REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 1724 OF 2021
(ARISING OUT OF SLP (C) NO. 27881 OF 2019)

INDIAN SCHOOL, JODHPUR & ANR. ...PETITIONER(S)

VERSUS

STATE OF RAJASTHAN & ORS. ...RESPONDENT(S)

WITH

CIVIL APPEAL NOS. 1713-1722 OF 2021
(ARISING OUT OF SLP (CIVIL) NOS.27907-27916 OF 2019)

CIVIL APPEAL NO. 1723 OF 2021
(ARISING OUT OF SLP (C) NO. 27987 OF 2019)

CIVIL APPEAL NO. 1725 OF 2021
(ARISING OUT OF SLP (C) NO. 2942 OF 2020)

CIVIL APPEAL NO. 1729 OF 2021
(ARISING OUT OF SLP (C) NO. 5470 OF 2020)

CIVIL APPEAL NO. 1730 OF 2021
(ARISING OUT OF SLP (C) NO. 5589 OF 2020)

CIVIL APPEAL NO. 1726 OF 2021
(ARISING OUT OF SLP (C) NO. 5902 OF 2020)

CIVIL APPEAL NO. 1727-1728 OF 2021
(ARISING OUT OF SLP (C) NO. 6743-6744 OF 2021)
(@ DIARY NO(S). 6803 OF 2020)

AND

CIVIL APPEAL NO. 1732 OF 2021
(ARISING OUT OF SLP (C) NO. 6745 OF 2021)
(@ DIARY NO(S). 44 OF 2021)

CIVIL APPEAL NO. 1731 OF 2021
(ARISING OUT OF SLP (C) NO. 431 OF 2021)

CIVIL APPEAL NOS. 1733-1735 OF 2021
(ARISING OUT OF SLP (C) NOS. 577-579 OF 2021)

CIVIL APPEAL NO. 1736 OF 2021
(ARISING OUT OF SLP (C) NO. 2494 OF 2021)

J U D G M E N T

A.M. Khanwilkar, J.

1. These two sets of appeals are being disposed of by this common judgment.

2. In the **first set** of appeals, six appeals[1] emanate from common judgment and order dated 14.08.2019 passed by the High Court of

1 arising out of SLP (C) No. 27881 of 2019; SLP (C) Nos.27907-27916 of 2019; SLP (C) No. 27987 of 2019; SLP (C) No. 2942 of 2020; SLP (C) No. 5902 of 2020; and SLP (C) No ..... of 2021 @ Diary No(s). 6803 of 2020;

Judicature for Rajasthan at Jodhpur and two other appeals[2] against the judgment and order dated 11.02.2020 of the Jaipur Bench of the same High Court, which followed the earlier decision of the Jodhpur seat referred to above. In these matters, the appellants (Management(s) of private unaided schools in the State of Rajasthan) had assailed the validity of the Rajasthan Schools (Regulation of Fee) Act, 2016[3], in particular Sections 3, 4, 6 to 11, 15 and 16 and the Rules framed thereunder titled Rajasthan Schools (Regulation of Fee) Rules, 2017[4], in particular Rules 3, 4, 6 to 8 and 11 thereof being *ultra vires* the Constitution and abridge the fundamental right guaranteed under Article 19(1)(g) of the Constitution of India.

3. In the **second set** of appeals, four appeals[5], also filed by the Management(s) of private unaided schools in the State of Rajasthan, emanate from the common judgment and order dated 18.12.2020 of the same High Court. In these appeals, the challenge is to the orders passed by the State Authorities on 09.04.2020, 07.07.2020

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2 arising out of SLP (C) Nos. 5470 and 5589 of 2020
3 for short, "the Act of 2016"
4 for short, "the Rules of 2017"
5 arising out of SLP (C) No ..... of 2021 @ Diary No(s). 44 of 2021; SLP (C) No. 431 of 2021; SLP (C) Nos. 577-579 of 2021; and SLP (C) No. 2494 of 2021

and 28.10.2020 regarding deferment of collection of school fees including reduction of fees limited to 70 per cent of tuition fees by schools affiliated with the Central Board of Secondary Education and 60 per cent from the schools affiliated with Rajasthan Board of Secondary Education, in view of reduction of syllabus by the respective-Boards due to aftermath of pandemic (lockdown) from March 2020.

4. The issues involved in all these appeals concern around 36,000 private unaided schools including 220 minority private unaided schools in the State of Rajasthan governed by the provisions of the Act of 2016 referred to above. Accordingly, all these appeals were clubbed and heard analogously. However, as aforesaid, two broad issues would arise for our consideration.

Re: First Set:

5. Reverting to the first set of appeals, the challenge is to the provisions of the Act of 2016 and Rules of 2017 being violative of rights guaranteed under Article 19(1)(g) of the Constitution to carry on occupation of imparting education which includes autonomy to

determine the school fees by the Managements of private unaided schools. It is urged that any restriction imposed in that regard would be arbitrary and unreasonable. Further, the impugned provisions inevitably limit the autonomy of the school Management of private unaided schools to the level of merely proposing the school fees to the School Level Fee Committee[6], in which the Management has only one representative as against eight others i.e., five parents, three teachers and one principal. This imbalance in the constitution of the SLFC negates the effective control of the Management in the affairs of the school and in particular the autonomy to determine its own school fees. Notably, five parents, who are appointed as members of the SLFC are chosen by draw of lots from amongst the willing parents of the wards pursuing education in the schools concerned and could include even the wards who are availing free education under the Right of Children to Free and Compulsory Education Act, 2009[7]. In fact, the latter have no stakes in the matter of determination of school fees. As the willing parents are selected by lottery system, in the process even the person who has no modicum of knowledge of development of a

6 for short, "the SLFC"
7 for short, "the RTE Act"

school, management of finances and dynamics of quality education, would become part of the process of determination of school fees. The members of the SLFC would inevitably have conflicting interest. They would be interested in ensuring that minimum school fee is finalised. The nominated teachers may constantly seek favour of the Management by exploiting their position as member of the SLFC. In the process, an environment of constant difference of opinion would prevail between the school Management on one side and the parents of the wards and teachers, who would form part of the SLFC. Pertinently, the provisions of the impugned Act of 2016 give authority to the SLFC to override the proposal of the school Management in the matter of school fees to be collected from the wards during the relevant period. Effectively, the parents who are members of the SLFC, would control the decision-making process impacting the autonomy of the school Management in regard to determination of school fees, guaranteed under Article 19(1)(g) of the Constitution. The parents-teachers duo who are part of the SLFC would have no intention or motivation to create new facilities or commitment to develop the school towards excellence. Moreover, they would not be accountable for anything that finally impacts the

quality of education in the school concerned. It is only the school Management who would be held accountable in that regard, whilst school Management is denuded of its autonomy to determine school fees. The school fees so determined by the SLFC as per the provisions of the impugned Act of 2016, would remain unchanged and binding for next three years with no provision for increase in case of contingency of funds needed for new development or general inflation or hike in salary and wages of staff or any other legitimate purpose.

