (iv) of the RTE Act is concerned; whereas, the impugned Notification exempts the unaided private schools from operation of such statutory obligation to provide admission to the extent of 25% of the strength of the school to the children belonging to disadvantaged and weaker sections of the society. It is, thus,

the submission that by issuing the impugned Amendment Rules, the State Government has over-reached the provisions of Section 12(1)(c) of the RTE Act which is impermissible on account of the settled legal position that any subordinate legislation cannot be made in contravention and breach of the principal Act of the Legislature.

23. She has further argued that the impugned Amendment Rules also impinge upon the fundamental rights as enshrined under Article 21-A of the Constitution of India inasmuch as the Amendment Rules create a bar and restriction on such right of children upto the age of 14 years of seeking free and compulsory education in the unaided schools which are situated within the radius of 1 km of the schools aided by the Government/Local Authority. Such a provision, according to Ms.Jayana Kothari, amounts to explicit curtailment of fundamental right embodied in Article 21-A and hence the Amendment Rules are not sustainable being unconstitutional.

24. In addition, it has also been contended on behalf of the petitioners that the impugned Amendment Rules are absolutely arbitrary and unreasonable being completely in contravention of the object of the RTE Act and thus, in this view of the matter as

well, the Amendment Rules are not tenable besides being in contravention of Article 15(5) of the Constitution of India which enables the State to make special provision by law for the advancement of socially and educationally backward class of citizens or the Scheduled Castes and Scheduled Tribes so far as as such provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided.

25. Drawing our attention to Section 12(1)(c) of the RTE Act, it has further been contended on behalf of the petitioners that on account of the occurrence of the words "shall admit" in the said provision, the provision is mandatory and such a statutory mandate emanating from a legislative enactment is being sought to be made nugatory by notifying the Amendment Rules 2024. A reference has also been made to the Statement of Objects and Reasons (SOR) of the RTE Act by the learned Counsel for the petitioners and it has been asserted that the RTE Act was enacted to give effect to the fundamental right enshrined under Article 21-A of the Constitution for providing free and compulsory education to all children upto the age of 14 years and since the said Article mandates the State to make law

determining the manner in which such a right can be made to be realized by the children, the RTE Act was passed by the Parliament. It has, thus, been contended that the Amendment Rules run absolutely in contrast with the aims and objects of the RTE Act and accordingly, such Rules could not have been made by the State. Our attention has also been drawn to the Statement of Objects and Reasons of Eighty Sixth Constitution Amendment Act to emphasize that Article 21-A was inserted in the Constitution by the Parliament with the realization that the goal of providing universal and quality education to the children, as per the directive principle contained in Article 45 of the Constitution, remained unfulfilled. It is, thus, the submission that the Amendment Rules not only are in infringement of Article 21-A of the Constitution but also impedes the aims and objects for which the Eighty Sixth Constitution Amendment Act was enacted by the Parliament.

26. Adopting the submissions advanced by Ms. Jayna Kothari, appearing for some of the petitioners, Shri Swanand Ganoo, learned Counsel appearing for the petitioners in PIL Petition (L) No.15520 of 2024 has also contended that the impugned Amendment Rules do not record the medium of instruction of

Government/aided schools to be a relevant factor and excludes all private unaided schools which are within 1 km radius of the Government/aided schools from operation of the provisions relating to providing 25% admission to the children of weaker and disadvantaged groups and accordingly, if there is a Government/aided school imparting education through medium of instructions of Marathi/Hindi etc. within a distance of 1 Km from the unaided school, then such a private unaided school would be excluded by operation of the impugned Amendment Rules, which is not the intended result of Section 12(1)(c). He has also taken objection to introduction of the proviso appended to Rule 8(2) by submitting that even if a private unaided school considers itself bound by Section 12(1)(c) of the RTE Act, then on account of operation of the impugned Amendment Rules it will not be entitled to reimbursement as per the provisions of Section 12(2) of the RTE Act. Such a situation, according to Mr. Ganoo, has not been envisaged in the scheme of the RTE Act.

27. Mr.Mihir Desai, learned Senior Advocate appearing for some of the petitioners, has submitted that in its very nature, Section 12 is mandatory and casts a statutory obligation which does not permit exclusion of unaided schools from admitting to

the extent of 25% of their strength the children belonging to the disadvantaged groups and weaker sections of the society. He has also stated that Section 12 of the RTE Act is not an enabling clause; rather it casts a duty on the schools for providing free and compulsory education and hence Amendment Rules 2024 are *ultra vires* the Section 12 of the RTE Act. He has also drawn our attention to the judgment of the Hon'ble Supreme Court in ***Pramati Educational and Cultural Trust & Ors. Vs. Union of India & Ors.***² wherein, the apex court did not find any merit in the submission made on behalf of non-minority private schools that Article 21-A of the Constitution and the RTE Act violate their right under Article 19(1)(g) of the Constitution of India. It is, thus, his submission that exclusion of private unaided schools from operation of 2011 Rules is not tenable.

28. Citing another judgment of the apex court in the case of ***Pathapati Subba Reddy (Died) by Lrs. & Ors. Vs. Special Dy. Collector (LA)***³, Mr. Desai has submitted that the State cannot escape from its constitutional and legal obligation of providing free and compulsory education to the children upto the

² (2014) 8 SCC 1

³ 2024 SCC OnLine SC 513

age of 14 years as per the mandate of Section 12(1)(c) of the RTE Act by stating that it has to make enormous expenditure in reimbursing the fee to unaided private schools for admitting the students of disadvantaged and weaker sections of the society merely because of the fact that as per State of Maharashtra it has established sufficient number of Government and aided schools. Submission is that if consequence of a legislative enactment results in some harsh or onerous consequence or inconvenience, on this count alone, the provisions of the legislation cannot be faulted with.

29. While supporting and adopting the arguments made by other learned Counsel representing the petitioners, Ms. Gayatri Singh, learned Senior Advocate has drawn our attention to 165th report of the Law Commission and 63rd report of the Parliamentary Standing Committee on Human Resource Development on "the Constitution (83rd Amendment) Bill, 1997" which ultimately was passed by the Parliament as Eighty Sixth Constitution Amendment Act. Quoting extensively from the Law Commission Report, Ms. Gayatri Singh has contended that the impugned Amendment Rules run contrary to the aims and object of Article 21-A of the Constitution and RTE Act of 2009.