6. The impugned Act of 2016 also gives wide powers to the Divisional Fee Regulatory Committee[8] and Revision Committee including power to issue summons, search, seizure and penalties as if the occupation of imparting education is akin to *res extra commercium*. The school Management-appellants apprehend that dispute with regard to determination of school fees would be endless and get embroiled in the process of appeal, revision and judicial proceedings. Resultantly, schools would suffer uncertainty in financial matters. Furthermore, there is no mechanism provided to guarantee the recovery of school fees after it is finally determined

8 for short, "the DFRC"

under the Act of 2016. The working of the impugned Act of 2016 would eventually stifle the growth and development of the private unaided schools and that all schools — small and big, would be treated equally with same measure, which would be arbitrary and discriminatory and against the principle expounded by this Court that the school fees of private unaided schools should be school-based and not a rigid or uniform arrangement. According to the appellants, the factors enumerated for determination of school fees are vague, subjective and irrelevant. The crucial factors such as for making a good school are not even adverted to in Section 8 of the impugned Act of 2016. The process of determination of school fees is a dynamic exercise and could be effectively done by the school Management on its own while keeping in mind that establishing a school is essentially a charity. According to the appellants, the provisions of the impugned Act of 2016 are unworkable and violate the fundamental right guaranteed under Article 19(1)(g) of the Constitution. The State can only regulate the fees determined by the private unaided schools only if it shows that the same entails in profiteering or capitation, which is prohibited by law.

7. It is urged that by now it is well-established that the private unaided schools ought to have maximum autonomy with regard to administration including the right of appointment, disciplinary powers, admission of students and the "fees to be charged" as expounded by this Court in ***T.M.A. Pai Foundation & Ors. vs. State of Karnataka & Ors.***[9]. The Court noted that it is in the interests of the general public that more good quality schools are established. Autonomy and non-regulation of the school administration in matters referred to above will ensure that more such institutions are established. This view has been restated in ***Society for Unaided Private Schools of Rajasthan vs. Union of India & Anr.***[10].

8. According to the appellants, the activities of school level education are qualitatively different from that of professional level education. The determination of school fees, therefore, stands on a totally different footing than determination of fees for professional colleges for medicine etc. The impugned Act of 2016 falls foul of doctrine of proportionality — as restrictions imposed on the school

9 (2002) 8 SCC 481 (paras 60 and 61)
10 (2012) 6 SCC 1 (paras 50 to 53)

Management in respect of determination of school fees have no cogent nexus/object sought to be achieved.

9. It is lastly urged that the legislative field regarding regulation of school fees is already occupied by the law made by the Parliament being the RTE Act[11] and the Rules[12] framed thereunder. Hence, it was not open to the State legislature to enact a law on the same subject.

10. These points were urged even before the High Court at the instance of the appellants. The respondent-State countered the same on the argument that the impugned Act of 2016 was in the nature of a regulatory law, with complete autonomy to the school Management to decide about its fee structure which, however, could be given effect to upon approval given by the SLFC. The SLFC consists of not only parents of wards, but also the school Management and their representatives in the form of teachers. It ensures participation of all the stakeholders and democratisation of the decision-making process. The proposal of the school Management, if found to be in order, is generally approved and it is

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11 Sections 13 and 16 of the RTE Act

12 The Right of Children to Free and Compulsory Education Rules, 2010 (Rules 12, 15 and 16)

open to the SLFC to give counter suggestion which if acceptable to the school Management can be acted upon by it. In case there is a difference of opinion, only then the matter goes for adjudication of the rival claims before the DFRC and the decision of that Authority becomes binding on the parties. Further, the school Management, the SLFC as well as the Adjudicatory-cum-Regulatory Authority, each one of them is guided by the principles and factors delineated in Section 8 of the Act of 2016 and Rule 10 of the Rules of 2017 in the matter of determination of school fees. Such external regulation for fee fixation has been recognised and approved by this Court in successive decisions *viz.*, ***Islamic Academy of Education & Anr. vs. State of Karnataka & Ors.***[13], ***P.A. Inamdar & Ors. vs. State of Maharashtra & Ors.***[14], ***Modern School vs. Union of India & Ors.***[15], ***Action Committee, Unaided Private Schools & Ors. vs. Director of Education, Delhi & Ors.***[16] and ***Modern Dental College and Research Centre & Ors. vs. State of Madhya Pradesh & Ors.***[17]. According to the respondent-State, the setting

13 (2003) 6 SCC 697 (5-Judge Bench)
14 (2005) 6 SCC 537 (7-Judge Bench)
15 (2004) 5 SCC 583 (3-Judge Bench)
16 (2009) 10 SCC 1 (3-Judge Bench)
17 (2016) 7 SCC 353 (5-Judge Bench)

up of External Fee Regulatory Authority is consistent with the jurisprudential exposition of this Court and held not to be violative of Article 19(1)(g) or Article 30 of the Constitution of India. According to the State, there is no ambiguity in the provisions of the Act of 2016. In that, the principles enunciated in the statutory provisions under consideration are not irrelevant or irrational as suggested by the appellants.

11. The respondent-State has also refuted the challenge to the impugned Act of 2016 merely on the basis of its nomenclature. According to the State, non-mentioning of the words prevention of profiteering and charging of capitation fee in the impugned Act of 2016, does not *ipso facto* make the same constitutionally suspect. It is urged that a Constitution Bench of this Court in ***Modern Dental College and Research Centre*** (supra) has upheld the validity of identical provisions enacted by the State of Madhya Pradesh in relation to fixation of fee by external committees and, therefore, the challenge set up by the appellants cannot be countenanced.

12. The respondent-State would urge that the High Court in the impugned judgment after adverting to the exposition of different Constitution Benches of this Court, justly concluded that the impugned Act of 2016 did not violate Article 19(1)(g) of the Constitution as the right flowing therefrom was not an absolute fundamental right. Further, there is no substance in the grounds set forth to assail the validity of the impugned Act of 2016.

13. The High Court did advert to these arguments canvassed by both sides and eventually dismissed the challenge to the validity of the impugned Act of 2016 vide common judgment and order dated 14.08.2019. The High Court after adverting to the exposition in ***T.M.A. Pai Foundation*** (supra), ***Islamic Academy of Education*** (supra), ***Modern School*** (supra) and ***Modern Dental College and Research Centre*** (supra), proceeded to dismiss the writ petitions by observing as follows:

> "19. Therefore, in the backdrop of law laid down by Constitution Bench in Modern Dental College & Research Centre (supra), if the impugned Act and the provisions sought to be assailed by the petitioners and the regulatory measures provided under the Rules are examined objectively with pragmatic approach, then, it would *ipso facto* reveal that State has not made any endeavour to trench into autonomy of petitioner-institutions. The provisions are

regulatory in nature with the solemn object of preventing profiteering and commercialization in school education. The constitution of the Committee for regulating fee structure, by no stretch of imagination be construed as an attempt to completely bye-pass the school management. The Committee as such is chaired by representative of the management besides principal as a Secretary with three teachers nominated by the management and five parents nominated from parent teachers association. Thus, the contention of the petitioners that State has completely chipped the wings of management or invaded their autonomy is an euphonious plea bereft of any merit.

The criteria for determining fee are also based on legitimate considerations provided under Section 8 of the Act. Thus, even while considering fee structure of the school, the Committee cannot be allowed to act at its whims and fancy but for adhering to the criteria laid down under Section 8 of the Act. That apart, the remedy against the fee determined by the Committee is also provided in the Statute by way of appeal/reference and second appeal, which sufficiently repudiate the contention of the petitioners about unreasonable restrictions on their autonomy within the mischief of unacceptable constraints envisaged under clause (6) of Article 19 of the Constitution.

20. Switching on to the coercive measures and penal provisions provided under the Statute and enforcement methodology prescribed under the Rules, it would be just and appropriate to observe that all these provisions are essential and necessary concomitant of regulatory mechanism for achieving desired objectives, and therefore cannot be categorized as unreasonable restrictions. In the overall scenario, we are also convinced that Sections 13 to 18 of the impugned Act and Rule 11 of the Rules are not intended to be invoked on sundry occasions for interfering with day to day functioning of the unaided recognized schools. Thus, complaint of the petitioners about fanciful and capricious supplication of these provisions *per se* appears to be a far cry without any substance.

Indisputably, the Rules are in the nature of subordinate legislation and framed by the Government in

> exercise of power under Section 19 of the Act for carrying out all or any of the purposes of the Act. Thus, the Rules as such are neither assailable on the ground of lack of legislative competence, nor for failure to conform to the parent statute under which Rules are made. Moreover, these rules are also not offending any right conferred on the petitioners under Part III of the Constitution or in violation of any provision of the Constitution, therefore, challenge to the Rules is wholly unsustainable.
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> 21. The argument of the learned counsel for the petitioners, that the impugned Act is unconstitutional as being in derogation to Article 13(2) of the Constitution, appears to be quite alluring but of no substance. Analyzing this argument meticulously in the backdrop of lis involved in these matters, we have already repudiated the same. At the cost of repetition, we may reiterate here that the impugned Act and its other provisions are not taking away or abridges rights of the petitioners conferred by Part III of the Constitution. We may hasten to add that entire edifice of challenge in these petitions is alleged infraction of Article 19(1)(g) of the Constitution, which indisputably is not an absolute fundamental right. As observed hereinabove, the said fundamental right is subject to reasonable restrictions and such restrictions are permissible as they are aimed at seeking laudable objectives in the larger public interest. Therefore, viewed from any angle, the impugned provisions of the Act as well as Rules are *intra-vires* of the Constitution not being in violation of Article 13(2) and 19(1)(g) of the Constitution.
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> The upshot of above discussion is that all these petitions fail and are hereby dismissed. The stay petitions are also dismissed and interim order passed on 9th of April, 2018 is vacated."

14. We have heard Mr. Pallav Shishodia, learned senior counsel for the appellants, Dr. Manish Singhvi and Mr. Devadatt Kamat, learned senior counsel for the State of Rajasthan.

15. After cogitating over the rival arguments and considering the impugned judgment, we have no hesitation in observing that although the High Court was right in its conclusion, it has disposed of the challenge to the validity of different provisions of the impugned Act of 2016 and the Rules framed thereunder in a summary manner. We agree that merely adverting to the decisions of this Court was not enough. The High Court should have then analysed the challenge to the respective provisions and also the overall scheme of the Act of 2016. Ordinarily, we would have relegated the parties before the High Court for reconsideration of the entire matter afresh. However, considering the nature of issues raised and the concerns expressed by the parties, we proceed to address the challenge to the relevant provisions of the Act of 2016 in this judgment itself.

16. Indeed, a Constitution Bench of this Court in ***T.M.A. Pai Foundation*** (supra) has expounded that the private unaided school management must have absolute autonomy to determine the school fees. But at the same time the consistent view of this Court has been restated and enunciated by the Constitution Bench in ***Modern***

Dental College and Research Centre (supra) in paragraph 75 of the reported decision. In that, though the fee can be fixed by the educational institutions and it may vary from institution to institution depending upon the quality of education provided by each of such institutions, commercialisation is not permissible; and in order to ensure that the educational institutions are not indulging in commercialisation and exploitation, the Government is equipped with necessary powers to take regulatory measures and to ensure that the private unaided schools keep playing vital and pivotal role to spread education and not to make money. The Court further noted that when it comes to the notice of the Government that the institution was charging fee or other charges which are excessive, it has complete authority coupled with its duty to issue directions to such an institution to reduce the same so as to avoid profiteering and commercialisation.

17. In paragraph 76 of the same decision, the Court then proceeded to consider the next question as to how a regulatory framework for ensuring that no excessive fee is charged by the educational institutions, can be put in place. For that, the Court

adverted to the decision in ***T.M.A. Pai Foundation*** (supra), ***Islamic Academy of Education*** (supra), ***Modern School*** (supra) and ***P.A. Inamdar*** (supra) and noted that primary education is a fundamental right, but it was not an absolute right as private schools cannot be allowed to receive capitation fee or indulge in profiteering in the guise of autonomy to determine the school fees itself. The Court plainly noted that every school management of private unaided school is free to devise its own fee structure, but the same can be regulated by the Government in the interests of general public for preventing profiteering and/or charging of capitation fee. Further, fixation of fees needs to be regulated and controlled at the initial stage itself. The Constitution Bench noted with approval the exposition in ***Association of Private Dental and Medical Colleges vs. State of M.P.***[18], which reads thus:

> "*42.* We are of the view that Sections 4(1) and 4(8) of the 2007 Act have to be read with Section 9(1) of the 2007 Act, which deals with factors which have to be taken into consideration by the Committee while determining the fee to be charged by a private unaided professional educational institution. A reading of sub-section (1) of Section 9 of the 2007 Act would show that the location of private unaided professional educational institution, the nature of the professional course, the cost of land and building, the available infrastructure, teaching, non-teaching staff and

18 2009 SCC Online MP 760

equipment, the expenditure on administration and maintenance, a reasonable surplus required for growth and development of the professional institution and any other relevant factor, have to be taken into consideration by the Committee while determining the fees to be charged by a private unaided professional educational institution. Thus, all the cost components of the particular private unaided professional educational institution as well as the reasonable surplus required for growth and development of the institution and all other factors relevant for imparting professional education have to be considered by the Committee while determining the fee. Section 4(8) of the 2007 Act further provides that the Committee may require a private aided or unaided professional educational institution to furnish information that may be necessary for enabling the Committee to determine the fees that may be charged by the institution in respect of each professional course. Each professional educational institution, therefore, can furnish information with regard to the fees that it proposes to charge from the candidates seeking admission taking into account all the cost components, the reasonable surplus required for growth and development and other factors relevant to impart professional education as mentioned in Section 9(1) of the 2007 Act and the function of the Committee is only to find out, after giving due opportunity of being heard to the institution as provided in Section 9(2) of the 2007 Act whether the fees proposed by the institution to be charged to the student are based on the factors mentioned in Section 9(1) of the 2007 Act and did not amount to profiteering and commercialisation of the education. The word "determination" has been defined in *Black's Law Dictionary*, Eighth Edn., to mean a final decision by the Court or an administrative agency. The Committee, therefore, while determining the fee only gives the final approval to the proposed fee to be charged after being satisfied that it was based on the factors mentioned in Section 9(1) of the 2007 Act and there was no profiteering or commercialisation of education. The expression "fixation of fees" in Section 4(1) of the 2007 Act means that the fee to be charged from candidates seeking admission in the private professional educational institution did not vary from student to student and also remained fixed for a certain period as mentioned in Section 4(8) of the 2007 Act. As has been held by the Supreme Court in *Peerless General Finance and Investment*

> *Co. Ltd.* v. *RBI*[19], the Court has to examine the substance of the provisions of the law to find out whether provisions of the law impose reasonable restrictions in the interest of the general public. The provisions in Sections 4(1), 4(8) and 9 of the 2007 Act in substance empower the Committee to be only satisfied that the fee proposed by a private professional educational institution did not amount to profiteering or commercialisation of education and was based on the factors mentioned in Section 9(1) of the 2007 Act. The provisions of the 2007 Act do not therefore, violate the right of private professional educational institution to charge its own fee."