30. All the learned Counsel representing the petitioners, in unison, have emphasized that the very purpose of creating fundamental right to free and compulsory education to the children upto the age of 14 years specially for those belonging to disadvantaged and weaker sections of the society is to provide inclusivity in the education. In their submission, it has been contended that Article 21-A and RTE Act not only aim at providing free and compulsory education to younger children but they also aim at providing an opportunity to different sections of the society of inclusive growth which ultimately would result in the education system producing better citizens.

(D2) Submission on behalf of the State of Maharashtra:

31. Opposing vehemently these petitions, Ms. Jyoti Chavan, learned Additional Government Pleader appearing for the State-respondents has argued that the right to education as enshrined under Article 21-A is not an absolute right and is subject to such laws and regulations as the State may frame. She has also submitted that the RTE Act not only casts a duty on the State Government and the Local Authorities but it also casts a duty on the parents and guardians of the children to admit them to a neighbourhood school for receiving elementary education. She

has also argued that for fulfillment of its obligation under Section 6 of the RTE Act the State Government and the Local Authorities in the State of Maharashtra have established about 65061 schools and in addition to bearing the expenditure on establishment and running of such schools, it is also granting funds/aids to 24152 private aided schools.

32. She has further stated that the State Government incurs an expenditure of about 75597.21 crores only on the salary and non-salary expenses of teaching staff and that the teaching technology in the State run schools has been upgraded for providing free, quality and inclusive elementary education in the schools. Her submission further is that there is nothing on record which shows that the education being imparted in the Government/aided schools is not of good quality. Further submission on behalf of the State is that the State Government is spending huge sum of public money to provide free and compulsory education to all children aged between 6 to 14 years of age and under the Act itself since the State can frame policy, the State can also amend the rules in order to save public money and also to ensure that the State Government does not spend the same amount of money twice. Ms. Chavan has also

argued that under Section 38(2)(b) of the RTE Act, the State is empowered to make rules in respect of the area or limits for establishing neighbourhood schools under Section 6 and further that Section 38(2)(d) empowers the State to make rules in respect of the manner and reimbursement of expenditure to be made under Section 12(2) and accordingly, the Rules of 2011 and the Rules of 2013 have been framed and under the same enabling powers the State has framed impugned Rules of 2024. On behalf of the State it has further been contended that by adding the proviso to Rule 4(5) of the Principal Rules, the State Government has validly exercised its powers to decide the limits and area of neighbourhood schools and by adding the impugned proviso, the Government has not violated the provisions of Section 12(1)(c) of the RTE Act.

33. Relying on the judgment in the case of ***Shree Sidhbali Steels Limited and Ors. Vs. State of Uttar Pradesh and Ors.***⁴ Ms.Chavan has submitted that where there is a power to make rules, power to amend rules also follows. It is also her submission that by the impugned amendment rules in the Principal Rules, the State Government can have bigger pool of

4 (2011) 3 SCC 193

seats to accommodate as many children who apply for admission. She has emphasized that by the Amendment Rules 2024 the unaided private schools have not been exempted from operation of Section 12(1)(c) of the RTE Act; rather by adding the proviso to Rule 4(5) of the 2011 Rules, what has been provided for is that such unaided private schools shall admit the students only if they are situated beyond the distance of 1 km from the Government/aided school. Her submission is that in the face of availability of Government/aided school in the neighbourhood, the right to seek admission within 25% quota as prescribed in Section 12(1)(c) of the RTE Act is not being infringed; rather it is intact. According to her, exclusion of unaided schools within 1 km radius of Government/aided school does not even curtail such right of a child to seek admission in terms of Section 12(1)(c) for the simple reason that such a child can always take admission in the Government/aided school, where in terms of Section 12(1)(c) or 12(1)(b) they shall be provided free and compulsory education. She has heavily placed reliance on the division bench judgment of the High Court of Karnataka in the case of ***Education Rights Trust & Ors. Vs. Government of Karnataka & Ors.***⁵ According to her the

⁵ (2019) SCC OnLine Kar 567

challenge before the Karnataka High Court was to a similar provision which was notified by the State of Karnataka in the form of a proviso to be appended to the rules framed under the RTE Act. The said proviso reads as under:

"provided that no unaided school falling under such clause (iv) of clause (n) of Section 2 shall be identified for the purpose of admission of disadvantaged group or weaker section, where Government school and aided schools are available within the neighbourhood."

34. In her submission, thus, Ms. Chavan has submitted that the impugned proviso appended to Rule 4(5) in the instant case is couched in a similar language as the proviso which was under challenge before the High Court of Karnataka and in view of the judgment rendered in the case of ***Education Rights Trust & Ors. (Supra)***, this petition deserves to be dismissed at its threshold.

(D3) Submission on behalf of Union of India:

35. Ms. Leena Patil, learned Counsel appearing for the Union of India, in her written submission, has only highlighted the purpose for which Article 21-A and the RTE Act have been enacted by the Parliament and has only drawn our attention to certain provisions of the said enactments without addressing the Court as to the issues involved.

(D4)Contentions raised on behalf of interveners which represent private unaided schools:

36. Dr. Milind Sathe, learned Senior Advocate representing the Association of Indian Schools, one of the interveners and party respondent in PIL No.61 of 2024, has vehemently submitted that if the scheme of the RTE Act is analyzed in its correct legal perspective, there is no infringement of any provision of either of the RTE Act or that of Article 21-A of the Constitution by issuance of the impugned Notification, dated 9th April 2024.

37. Taking us to the Index, where different sections of the RTE Act have been arranged, it has been argued by Dr. Sathe that the RTE Act delineates three concepts, viz. (i) right of a child, (ii) duties of State/Local Authority and parents, and; (iii) responsibility of a school. He has stated that these three different aspects as per the RTE Act i.e. right of the child, duties of the State / Local Authority and responsibility of the schools have been kept at different places in the scheme of the Act, that is to say that Chapter II describes Right to Free and Compulsory Education, Chapter III contains Duties of Appropriate Government, Local Authority and Parents and Chapter IV provides for Responsibilities of Schools and Teachers.