18. After having quoted the above exposition with approval in paragraph 81, the Court then proceeded to examine the need for a regulatory mechanism. It noted that the regulatory measures are felt necessary to promote basic well-being for individuals in need. In paragraphs 90 to 92 in ***Modern Dental College and Research Centre*** (supra), this Court noted as follows:

> "**90**. Thus, it is felt that in any welfare economy, even for private industries, there is a need for regulatory body and such a regulatory framework for education sector becomes all the more necessary. It would be more so when, unlike other industries, commercialisation of education is not permitted as mandated by the Constitution of India, backed by various judgments of this Court to the effect that profiteering in the education is to be avoided.
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> **91**. Thus, when there can be regulators which can fix the charges for telecom companies in respect of various services that such companies provide to the consumers; when regulators can fix the premium and other charges which the insurance companies are supposed to receive from the persons who are insured; when regulators can fix the rates at which the producer of electricity is to supply the electricity

19 (1992) 2 SCC 343

to the distributors; we fail to understand as to why there cannot be a regulatory mechanism when it comes to education which is not treated as purely economic activity but welfare activity aimed at achieving more egalitarian and prosperous society by empowering the people of this country by educating them. In the field of education, therefore, this constitutional goal remains pivotal which makes it distinct and special in contradistinction with other economic activities as the purpose of education is to bring about social transformation and thereby a better society as it aims at creating better human resource which would contribute to the socio-economic and political upliftment of the nation. The concept of welfare of the society would apply more vigorously in the field of education. Even otherwise, for economist, education as an economic activity, favourably compared to those of other economic concerns like agriculture and industry, has its own inputs and outputs; and is thus analysed in terms of the basic economic tools like the laws of return, principle of equimarginal utility and the public finance. Guided by these principles, the State is supposed to invest in education up to a point where the socio-economic returns to education equal to those from other State expenditures, whereas the individual is guided in his decision to pay for a type of education by the possibility of returns accruable to him. All these considerations make out a case for setting up of a stable regulatory mechanism.

92. In this sense, when imparting of quality education to cross-section of the society, particularly, the weaker section and when such private educational institutions are to rub shoulders with the State managed educational institution to meet the challenge of the implementing ambitious constitutional promises, the matter is to be examined in a different hue. It is this spirit which we have kept in mind while balancing the right of these educational institutions given to them under Article 19(1)(g) on the one hand and reasonableness of the restrictions which have been imposed by the impugned legislation. The right to admission or right to fix the fee guaranteed to these appellants is not taken away completely, as feared. T.M.A. Pai Foundation[20] gives autonomy to such institutions which remains intact. Holding of CET under the control of the State does not impinge on this autonomy. Admission is still in the hands of these institutions. Once it is even conceded by the appellants that

20 supra at footnote No.9

> in admission of students "triple test" is to be met, the impugned legislation aims at that. After all, the sole purpose of holding CET is to adjudge merit and to ensure that admissions which are done by the educational institutions, are strictly on merit. This is again to ensure larger public interest. It is beyond comprehension that merely by assuming the power to hold CET, fundamental right of the appellants to admit the students is taken away. Likewise, when it comes to fixation of fee, as already dealt with in detail, the main purpose is that the State acts as a regulator and satisfies itself that the fee which is proposed by the educational institution does not have the element of profiteering and also that no capitation fee, etc. is charged. In fact, this dual function of regulatory nature is going to advance the public interest inasmuch as those students who are otherwise meritorious but are not in a position to meet unreasonable demands of capitation fee, etc. are not deprived of getting admissions. The impugned provisions, therefore, are aimed at seeking laudable objectives in larger public interest. Law is not static, it has to change with changing times and changing social/societal conditions."

19. After this jurisprudential exposition, it is not open to argue that the Government cannot provide for external regulatory mechanism for determination of school fees or so to say fixation of "just" and "permissible" school fees at the initial stage itself.

20. The question is: whether the impugned enactment stands the test of reasonableness and rationality and balances the right of the educational institutions (private unaided schools) guaranteed to them under Article 19(1)(g) of the Constitution in the matter of determination of school fees? The Act of 2016 has been enacted by the State legislature. It was enacted as it was noticed that the

earlier enactment on the self-same subject did not include provision of appeal against the orders of fee determination by the Fee Determination Committee. It was also noticed that there are large number of private schools (approximately 34,000) and a single fee determination committee cannot determine the fee of such schools in a proper manner in time. For that reason, the Act of 2016 came into being to provide for regulation of collection of fees by schools in the State of Rajasthan and matters connected therewith and incidental thereto. It extends to the whole of the State of Rajasthan and applies to both aided and unaided schools. The Act provides for a regulatory mechanism. The expression "aided school" is defined in Section 2(b) to mean a school receiving any sum of money as aid from the State Government. The expression "unaided school" has not been defined. It must, however, follow that all other private schools, other than aided schools would qualify that category (i.e., unaided private schools). The expression "school" has been defined in Section 2(t), which reads thus:

> "**2. Definitions.-** In this Act, unless the context otherwise requires,-
>
> xxx xxx xxx

> (t) "school" means the school imparting elementary, secondary and senior secondary education recognized by the Government and managed by any management and affiliated to any Indian or foreign course or Board, whether aided, partially aided, un-aided including the school run by the minority educational institution but does not include a school imparting religious instructions only;"

21. The expression "private school" has been defined in Section 2(p), which reads thus:

> "**2. Definitions.-** In this Act, unless the context otherwise requires,-
>
> xxx xxx xxx
>
> (p) "private school" means a school established and administered or maintained by any person or body of persons and which is a recognized institution within the meaning of clause (q) of Section 2 of the Rajasthan Non-Government Educational Institutions Act, 1989 (Act No. 19 of 1992), but does not include -
> (i) an aided school; and
> (ii) a school established and administered or maintained by the Central Government or the State Government or any local authority;"

It is, thus, clear that the Act of 2016 applies to all the schools within the State of Rajasthan referred to in Section 2(t) including private schools as defined in Section 2(p).