38. Dr. Sathe has thus, very vociferously and vehemently attempted to distinguish between (i) right, (ii) duties and (iii) responsibilities. According to him, the responsibility of schools as cast on them in Chapter IV of the RTE Act cannot be equated either with the right of the children or with the duties of the State Government / Local Authority. His further submission is that so far as the right of children to free and compulsory education is concerned, Section 3 confers a right to seek free and compulsory education but it does not confer any right to seek free and compulsory education in any particular institution. His further submission is that the right created under Section 3 casts a corresponding duty under Section 6 of the Act upon State Government / Local Authority, which falls under different Chapter i.e. Chapter-III which is in relation to Duty of Appropriate Government and Local Authority to establish school.

39. In his submission, Dr. Sathe, thus has argued that the responsibility of the schools, which falls in Chapter IV of the RTE Act, corresponding to the right of a child is always subject to the duties of the appropriate Government/Local Authority under Section 6 of the Act and once the State Government, in the instant case, has established sufficient number of schools being

run by the State or Local Authorities, the right conferred under Section 3 by a child to seek free and compulsory education can be fulfilled by getting admission to the schools run by the State Government/Local Authority and in such a situation the responsibility of the schools in terms of Section 12 of the RTE Act will arise only if sufficient number of schools have not been established by the State/Local Authority under Section 6.

40. Taking a cue from what has been argued on behalf of the State Government, it has been further contended by Dr. Sathe that in the light of the the stand taken by the State Government that it has not only established sufficient number of schools fulfilling its statutory duty under Section 6 of the RTE Act but it has been incurring huge expenditure in aiding the privately managed schools, the impugned proviso added to Rule 4(5) of the Principal Rules does not in any manner infringe the right of the children to seek free and compulsory education. Reiterating his submission that Right to Education Act confers a right to seek free and compulsory education and not a right to seek such education in any particular school or institution, Dr.Sathe has argued that the statutory responsibility of the schools cast on them under Section 12 (1)(c) will be in force only till the State

does not fulfill its duty of establishing sufficient number of schools under Section 6 and since the State has established sufficient number of schools under its control or under the control of the Local Authorities, the statutory responsibility of the schools under Section 12 does not come into picture to enable the children to realize their fundamental right of seeking free and compulsory education. He has empathetically argued that the responsibility under Section 12 (1)(c) cast on the schools cannot be equated with the duty cast on the Government and Local Authorities under Section 6 on account of the fact that these provisions have been arranged in different Chapters described differently in the RTE Act. In his submission Dr. Sathe stated that Chapter III is described as "Duties of Appropriate Government, Local Authority and Parents", whereas Chapter IV is described as "Responsibilities of Schools and Teachers" and accordingly, in his submission, he has contended that once the State Government and the Local Authorities fulfill their statutory duty of establishing sufficient number of schools, the so called statutory responsibility upon the unaided private schools cannot be thrust upon. Dr. Sathe has also argued that Section 12(1)(c) providing for the statutory responsibility on the private unaided

schools of providing free and compulsory education to the children upto the age of 14 years belonging to the disadvantaged and weaker sections of the society to the extent of 25% of the strength of the school, can be saved from the wrath of Article 19(1)(g) of the Constitution only if it is interpreted to mean that responsibility by unaided school shall be borne only till the duty of the Government and the Local Authorities remain unfulfilled under Section 6 of the RTE Act.

41. Dr. Sathe has contended that Section 12 is to be interpreted in a manner where the primary duty to provide free and compulsory education to the children of the age of 14 years is that of the State and it is only when the State is found deficient in discharge of its duty of establishing sufficient number of schools that the statutory responsibility by the unaided school is to be borne. His submission is that Sections 6 and 12 of the RTE Act will operate simultaneously only till there remains deficiency in establishment of the sufficient number of schools and once such statutory duty/obligation of the State and Local Authorities is fulfilled, the responsibility of the unaided school as envisaged under Section 12 cannot be insisted upon. Thus, Dr.Sathe has argued that since proviso to Rule 4(5) of the

Principal Rules has been added, as submitted on behalf of the State Government, only once the sufficient number of schools have been established by the State Government and the Local Authorities, the responsibility under Section 12 of the unaided schools should not be insisted upon in the neighbourhood, where a Government/aided school is available within the radius of 1 km from such unaided school.

42. He has also argued that a bare reading of Article 21-A of the Constitution shows that the primary duty to provide free and compulsory education is that of the State which can be discharged by (i) establishing the neighbourhood school under Section 6, and (ii) by granting aid to schools to meet their expenses. He has further argued that a child seeking free and compulsory education is not concerned in the manner in which the right under Section 3 is to be provided by the State; rather the manner in which such a right is to be realized by the children has to be left to the State.

43. Dr. Sathe has referred to the judgment of the Hon'ble Supreme Court in the case of ***Society for Unaided Private Schools of Rajasthan Vs. Union of India & Anr.***⁶, where the

⁶ 2012 (6) SCC 1

Hon'ble Supreme Court, while considering as to whether Section 12(1)(c) of the RTE Act is violative of Article 19(1)(g) of the Constitution has held that the RTE Act casts duty on State to establish schools and that responsibility of private unaided non-minority schools merely supplements the primary obligation of the State. According to him, validity of Section 12(1)(c) was upheld by observing that imposing a reasonable restriction on the schools under Article 19(1)(g) by requiring the unaided schools to admit upto 25% of the students if the State is unable to do so under Section 6, is permissible.

44. As observed above, his submission is that Section 12(1)(c) of the RTE Act can escape the rigours of Article 19(1)(g) only if it is held that Section 12(1)(c) casts responsibility on the unaided schools to provide admission to the extent of 25% of the strength, to the children of the disadvantaged and weaker sections of the society as a supplemental role and not as a primary duty under the RTE Act. He has, thus, contended that as per the scheme of the RTE Act, recourse can be taken to Section 12(1)(c) only in the event the State fails in discharge of its statutory duty under Section 6 of establishing sufficient number of schools and that Section 12(1)(c) which falls in

Chapter IV of the RTE Act will come into effect only if State has failed in discharge of its duties under Section 6 which falls in Chapter III.

45. On the aforesaid counts, it has been argued by Dr. Sathe that the impugned Notification is neither contrary to the Constitution of India nor to the RTE Act and that the State is well within its power to make such rules under Section 38 of the RTE Act. His submission is that the power to identify the school in the neighbourhood always vested with the State even prior to the impugned Notification and hence the impugned Notification has only made the power more explicit which was already provided for under Rule 4.

(E) DISCUSSION AND ANALYSIS:

46. As noticed above, by the impugned Notification dated 9th February 2024, a proviso has been appended to Rule 4(5) of the Principal Rules, whereby in the process of identifying the private unaided schools for the purposes of 25% admission of children from disadvantaged groups and weaker sections of the society, such unaided schools have been excluded which are situated within the radius of 1 km of the Government/aided schools. The

primary ground of challenge to the impugned proviso is that it is *ultra vires* the RTE Act under which Principal Rules as also the Amendment Rules have been framed. The submission, challenging the impugned Notification is also that it is in violation of Article 21-A of the Constitution.

47. As to what is the yardstick or parameter to test the validity of a delegated legislation has been discussed at length by Hon'ble Supreme court in the case of ***Union of India & Ors. Vs. S. Srinivasan***⁷. In the said judgment, it has been observed by the Hon'ble Supreme Court, *inter alia*; that if a rule goes beyond the rule making power or if a rule supplants any provision for which power has not been conferred on the rule making body, it is rendered *ultra vires*. Further observation by Hon'ble Supreme court in the said judgment is that basic test to determine and consider the validity of a subordinate legislation is the source of power and also the consideration as to whether such subordinate legislation is in accord with the parent statute as it cannot travel beyond it. Paragraphs 21 and 22 of the judgment in the case of ***S. Srinivasan (Supra)*** are quoted hereunder:

7(2012) 7 SCC 683

"21. At this stage, it is apposite to state about the rule-making powers of a delegating authority. If a rule goes beyond the rule-making power conferred by the statute, the same has to be declared *ultra vires*. If a rule supplants any provision for which power has not been conferred, it becomes *ultra vires*. The basic test is to determine and consider the source of power which is relatable to the rule. Similarly, a rule must be in accord with the parent statute as it cannot travel beyond it.

22. In this context, we may refer with profit to the decision in *General Officer Commanding-in-Chief v. Subhash Chandra Yadav* [(1988) 2 SCC 351 : 1988 SCC (L&S) 542 : (1988) 7 ATC 296 : AIR 1988 SC 876] wherein it has been held as follows : (SCC p. 357, para 14)"

"14. ... before a rule can have the effect of a statutory provision, two conditions must be fulfilled, namely, (1) it must conform to the provisions of the statute under which it is framed; and (2) it must also come within the scope and purview of the rule-making power of the authority framing the rule. If either of these two conditions is not fulfilled, the rule so framed would be void."

48. In **S. Srinivasan (Supra)**, Hon'ble Supreme Court has also observed that the Court while considering the validity of a subordinate legislation needs to consider the nature, object and the scheme of the enabling Act as also the subjects over which power has been delegated under the enabling Act. The Supreme Court further observes that where the rule is inconsistent with the mandatory provisions of the Statute, it is to be declared *ultra vires* the Parent Act. Paragraph 31 of the judgment in the case of **S. Srinivasan (Supra)** is also apposite to be quoted, which is as under:

"31. In *Pratap Chandra Mehta v. State Bar Council of M.P.* [(2011) 9 SCC 573] , while discussing about the conferment of extensive meaning, it has been opined that : (SCC p. 604, para 58)"

"58. ... The Court would be justified in giving the provision a purposive construction to perpetuate the object of the Act, while ensuring that such rules framed are within the field circumscribed by the parent Act. It is also clear that it may not always be absolutely necessary to spell out guidelines for delegated legislation, when discretion is vested in such delegatee bodies. In such cases, the language of the rule framed as well as the purpose sought to be achieved, would be the relevant factors to be considered by the Court."

49. It is not in dispute that under Section 38, the appropriate Government has been vested with the power to make rules for carrying out the provisions of the RTE Act. Said provision vests power with the State Government not only to make rules in general for giving effect to the provisions of the RTE Act but also the power to make rules for certain matters enlisted under sub-section (2) of Section 38. Section 38(2)(e) empowers the appropriate Government to make rules in relation to the area or limits of establishment of a neighbourhood school under Section 6 of the RTE Act. Thus, so far as rule making power of the State Government to make rules including any addition or deletion in the rules is concerned, there is no doubt that such a power is available with the State Government, however, validity of a rule made under the rule making powers of the State Government has to be tested on the parameters as enunciated in various judgments of the apex court including the judgment in the case of **S. Srinivasan (Supra)**.

50. Accordingly, if this Court finds that the impugned proviso appended to rule 4(5) of the Principal Rules in any manner overreaches the provisions of the RTE Act under which it has been made, the same has to be struck down. For determining as to whether the impugned proviso offends the provisions of Section 12(1)(c) of the RTE Act, we need to consider the scheme of the Act and the purpose for which the Act has been enacted by the Parliament. In case we come to the conclusion that the impugned proviso is not in conformity with the statutory mandate available under Section 12(1)(c) or if it is found to run contrary to the very object for which the RTE Act has been enacted, the same may be declared to be void and inapplicable. However, in case we conclude that the impugned proviso does not offend the RTE Act and it is in conformity with the aims and object for which the RTE Act has been enacted by the Parliament, its validity cannot be disturbed.

51. The validity and applicability of the RTE Act qua unaided non-minority schools was considered by the Hon'ble Supreme Court in the case of ***Society for Unaided Private Schools of Rajasthan Vs. Union of India & Anr.***⁸ The majority opinion

8 (2012) 6 SCC 1

in this judgment was authored by Hon'ble Shri Justice S. H. Kapadia, Chief Justice of India (as His Lordship then was) and it was held that it is not only that RTE Act is constitutionally valid but also that it shall apply to unaided non-minority schools not receiving any kind of aid or grant from the appropriate Government or the Local Authority. The conclusion expressed by the majority view has been summarized in paragraph 62 of the said judgment which is extracted hereinbelow:

"62. Reservations of 25% in such unaided minority schools result in changing the character of the schools if right to establish and administer such schools flows from the right to conserve the language, script or culture, which right is conferred on such unaided minority schools. Thus, the 2009 Act including Section 12(1)(c) violates the right conferred on such unaided minority schools under Article 30(1)."