22. Section 3 of the Act of 2016 predicates that no school itself or on its behalf shall collect any fee in excess of the fee fixed or approved under the Act of 2016. The expression "fee" has been defined in Section 2(h), which reads thus:

> "**2. Definitions.-** In this Act, unless the context otherwise requires,-
>
> xxx xxx xxx
>
> (h) "fee" means any amount, by whatever name called, collected, directly or indirectly, by a school for admission of a pupil to any Standard or course of study;"

23. Besides the definition of expression "fee", it would be apposite to advert to the factors for determination of fee under the Act of 2016 as delineated in Section 8 of the Act of 2016. The same reads thus:

> "**8. Factors for determination of fee.** - The following factors shall be considered while deciding the fee leviable by a school, namely: -
>
> (a) the location of the school;
>
> (b) the infrastructure made available to the students for the qualitative education, the facilities provided and as mentioned in the prospectus or web-site of the school;
>
> (c) the education standard of the school as the State Government may prescribe;
>
> (d) the expenditure on administration and maintenance;
>
> (e) the excess fund generated from non-resident Indians, as a part of charity by the management and contribution by the Government for providing free-ship in fee or for other items under various Government schemes given to the school for the Scheduled Castes, the Scheduled Tribes, Other Backward Class and Special Backward Class students;
>
> (f) qualified teaching and non-teaching staff as per the norms and their salary components;
>
> (g) reasonable amount for yearly salary increments;
>
> (h) expenditure incurred on the students over total income of the school;
>
> (i) reasonable revenue surplus for the purpose of development of education and expansion of the school; and
>
> (j) any other factor as may be prescribed."

24. In addition to Section 8, it is essential to take note of Rule 10 of the Rules of 2017 which provides for additional factors to be reckoned for determination of school fees. Rule 10 reads thus:

> "**10. Additional factors for determination of fee.** - The following factors shall be considered while deciding the fee in addition to the factors specified in section 8 of the Act, namely:-
>
> (i) facilities made available by the school under e-governance i.e. hardware and software facilities;
> (ii) strength of students;
> (iii) other facilities made available to students such as swimming pool, horse riding, shooting, archery and performing art etc.;
> (iv) supply of books, notebooks, etc. and other educational material provided to students;
> (v) provision of meal or snacks; and
> (vi) any other factor submitted by the Management before the School Level Fee Committee."

25. After adverting to Section 8 and Rule 10, it is amply clear that the relevant factors for determination of reasonable school fees under the Act of 2016 and Rules framed thereunder have been duly articulated and are based on objective parameters. It was urged that clause (a) of Section 8 is vague. We find force in the argument of the respondent-State that the factors referred to in Section 8 and Rule 10 for determination of fee are founded on the dictum of this Court in successive reported precedents, as relevant factors. The factor of location of the school is certainly relevant for

determination of fee as are the other factors referred to in Section 8 and Rule 10. The totality of the effect of all the specified factors is to be reckoned for determining the school fees of the concerned school for the relevant period. The location of the school is not the only factor that is to be taken into account.

26. At the end, what is relevant is that the institution is entitled to fix its own fee structure, which may include reasonable revenue surplus for the purpose of development of education and expansion of the institution, as long as it does not entail in profiteering and commercialisation. Whether fee structure evolved by the concerned school results in profiteering or otherwise is a matter which eventually would become final with the determination/adjudication by the Statutory Regulatory Committees constituted under Sections 7 and 10 of the Act of 2016, namely, Divisional Fee Regulatory Committee (DFRC) and Revision Committee respectively, as the case may be. That adjudication, however, becomes necessary only if the SLFC were to disapprove the proposal of the school Management regarding fee structure determined by the school. Whereas, if the SLFC were to accept the proposal of the school Management regarding fee structure as it is, that would be the fees under the Act

of 2016 for the relevant period and then there would be no need for the DFRC to adjudicate upon the fixation of fee in the concerned school.

27. The SLFC is constituted institution or school wise, whereas the DFRC is an independent statutory regulatory authority empowered to enquire into the factum of whether fee structure of the given school determined by its Management entails in profiteering. In the event, the SLFC disapproves the proposal of the school Management, the dispensation provided for adjudication of the contentious position between the stakeholders in no manner violate the fundamental right of establishment of educational institution guaranteed under Article 19(1)(g) of the Constitution.

28. Section 4 of the Act of 2016 provides for Parent-Teachers Association, which reads thus:

> "**4. Parent-Teachers Association.** - (1)(a) Every private school shall constitute the Parent-Teachers Association.
> (b) The Parent-Teachers Association shall be formed by the head of the school within thirty days from the beginning of each academic year. Every teacher of the school and parent of every student in the school shall be a member of the Parent-Teachers Association and an annual amount of rupees fifty, in case of urban area and rupees twenty, in case of rural area, shall be collected from each member of such association.

(c) On formation of the Parent-Teachers Association, a lottery shall be conducted by drawing a lot of the willing parents to constitute the School Level Fee Committee and a notice of one week before such lottery shall be given to the member of the Parent-Teachers Association.
(2)(a) The School Level Fee Committee shall consist of, -

(i) Chairperson	- representative of management of the private school nominated by such management;
(ii) Secretary	- Principal of the private school;
(iii) Member	- three teachers nominated by the management of private school;
(iv) Member	- five parents from Parent-Teachers Association.

(b) The list of members of the School Level Fee Committee shall be displayed on the notice board within a period of fifteen days from formation of the School Level Fee Committee and copy thereof shall forthwith be forwarded to the District Education Officer concerned.
(c) The term of the School Level Fee Committee shall be for one academic year and no parent member shall be eligible for drawing a lot by lottery within the period of next three years since the expiry of his/her last term as the member of the School Level Fee Committee.
(d) The School Level Fee Committee shall meet at least once in three months. The procedure to be followed for conducting the meeting of the School Level Fee Committee shall be such as may be prescribed.
(e) The Parent-Teachers Association shall have a general meeting at least once before the 15th August of every year. The procedure to be followed for conducting the meeting of the Parent-Teachers Association shall be such as may be prescribed. The Parent-Teachers Association shall discharge such duties and perform such functions as may be assigned to it under this Act and as may be prescribed."

Section 4 predicates that every private school shall constitute the Parent-Teachers Association, which is to be formed by the head of

the school within thirty days from the beginning of each academic year. Section 4(1)(b) envisages that every teacher of the school and parent of every student in the school shall be a member of the Parent-Teachers Association. Section 4(1)(c) provides that on formation of the Parent-Teachers Association, a lottery shall be conducted by drawing a lot of the willing parents to constitute the SLFC. In the context of this provision, it was urged that for choosing the willing parent to become member of the SLFC by draw of lots, no eligibility criteria has been prescribed in the Act of 2016 or the Rules of 2017. Besides, willing parent of the ward, who is admitted in the school against the 25 per cent quota of free education under the RTE Act, may also fit into this category even though he would have no stakes in the fee structure proposed by the school Management. The argument seems to be attractive, but for that reason the provision need not be struck down or declared as violative of any constitutional right of management of the school. This provision can be read down to mean that the draw of lots would be in respect of willing parents whose wards have been admitted against the seats other than the seats reserved for free education under the RTE Act. Further, for ensuring that the willing

parent must be well-informed and capable of (meaningful) interacting in the discourse on the proposal of fee structure presented by the school Management, he/she must have some minimum educational qualification and also familiar with the development of school, management of finances and dynamics of quality education. The desirability of such eligibility of the willing parent ought to be specified.

29. Absence of such provisions in the Act or Rules, however, can be no basis to suspect the validity of the provision in question. We say so because draw of lots can be one of the ways of identifying the willing parent who could become member of the SLFC. Whether the member should be chosen by election from amongst the willing parents or draw of lots or by nomination including his/her eligibility conditions, is a legislative policy. They may serve the same purpose for constituting the SLFC to give representation to the parents of the wards who are already admitted in the school and are pursuing education thereat. In any case, this argument of the appellants will not take the matter any further much less to declare the relevant provision *ultra vires* as being violative of fundamental right of the appellants as such.

30. The composition of the SLFC has been specified in Section 4(2)(a) of the Act of 2016. It consists of a Chairperson being representative of management of the private school nominated by such management; Secretary — Principal of the private school (*Ex officio*); three teachers nominated by the management of private school as to be the members of the SLFC; and five parents from Parent-Teachers Association chosen by a lottery conducted by drawing a lot of willing parents. The SLFC consists of ten members — five are, in a way, representatives or nominees of the Management and five parents from the Parent-Teachers Association. The SLFC so constituted would continue to function for one academic year and the member chosen from Parent-Teachers Association is not eligible to participate again for a period of three years thereafter from the date of expiry of his/her term as the member of the SLFC. By this process, the parents representing different wards get opportunity to be part of the SLFC. Suffice it to observe that the constitution of the SLFC and for the nature of its function, no fault can be found with Section 4 of the Act of 2016 much less on the ground that it violates the fundamental right to establish an educational institution.

31. Section 5 of the Act of 2016 deals with fixation of fee in "Government schools" and "aided schools". However, we are not concerned with the said provision in the cases before us.

32. Section 6 deals with regulation of fees in private schools and the procedure to be followed for finalisation of the fee structure. The same reads thus:

> "**6. Regulation of fees in private schools.** - (1) The management of the private schools shall be competent to propose the fee in such schools.
> (2) On the formation of the School Level Fee Committee, the management shall submit the details of the proposed fee along with the relevant record to the School Level Fee Committee for its approval at least six months before the commencement of the next academic year. While giving the approval, the School Level Fee Committee shall have the authority to decide the amount of fee afresh.
> (3) After considering all the relevant factors laid down under Section 8, the School Level Fee Committee shall approve the fee within a period of thirty days from the date of receipt of the details of the proposed fee and the record under sub-section (2) and communicate the details of the fee so approved in writing to the management forthwith. The details of the fee so approved by the School Level Fee committee shall be displayed on the notice board in Hindi, English and in the respective medium of school, and if such school has its own website it shall be displayed on the same and it shall be binding for three academic years.
> (4) The School Level Fee Committee shall indicate the different heads under which the fee shall be levied.
> (5) If the School Level Fee Committee fails to decide the fee within the period specified in sub-section (3), the management shall immediately refer the matter to the Divisional Fee Regulatory Committee for its decision under intimation to the School Level Fee Committee in such manner as may be prescribed. During the pendency of the reference, the management shall be at liberty to collect the

> fee of the previous academic year plus ten percent increase in such fee till the final decision of the Divisional Fee Regulatory Committee.
> (6) The Divisional Fee Regulatory Committee shall decide the appeal or reference as far as possible within the period of sixty days from the date of its filing after giving the opposite party an opportunity of being heard.
> (7) The management or the School Level Fee Committee aggrieved by the decision of the Divisional Fee Regulatory Committee in appeal or reference may, within thirty days from the date of such decision, prefer an appeal before the Revision Committee in such manner as may be prescribed."

33. On bare perusal of this provision, it is noticed that the Management has the prerogative to submit its proposal regarding the fee structure in the given school. That proposal is submitted to the SLFC set up under Section 4 of the Act of 2016. The mechanism provided in Section 6 onwards would primarily apply to private unaided schools. Indeed, the expression "propose" used in Section 6(1) would mean that the proposal of the school Management is its in-principle decision regarding the fee structure for the relevant period. The usage of expression "propose" in no way undermines the autonomy of the school Management, in particular to determine its own fee structure for the relevant period. The consequence of proposal not being accepted by the SLFC is a different issue. Notably, the SLFC's decision under Section 6(2) is not binding on the school Management. For, it is open to the school

Management to then refer the matter for adjudication to the DFRC constituted under Section 7 of the Act of 2016, who in turn is obliged to decide the reference one way or the other. Indeed, that decision would be binding on both — the school Management as well as the parents, unless it is interdicted by the Revision Committee constituted under Section 10 of the Act of 2016 at the instance of the other party.

34. The stipulation such as in Section 6(3) of the Act of 2016 that the decision of fee structure proposed by the school Management, if approved by the SLFC, would be binding for three academic years, had been recognised and approved in ***Islamic Academy of Education*** (supra) in paragraphs 7 and 161 and also noted in ***P.A. Inamdar*** (supra).

35. To put it differently, the dispensation envisaged under Section 6 of the impugned Act of 2016 is not intended to undermine the autonomy of the school Management in the matter of determination of fee structure itself. What it envisages is that the school Management may determine its own fee structure, but may finalise or give effect to the same after interacting with the SLFC. It is a

broad-based committee, consisting of representatives of the school Management as well as five parents from Parent-Teachers Association. This is merely a consultative process and democratisation of the decision-making process by taking all the stakeholders on board. The SLFC does not sit over the proposal submitted by the school Management as a court of appeal, but only reassures itself as to whether the proposed fee structure entails in profiteering by the school on applying the parameters specified in Section 8 and Rule 10. In other words, it is open to the SLFC to take a different view regarding the school fees proposed by the school Management and arrive at a different fee structure. If that counter proposal is acceptable to the school Management, nothing further is required to be done and the decision so taken by the school Management would become binding for three academic years on all concerned. However, in case the school Management disagrees with the recommendations of the SLFC, it is open to both sides, namely, the school Management as well as the parents of wards to take the matter to the DFRC for adjudication on that aspect.

36. While deciding the school fees, the school Management/SLFC including the Statutory Regulatory Authorities, all concerned are guided by the factors delineated in Section 8 of the Act of 2016 and Rule 10 of the Rules of 2017. Suffice it to note that the process envisaged in Section 6 is democratic and consensual resolution of the issue of fee structure for the relevant period between the school Management and the parents' representative being part of the SLFC. It is not to give final authority to the SLFC to determine the fee structure itself which, as aforesaid, is the prerogative of the school Management as per Section 6(1) of the Act of 2016. In that sense, the autonomy of the school Management to determine the fee structure itself in the first place is untrammelled and not undermined in any way.

37. Section 7 of the Act of 2016 is about the constitution of the DFRC. The same reads thus:

> "**7. Constitution of Divisional Fee Regulatory Committee.** - (1) The Government shall, by notification in the Official Gazette, constitute a Divisional Fee Regulatory Committee for each Revenue Division, which shall consist of the following members, namely: -
>
> | | | |
> |---|---|---|
> | (a) Divisional Commissioner, | - | Chairperson; |
> | (b) Deputy Director, | - | Member; |

Secondary Education		
(c) Nominee of Director Sanskrit Education	-	Member;
(d) Treasury Officer of District Treasury situated at Revenue Division Headquarter	-	Member;
(e) Deputy Director, Elementary Education	-	Ex-officio Member-Secretary;
(f) two representatives of private schools nominated by Divisional Commissioner	-	Member;
(g) two representatives of parents nominated by Divisional Commissioner	-	Member.