52. Hon'ble Supreme Court, in its majority view in the case of ***Society for Unaided Private Schools of Rajasthan (supra)*** has also held that Section 12(1)(c) of the RTE Act does not impede the right of non-minority to establish and administer an unaided educational institution. The said view is mentioned in paragraph 37 of the report which reads thus:

"37. Thus, from the scheme of Article 21-A and the 2009 Act, it is clear that the primary obligation is of the State to provide for free and compulsory education to children between the age 6 to 14 years and, particularly, to children who are likely to be prevented from pursuing and completing the elementary education due to inability to afford fees or charges. Correspondingly, every citizen has a right to establish

and administer educational institution under Article 19(1)(g) so long as the activity remains charitable. Such an activity undertaken by the private institutions supplements the primary obligation of the State. Thus, the State can regulate by law the activities of the private institutions by imposing reasonable restrictions under Article 19(6)."

53. The apex court in the aforesaid case also repelled the challenge to Section 12(1)(c) on the ground of Article 14 and came to the conclusion that Section 12(1)(c) provides for a level playing field in the matter of right of education to children who are prevented from accessing education for want of means to pay for their fees. Said observations have been made by the Hon'ble Supreme Court in paragraph 41 which is quoted hereinbelow:

"41. We also do not see any merit in the contention that Section 12(1)(c) violates Article 14. As stated, Section 12(1)(c) inter alia provides for admission to Class I, to the extent of 25% of the strength of the class, of the children belonging to weaker sections and disadvantaged group in the neighbourhood and provide free and compulsory elementary education to them till its completion. The emphasis is on "free and compulsory education". Earmarking of seats for children belonging to a specified category who face financial barrier in the matter of accessing education satisfies the test of classification in Article 14. Further, Section 12(1)(c) provides for a level playing field in the matter of right to education to children who are prevented from accessing education because they do not have the means or their parents do not have the means to pay for their fees."

54. When we examine Section 12(1)(c) in the light of the scheme of the RTE Act, the purpose and object for which RTE Act has been enacted and the analysis of various provisions of the said enactment made by the Hon'ble Supreme Court in **Society**

for Unaided Private Schools of Rajasthan (supra), what we find is that the said provision, in explicit terms, casts a duty on unaided private schools to admit children belonging to disadvantaged groups and weaker sections of the society in the neighbourhood to the extent of 25% of the strength in Class-I and provide free and compulsory elementary education till its completion. The emphasis, here may be laid on occurrence of the word "shall" in Section 12(1)(c) which, in our considered opinion, makes it mandatory for all unaided private schools to provide for admission of such children to the extent of 25% of its strength.

55. We may further notice that Section 12(1)(c) does not contain any condition of existence of Government/aided school (which expression herein shall include the schools run by the local authority as well) in the neighbourhood or at any distance from the unaided private schools. In other words, Section 12(1)(c) casts a duty on every unaided school irrespective of its distance from the Government/aided schools. By the impugned Notification, however, the operation of Section 12(1)(c) on the unaided schools has been made conditional, in the sense that the said provision will be applicable only in case the unaided

school is situated outside the radius of 1 km from the Government/aided school. Such a condition is completely absent in Section 12(1)(c) of the RTE Act and accordingly any rule or subordinate legislation which provides for a condition of distance of private unaided schools from the Government/aided schools clearly runs contrary to what Section 12(1)(c) provides for.

56. Hon'ble Supreme Court in ***Society for Unaided Private Schools of Rajasthan (supra)*** has highlighted the nature of education and the good it brings to a child. In paragraph 5 of the report, the apex court has observed that the education is a process which engages many actors such as the one who provides education i.e. the teacher, the school and the parents, the one who receives education i.e. the child and the pupil and the one who is legally responsible for those who receive education that is, the parents, the legal guardians, the society and the State. Hon'ble Supreme Court has observed further that these actors influence the right to education. Paragraph 5 of the judgment is extracted hereunder:

"5. Education is a process which engages many different actors: the one who provides education (the teacher, the owner of an educational institution, the parents), the one who receives education (the child, the pupil) and the one who is legally responsible for the one who receives education (the parents, the legal guardians, society and the State). These actors influence the right to education".

57. Considering the involvement of different actors in the process of education, the Parliament, while enacting the RTE Act, has specifically provided in Section 12(1)(c) that the school defined in Section 2(n)(iv) of the RTE Act will also be liable for making admission in Class-I to the extent of 25% of their strength, of the children belonging to disadvantaged groups and weaker sections of the society. If Section 12(1)(c) of the RTE Act consciously does not provide for any condition of distance, putting such a condition by making rules under the rule making powers of the State Government, cannot be approved of for the simple reason that the settled legal proposition of law is that any delegated legislation cannot overreach the provision of the parent Act under which it is made; neither can it supplant something which is clearly absent in the Act.

58. Our view that Section 12(1)(c) does not specify any condition, is strengthened by a judgment of a Division Bench of Allahabad High Court in the case of **Ajay Kumar Patel Vs. State of U.P. and Ors.**⁹ In this case, challenge was made to Government orders, dated 3rd December 2012 and 6th January 2015 which directed that it is only when no seat is available in

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the Government schools or aided institutions that the provisions of Section 12(1)(c) would apply. The Division Bench of Allahabad High Court, in the said judgment clearly opined that the prescription available in the Government orders that provision of Section 12(1)(c) would apply only where no seat is available in the Government or aided institution, was clearly contrary to the provisions of Section 12(1)(c). The Allahabad High Court has explicitly held in the said judgment that the mandate of Section 12 is not conditional on the absence of schools established, owned, or controlled by the appropriate Government or the Local Authority or aided schools. Paragraph 17 of the said judgment is relevant to be extracted here, which reads as under:

"17. The first issue which falls for consideration relates to the interpretation of the provisions of Section 12(1)(c). Section 12 defines the nature of the responsibility of a school to provide for free and compulsory education. Section 12(1)(c) covers schools belonging to specified categories and unaided schools not receiving any grant or aid to meet expenses from the Government or local authority. These schools have been obligated to admit to Class 1 to the extent at least 25% of the strength of that class, children belonging to weaker sections and disadvantaged groups in the neighborhood and to provide free and compulsory elementary education till its completion. The mandate of Section 12 is not conditional on the absence of schools established, owned or controlled by the appropriate Government or local authority or of aided schools. In other words, the obligation to admit students belonging to the weaker sections and from disadvantaged groups does not come into existence only upon the absence of seats in schools which are run by the State or local authority or by aided institutions. The obligation under Section 12(1)(c) has not been made dependent on the non-existence of State run schools or aided schools or the unavailability of seats in those schools.