(2)(a) The term of office of the representatives of private schools and parents shall be for a period of two years from the date of their nomination and in case of vacancy arising earlier, for any reason, such vacancy shall be filled for the remainder period of the term.
(b) The representatives of private schools and parents shall not be eligible for reappointment.
(c) The representatives of private schools and parents may resign from the office in writing addressed to the Divisional Commissioner and on such resignation being accepted, his office shall become vacant and may be filled in within a period of three month from the date of occurrence of vacancy.
(d) A representative of private schools and parents may be removed, if he does any act which, in the opinion of the Divisional Commissioner, is unbecoming of a member of Divisional Fee Regulatory Committee:

Provided that no representative of private schools or parents shall be removed from the Divisional Fee Regulation Committee without giving him an opportunity of being heard.
(e) The other terms and conditions for the service of the representatives of private schools and parents shall be such as may be prescribed."

From the bare perusal of Section 7(1), it is noticed that first five members are official members. It is a broad-based independent Committee which includes two representatives of private schools in the divisional area “nominated by the Divisional Commissioner” and similarly two representatives of parents “nominated by the Divisional Commissioner”. The representation is given to the concerned stakeholders in the matter of determination of fee structure and in particular in the matter of enquiry into the factum whether fee structure proposed by the concerned school Management entails in profiteering or otherwise. In reference to Section 7(2)(a), we must observe that the term of office of representatives of the private schools and, in particular parents has been earmarked as two years from the date of their nomination. This would mean, necessarily, that the concerned parent would be eligible until his/her ward continues in the school during the tenure and is not a member of the SLFC of any school within the divisional area. Any member not fulfilling this criterion would be deemed to have vacated his office forthwith and, in his place, a new member can be nominated by the competent authority from amongst the parents of the wards pursuing studies in the school in

the concerned divisional area. Moreover, while nominating representative of parents, the Divisional Commissioner must keep in mind that the person so nominated must possess basic qualification of accounting, development of a school and dynamics of quality education; and whose ward has not secured admission against 25 per cent quota of free education under the RTE Act. Thus understood, even Section 7 of the Act of 2016 does not violate the fundamental right guaranteed under Article 19(1)(g) of the Constitution in respect of establishment of educational institution.

38. Needless to underscore that the Divisional Commissioner, who is empowered to nominate two representatives of private schools would keep in mind that his/her nominees are from the schools within the divisional area and at least one amongst them should be chosen from a minority school so that representation is given to all stakeholders, including minority and non-minority private unaided schools. At the same time, it must be borne in mind that such a person is already not a member of the SLFC of any school in the divisional area. The dispensation provided in Section 7, is, thus, to create an independent machinery for adjudication of the question as to whether the fee structure proposed/determined by the school

Management of the concerned school entails in profiteering, commercialisation or otherwise.

39. As regards challenge to Section 8 of the Act of 2016, the usage of expression "determination", in our opinion, does not take away the autonomy of the school Management in determining its own fee structure. This provision is only an indicator as to what factors should be reckoned for determination of fee and on that scale the SLFC as well as the Statutory Regulatory Committees will be in a position to analyse the claim of the school Management. This provision, in fact, sets forth objective parameters as to what would be the reasonable fee structure — not resulting in profiteering and commercialisation by the school Management. As aforesaid, this provision will have to be read along with Rule 10 of the Rules of 2017 which provides for additional factors to be borne in mind while examining the question regarding reasonableness of the fee structure proposed by the school Management.

40. Reverting to Section 9, which reads thus:

> "**9. Powers and functions of Divisional Fee Regulatory Committee.** - (1) The powers and functions of the Divisional Fee Regulatory Committee shall be to adjudicate the dispute between the management and the Parent-Teachers

Association regarding fee to be charged by the school management from the students.

(2) The Divisional Fee Regulatory Committee may authorize any officer not below the rank of the Head Master of Secondary School to enter any private school or any premises belonging to the management of such school, if the Divisional Fee Regulatory Committee finds so necessary, and search, inspect and seize any records, accounts, registers or other documents belonging to such school or the management in so far as such records, accounts, registers or other documents are necessary and relevant to decide the issues before the said Committee. The provisions of the Code of Criminal Procedure, 1973 (Central Act No. 2 of 1974) relating to searches and seizures shall apply, so far as may be, to searches and seizures under this section.

(3) The Divisional Fee Regulatory Committee shall regulate its own procedure, for the discharge of its functions, and shall, for the purpose of making any inquiry under this Act, have all powers of a civil court under the Code of Civil Procedure, 1908 (Central Act No. 5 of 1908) while trying a suit, in respect of the following matters, namely: -

(i) the summoning and enforcing the attendance of any witness and examining him on oath;

(ii) the discovery and production of any document;

(iii) the reception of evidence on affidavits;

(iv) the issue of commission for the examination of the witness;

(4) No order shall be passed by the Divisional Fee Regulatory Committee in the absence of the Chairperson. The order of the Divisional Fee Regulatory Committee shall be binding on the parties to the proceedings before it for three academic years. It shall not be called in question in any civil court except by way of an appeal before the Revision Committee constituted under this Act.

(5) At the time of resolving the dispute, the Divisional Fee Regulatory Committee shall not grant any interim stay to the fee determined by the management. On decision in appeal or reference, the Divisional Fee Regulatory Committee may pass appropriate orders for refund of the excess fee to the student concerned. In case the management fails to refund the excess fee to such student, the Divisional Fee Regulatory Committee shall proceed to recover such excess fee from the management as an arrear of land revenue and pay the same to such student.

> (6) The Divisional Fee Regulatory Committee shall, on determining the fee leviable by a private school, communicates its decision to the parties concerned.
> (7) Every private school preferring an appeal before the Divisional Fee Regulatory Committee shall place the copy of decision in appeal on its notice board, and if such school has web-site, on its web-site;
> (8) The Divisional Fee Regulatory Committee shall indicate the different heads under which the fee shall be levied.
> (9) The orders passed by the Divisional Fee Regulatory Committee shall be binding on the private school for three academic years. At the end of the said period, the private school shall be at liberty to propose changes in its fee structure by following the procedure as laid down under this Act."

Section 9 deals with powers and functions of the DFRC *inter alia* to adjudicate the dispute between the Management and the Parent-Teachers Association regarding fee to be charged by the school Management from the students. The DFRC has been empowered to undertake search, inspect and seize any records, accounts, registers or other documents belonging to the concerned school or the management in so far as such records, accounts, registers or other documents are necessary and relevant to decide the issues before the said Committee. It can regulate its own procedure for the discharge of its functions and exercise all powers of a civil court under the Code of Civil Procedure, 1908.

41. Essentially, Section 9 bestows power upon the DFRC to adjudicate the dispute between the school Management and Parent-

Teachers Association regarding difference of opinion in respect of fee structure for the concerned school. What is significant to note is that Section 9(5) makes it amply clear that the DFRC has no power to grant any interim stay to the fee determined by the Management. However, in light of Section 6(5) during the pendency of the appeal or reference before the DFRC, school Management is at liberty to collect fee of the previous academic year plus ten per cent increase in such fee till the final decision of the DFRC, as predicated in Section 6(5) of the Act of 2016. The decision of the DFRC is amenable to appeal before the Revision Committee constituted under Section 10 of the Act of 2016. None of these violate the fundamental right of the school Management guaranteed under Article 19(1)(g) of the Constitution to determine its own fee structure in any manner.