To read Section 12(1)(c) in a contrary manner so as to import an obligation to admit students from the weaker sections and disadvantaged groups only where seats are not available in State run schools or aided institutions would be to defeat the object of the provisions. The Government Order dated 6 January, 2015 reiterates the earlier Government Order dated 3 December, 2012 by stipulating that it is only where the District Basic Education Officer has found that students belonging to weaker sections or disadvantaged groups are unable to obtain admissions to Government schools or schools run by the Basic Shiksha Parishad and in aided institutions due to unavailability of seats that such students would be entitled to obtain admission against the 25% seats available in unaided institutions. This prescription creates a hierarchy in the availment of the benefits under Section 12(1)(c) by stipulating that it is only in the absence of admissions being available in Government run schools or aided institutions that the obligation to admit students from disadvantaged groups or of weaker sections under Section 12(1)(c) would arise. This interpretation and understanding of the State is clearly contrary to the provisions of Section 12(1)(c)."

59. Thus, the submission that Section 12(1)(c) of the RTE Act will operate only in absence of Government or aided schools in the neighbourhood area was repelled by the Allahabad High Court in the case of **Ajay Kumar Patel (supra)** and it was clearly held that the operation of the mandate of Section 12 is not conditional, that is to say that the contention that Section 12 will operate only in absence of Government/aided schools, was not found to be correct.

60. Similar view has been taken by the High Court of Himachal Pradesh in the case of **Smt. Namita Maniktala Vs. State of H.P. and Ors.**¹⁰ In the said case, High Court of

¹⁰ 2016 SCC OnLine HP 3285.

Himachal Pradesh has clearly held that the mandate of Section 12 is not contingent or dependent on any condition. **Smt.Namita Maniktala (supra)** further observes that private unaided schools are obliged to provide free and compulsory education in terms of Section 12(1)(c) and that the objective behind such obligation is to achieve the constitutional goal of equality of opportunity through inclusive elementary education of satisfactory quality to children belonging to disadvantaged and weaker sections of the society. Paragraph 25 of the judgment in the case of **Smt. Namita Maniktala (supra)** is relevant here, which is extracted hereinbelow:

"25. A plain reading of Sections 12(1)(c) and 12(2) would make it clear that there is a mandatory obligation imposed on schools specified in sub clauses (iii) and (iv) to admit in class I to the extent of 25% of the strength of the class, children belonging to weaker sections and disadvantaged groups in the neighbourhood and provide free and compulsory education to them. There is no condition whatsoever that such schools should be declared as neighbourhood schools by the State Government or local authority. Thus, the corresponding obligation of the State to reimburse the expenditure as provided in Section 12(2) of the Act is also independent of the such schools being declared neighbourhood schools. It is an obligation consequent to the free and compulsory education that the private unaided schools are obliged to provide in terms of Section 12(1)(c). The objective behind the obligation so imposed even on private unaided schools was to achieve the constitutional goal of equality of opportunity through inclusive elementary education of satisfactory quality to children from weaker sections and disadvantaged groups."

61. Thus, creating a condition of distance of 1 km of a private

unaided school from Government/aided school for application of Section 12(1)(c) on such private unaided school is clearly in infringement of Section 12(1)(c) of the RTE Act for the reason that the said provision of the RTE Act does not provide for any condition. Its operation is; rather unconditional and hence, in our opinion, it is mandatory for all private unaided schools in the neighbourhood to follow the mandate of Section 12(1)(c) of the RTE Act.

62. Submission raised on behalf of the State that since the State has established sufficient number of schools and has been spending a lot of public money to meet the expenditure on establishment of schools and also to meet the grants being given to the private aided schools as such the impugned proviso does not impede in any manner right to free and compulsory education, cannot be appreciated for the reason that the provision made under the rule making power of the State Government under Section 38 of the RTE Act has to be examined in the light of the settled legal position that in case any subordinate legislation is contrary to the Parent Act itself, the same would be void. We have already noticed that the impugned amendment rule provides for condition of distance

whereas, Section 12(1)(c) is unconditional and for this simple reason alone, in our opinion, the impugned proviso does not withstand judicial scrutiny.

63. On behalf of the State it has also been argued that providing for a condition of distance of the unaided school from the Government/aided school for application of Section 12(1)(c) does not mean that unaided schools have been exempted from operation of Section 12(1)(c). This contention is also not tenable. We have already noticed that mandate of Section 12(1)(c) operates on all unaided schools defined under Section 2(n)(iv) of the RTE Act irrespective of their location. In absence of such permissibility under Section 12(1)(c) regarding distance of a private unaided school from the Government/aided school for its operation, the contention of the learned Counsel for the State merits rejection, which is hereby rejected.

64. The submission of the learned Additional Government Pleader representing the State-respondents that a huge expenditure is being incurred by the Government and that now since the obligation under Section 6 of the RTE Act has been fulfilled, as such the impugned proviso appended to Rule 4(5) of the Principal Rules is to save the public money, is also not

tenable as the financial constraint cannot come in the way of statutory mandates keeping in view the purpose for which the RTE Act has been enacted. We have already noticed that prior to Eighty Sixth Constitution Amendment, right to free and compulsory education to children upto a certain age was only a directive principle which was declared to be a fundamental right emanating from Article 21 in ***Unni Krishnan J.P. & Ors. (supra)*** and later on; by Eighty Sixth Constitution Amendment Act, it now forms part of Part-III of the Constitution of India in the form of Article 21-A. Article 21-A is couched in a language which makes it mandatory in nature as it speaks of the State's constitutional duty to provide free and compulsory education to all children of the aged 6 to 14 years. Of course; such right of free and compulsory education is to be realized in such a manner as the State may determine. It is in fulfillment of this obligation to determine the manner for providing free and compulsory education to children aged 6 to 14 years that the Parliament has enacted RTE Act in the year 2009 which in its wisdom thought it proper to provide for compulsory and free education to the extent of 25% of the strength to the children belonging to disadvantaged and weaker sections of the society in the private

unaided schools under Section 12(1)(c) of the RTE Act.

65. Mandate to the State to provide free and compulsory education under Article 21-A is almost absolute. It is only the manner which can be prescribed by the State by making law and once law in the form of RTE Act has been framed which mandates under Section 12(1)(c) that private unaided schools shall also be part of such mandatory duty, the submission on behalf of the State respondents based on heavy expenditure is not tenable.

66. We also find ourselves unable to agree with the submissions made on behalf of the interveners, who are private unaided schools. Leading the arguments on behalf of the interveners, Dr.Sathe has attempted to dissect the provisions of the RTE Act into three heads; (i) right (ii) duties, and (iii) responsibility. According to Dr. Sathe, since right of a child to free and compulsory education, duty of appropriate Government and local authority to establish school and school's responsibility for free and compulsory education, fall in different Chapters in the arrangement of provisions of the RTE Act, hence, they are to be interpreted somewhat differently. We have already noted his arguments above where he states that no doubt, it is the right of

a child to receive free and compulsory education under Section 3, however, the corresponding duty is cast on the State under Section 6 to establish the schools and it is only till the Government/Local authority under Section 6 of the RTE Act does not establish sufficient number of schools that the responsibility of the schools to provide free and compulsory education comes into play. He has attempted to differentiate between duty and responsibility and has argued that the appropriate Government and Local Authorities having been cast with statutory duty, which is to be put on a higher pedestal for achieving the goal of free and compulsory education to children as compared to statutory responsibility cast on the schools. Dr. Sathe also argued that Sections 3, 6 and 12 will not operate simultaneously for all times; rather they operate simultaneously only till sufficient number of schools are not set-up/established by the Government /local authorities under Section 6 and once sufficient number of schools are established, the statutory responsibility of the schools may not be insisted upon.

67. From the submission made by Dr. Sathe what appears to the Court is that he has attempted to dissect the provisions of the RTE Act, however, such submission appears to be based on

completely irrelevant considerations. The object and purpose of enactment of RTE Act is to fulfill the constitutional mandate of Article 21-A of providing free and compulsory education to children from 6 to 14 years of age and accordingly, the entire provisions, irrespective of the Chapter in which they fall in the Act, are to operate concurrently, otherwise, in our opinion, it will not be possible for the State to achieve the purpose for which the RTE Act has been enacted. It will result in denial of the fundamental right enshrined under Article 21-A of the Constitution of India. It is also to be noticed that the RTE Act not only casts statutory obligation on the schools as defined under Section 2(n) of the RTE Act but it also provides that the State can provide a complete scheme so that the right to free and compulsory education is ultimately realized by the beneficiaries. In this regard we may note at this juncture that Section 18 of the RTE Act provides that no school other than the Government school or school established by minority can be established without obtaining a certificate of recognition from the concerned authority by making an application, as may be prescribed. The schools described in Section 2(n)(iv) of the RTE Act have not been exempted from operation of Section 18. It is

not only that if a private management intends to open an unaided school that it has to obtain a certificate of recognition under Section 18 of the RTE Act but also that for its continued function as a school as well a certificate of recognition is needed. That is to say, if a private unaided school was already established on the date of promulgation of the RTE Act, for its continuation also such certificate of recognition is needed under Section 18. Noticeable feature of Section 18 is that from its operation, private unaided schools defined under Section 2(n) (iv) are not excluded.

68. Similarly, all the schools recognized under Section 18 are to fulfill the norms and standards which are specified in the Schedule appended to RTE Act in terms of the provisions of Section 19 of the RTE Act. It is also to be noticed that Section 19 in its fold encompasses all types of schools including the schools defined under Section 2(n)(iv) i.e. private unaided schools. Section 25 mandates that all schools shall maintain pupil-teacher ratio as specified in the Schedule appended to the Act. The private unaided schools have not been exempted from operation of Section 25 as well. Similarly, the prohibition of deployment of teachers for non-educational purposes and

prohibition of private tuition by teachers are also applicable to the private unaided schools.

69. On a perusal of the scheme of the RTE Act and also bearing in mind its purpose, the submission of Dr. Sathe that Sections 3, 6 and 12 are not to be read in unison, in our opinion, is fallacious and cannot, thus, be accepted as in case these provisions do not operate concurrently or simultaneously, it will not be possible for the State to achieve the purpose for which the RTE Act has been enacted. In this view the word "responsibility" occurring in Section 12 of the RTE Act has to be read as "duty".

70. There is yet another reason for the Court not to agree with the submission made by Dr. Sathe. Section 12(1) in all its sub clauses viz. clause (a), (b) and (c) uses the word "shall". These clauses apply to different classes of schools defined in Section 2(n). So far as the unaided private institutions are concerned, they are defined under Section 2(n)(iv) and accordingly, Section 12(1)(c) of the RTE Act is applicable to these unaided institutions as well as the occurrence of the word "shall" makes it mandatory for all unaided schools to admit at least 25% students belonging to disadvantaged group and weaker sections of the society.

71. For the aforesaid reasons the submission made on behalf of the private unaided schools that the statutory responsibility under Section 12(1)(c) on them will operate only till sufficient number of schools are not established by the Government/local authority under Section 6, is not tenable.

72. The aforesaid submission is also not tenable on a plain reading of the provisions contained in Section 12 which reveals that its operation is not dependent on any other provision in the Act; rather Section 12 has been enacted to give effect to the provisions of RTE Act as is clear from the opening phrase occurring in Section 12(1) i.e. "for the purposes of this Act". If Section 12 has been enacted to give effect to the purpose and object of the Act as is clear from the language in which Section 12 (1) of the RTE Act is couched, the contention raised on behalf of the private schools that Section 12(1)(c) will operate on unaided school only till sufficient number of schools are not established by the State under Section 6, in our considered opinion, does not have any legs to stand.

73. The last submission made by Dr. Sathe that Section 12(1) (c) of the RTE Act can be saved from the wrath of Article 19(1) (g) of the Constitution only if it is interpreted to mean that it

shall operate only till fulfillment of duty of establishing sufficient number of schools by the State/local authorities under Section 6, is misconceived. The reason for such an argument being misconceived can very well be found in the judgment of ***Society for Unaided Private Schools of Rajasthan (supra)***, wherein it has been held that such an obligation cast on private schools under Section 12(1)(c) does not infringe fundamental right under Article 19(1)(g) for the reason that the education is a charitable purpose. The Hon'ble Supreme Court in the said case has clearly held that Section 12(1)(c) also satisfies the test of reasonableness apart from classification in Article 14 of the Constitution. In paragraph 33 of ***Society for Unaided Private Schools of Rajasthan (supra)*** Hon'ble Apex Court clearly states that the RTE Act cannot be termed as unreasonable and further that to put an obligation on unaided non-minority school to bear 25% children in class-I under Section 12(1)(c) cannot be termed as unreasonable restriction and that such a law cannot be said to transgress any constitutional right for the reason that the object of RTE Act is to remove barriers faced by the children to seek admission and not to restrict the freedom under Article 19(1)(g) of the Constitution. Paragraphs 33 and 42 of the

judgment in ***Society for Unaided Private Schools of Rajasthan (supra)*** are extracted hereinbelow:

“33. It is true that, as held in T.M.A. Pai Foundation (2002) 8 SCC 481 as well as P.A. Inamdar (2005) 6 SCC 537, the right to establish and administer an educational institution is a fundamental right, as long as the activity remains charitable under Article 19(1)(g), however, in the said two decisions the correlation between Articles 21 and 21-A, on the one hand, and Article 19(1)(g), on the other, was not under consideration. Further, the content of Article 21-A flows from Article 45 (as it then stood). The 2009 Act has been enacted to give effect to Article 21-A. For the above reasons, since the Article 19(1)(g) right is not an absolute right as Article 30(1), the 2009 Act cannot be termed as unreasonable. To put an obligation on the unaided non-minority schools to admit 25% children in Class I under Section 12(1)(c) cannot be termed as an unreasonable restriction. Such a law cannot be said to transgress any constitutional limitation. The object of the 2009 Act is to remove the barriers faced by a child who seeks admission to Class I and not to restrict the freedom under Article 19(1)(g).

42. As stated above, education is an activity in which we have several participants. There are number of stakeholders including those who want to establish and administer educational institutions as these supplement the primary obligation of the State to provide for free and compulsory education to the specified category of children. Hence, Section 12(1)(c) also satisfies the test of reasonableness, apart from the test of classification in Article 14.”

74. So far as the reliance placed by the respondents on the judgment in the case of ***Education Rights Trust & Ors. (supra)***, we have gone through the reasoning given by the Karnataka High Court in the said case, to which we do not find ourself in agreement. Karnataka High Court gives the following reason in paragraph 21 of the said judgment:

“21. The learned Advocate General is right in his submission that the State Government or the local authorities are under the obligation to identify schools defined under Section 2(n)(iii) & (iv) only if there are no schools in the neighbourhood. The case of the petitioners is that notwithstanding the existence of Government or Government aided

schools in the neighbourhood, unaided schools must also be identified to ensure that parent and the child get admission in schools of their choice. If petitioner's contention is to be accepted, the State Government will be compelled to reimburse astronomical figures. The argument on behalf of the petitioners that children entitled for seat under the RTE Act may choose an unaided school in the neighbourhood though there exist Government and aided schools, is fallacious."

75. In the said judgment, the Karnataka High Court had agreed with the submissions made on behalf of the State that the State Government or local authorities are under obligation to identify schools defined under Section 2(n)(iii) and (iv) only if there are no schools in the neighbourhood, however, while arriving at such conclusion it appears that the fact that condition of distance is absent in Section 12(1)(c) of the RTE Act, appears to have escaped the attention of the Hon'ble Judges. We have already noticed that Section 12 of the RTE Act is not conditional and accordingly, by providing a condition that private unaided schools shall be under obligation to admit 25% students belonging to disadvantaged groups and weaker sections of the society only in case there does not exist any Government/aided school within the periphery of 1 km of such unaided school by the impugned proviso, the State Government has exceeded the provisions of the RTE Act itself. No subordinate legislation can be permitted to exceed what has been provided for in the parent

Act. Thus, the said judgment does not save the impugned proviso.

76. For the discussion made and reasons given above, it is held that the impugned proviso appended to rule 4(5) of Principal Rules 2011 vide impugned Notification, dated 9th February 2024 is *ultra vires* the RTE Act 2009 and Article 21-A of the Constitution of India and, accordingly, the impugned proviso is declared to be void. Consequently, the proviso appended to Rule 8(2) of the Principal Rules 2011 is held to be inoperative. The communication, dated 6th March 2024 and the Circular, dated 3rd April 2024 issued by the Director of Education (Primary), State of Maharashtra are also hereby quashed.

77. The Court has been informed that prior to passing of the interim order by this Court on 6th May 2024 whereby it was directed that the impugned provision shall remain stayed, certain admissions even against the 25% seats reserved for the children belonging to disadvantaged groups and weaker sections of the society were made by some of the private unaided schools from amongst children belonging to other sections of the society, as such, it is directed that the admissions of such students shall not be disturbed. However, in any circumstance, 25% of the total

strength of Class-I of private unaided schools shall be filled-in in terms of Section 12(1)(c) of the RTE Act and where it is necessary, the total seats may be increased by such schools by submitting necessary information and details to the concerned authority of the Education Department of the State Government.

78. The Petitions stand allowed in the aforesaid terms.

79. Interim application, if any, shall stand disposed of.

80. Costs made easy.

(AMIT BORKAR, J.)

(CHIEF JUSTICE)