42. Section 10 deals with constitution of Revision Committee. This Committee discharges the function of an appellate authority where the aggrieved party, namely, school Management or the Parent-Teachers Association can assail the decision of the DFRC. This is a final adjudicatory body created under Section 10 consisting of official members including two representatives of

private schools nominated by the State Government and two representatives of parents nominated by the State Government. This is again a broad-based independent Committee to consider the revision preferred against the decision of the DFRC, constituted on similar lines. The latter Committee is constituted under Section 7 of the Act of 2016. The observations made in reference to the constitution of the DFRC under Section 7 hitherto would, therefore, apply with full force to this provision as well.

43. The procedure to be followed by the Revision Committee is specified in Section 11 of the Act of 2016, which provision makes it amply clear that the decision of the Revision Committee shall be final and conclusive and shall be binding on the parties for three academic years. Setting up of an independent final adjudicatory authority especially created for considering the question as to whether the fee structure proposed by the school Management results in profiteering or otherwise, it does not impinge upon the fundamental right of the school Management guaranteed under Article 19(1)(g) of the Constitution.

44. Even the challenge to the validity of Sections 15 and 16 of the Act of 2016 is devoid of merit. Section 15 deals with consequences of contravention of the provisions of the Act of 2016 or the Rules made thereunder by an individual. Whereas, Section 16 deals with consequences of violation by a management and persons responsible therefor. It is unfathomable as to how these provisions can have the propensity to violate the fundamental right of the school Management under Article 19(1)(g) of the Constitution especially when violation of the mandate of certain compliances under the Act of 2016 and Rules framed thereunder has been made an offence and persons responsible for committing such violation can be proceeded with on that count.

45. The appellants having failed to substantiate the challenge to the validity of the relevant provisions of the Act of 2016, must also fail with regard to the challenge to Rules 3, 4, 6 to 8 and 11 of the Rules of 2017.

46. Rule 3 provides for a procedure for conducting meeting of Parent-Teachers Association. The school Management can have no grievance regarding the procedure for conducting meeting of Parent-

Teachers Association of the school concerned much less violating its fundamental right guaranteed under Article 19(1)(g) of the Constitution regarding establishment of educational institution and administration thereof, including determination of fee structure on its own.

47. Rule 4 deals with duties and functions of Parent-Teachers Association, which reads thus:

> "**4. Duties and functions of Parent-Teachers Association.** - The Association shall discharge the following duties and perform the following functions, namely:-
>
> (i) to get information about Tuition fees, Term fees and fees for co-curricular activities as decided by the School Level Fee Committee;
>
> (ii) to observe completion of syllabus as per the planning;
>
> (iii) to assist school for planning of other co-curricular activities; and
>
> (iv) to assess the needs of co-curricular activities."

The above Rule enables the Parent-Teachers Association to get information about tuition fees, term fees and fees for co-curricular activities as decided by the SLFC; to also observe completion of syllabus as per the planning; to assist school for planning of other co-curricular activities; and to assess the needs of co-curricular activities. This is an enabling provision bestowing power coupled with duty in the Parent-Teachers Association. This in no way affect

the right of the school Management in the matter of determination of school fees by itself. The purpose of above provision is to empower the Parent-Teachers Association to get information about tuition fees, term fees and fees for co-curricular activities, to facilitate it to analyse the claim of the school Management regarding the fee structure being reasonable or otherwise. It is on the basis of that information, the representatives of the Parent-Teachers Association, forming part of the SLFC, will be in a position to meaningfully interact either to give counter offer or agree with the proposal submitted by the school Management. Even though, the Act of 2016 is largely for regulation of fee, the information regarding the incidental aspect thereof as to whether co-curricular activities proposed by the school Management are necessary or not is significant. For, if Parent-Teachers Association is of the view that it is unnecessary, it can project its perception in that regard during the interaction to persuade the school Management to avoid such co-curricular activities and to reduce the burden of expenses to be incurred therefor. That would resultantly reduce the liability of the parents commensurately due to reduced fee liability.

48. Rule 6 deals with duties and functions of the SLFC. It specifies the additional duties to be performed by the SLFC besides the powers and functions specified in the Act of 2016. Rule 6 reads thus:

> "**6. Duties and functions of School Level Fee Committee.** - The School Level Fee Committee shall, in addition to the powers and functions specified in the Act, discharge the following duties and perform the following functions, namely:-
>
> (a) to oversee the compliance of the provisions of the Act and rules made their under;
>
> (b) to take decision on proposals received from Management, regarding determination of fee within time specified in sub-section (3) of section 6 of the Act; and
>
> (c) to make available necessary documents to the Divisional Fee Regulatory Committee or Revision Committee, as the case may be, where appeal is filed by the Management."

We fail to understand as to how Rule 6 would come in the way or infringe the fundamental right of the school Management guaranteed under Article 19(1)(g) of the Constitution. This Rule gives additional powers to the SLFC for ensuring compliances of the provisions of the Act of 2016 and the Rules made thereunder including regarding determination of school fees.

49. Rules 7 and 8 of the Rules of 2017 deal with meeting of the SLFC and procedure to refer proposal to DFRC and to file appeal

and revision before the Statutory Regulatory Committees respectively. The same reads thus:

> "**7. Meeting of the School Level Fee Committee.** - (1) The Chairperson of the School Level Fee Committee shall call the meetings of the School Level Fee Committee. The Secretary of the committee shall issue notice of meeting to the members of the School Level Fee Committee in Form-II. The notice shall be issued fifteen days before the date of meeting.
> (2) The notice shall be sent to each member of the School Level Fee Committee by registered post or delivered through any other mode. The acknowledgement of notice shall be preserved for a period of one year.
> (3) No business shall be transacted in the meeting of the School Level Fee Committee unless four members are present out of which at least two shall be the parent members of the School Level Fee Committee. If there is no quorum, the Chairperson of the School Level Fee Committee shall adjourn the meeting. The adjourned meeting shall be recalled again after the lapse of ten days from the date of the meeting which is adjourned.
> (4) The Secretary of the School Level Fee Committee shall prepare minutes of the meeting and circulate the same to all the members within fifteen days from the date of the meeting.
> (5) The minutes of the meeting shall be made available to the District Education Officer or Deputy Director concerned, as and when required.
> (6) If a parent member is absent for three consecutive meetings, his membership shall be deemed to be cancelled and such vacancy shall be filled in by lottery, from amongst the applications received for that academic year under rule 5.
>
> **8. Procedure to refer proposal to Divisional Fee Regulatory Committee and to file appeal before Divisional Fee Regulatory Committee and Revision Committee under section 6 of the Act.** - (1) The Management of the school shall submit fee proposal to the School Level Fee Committee at least six months before the commencement of the next academic year in Form-III.
> (2) If the School Level Fee Committee fails to decide the fees within the period specified in sub-section (3) of section 6 of

> the Act, the management shall immediately refer the matter in Form-IV, along-with the proposal submitted to the School Level Fee Committee, to the Divisional Fee Regulatory Committee, within thirty days of expiry of the period specified in sub-section (3) of section 6 of the Act, for its decision.
> (3) The management may prefer an appeal in Form-V against the decision of the School Level Fee Committee within 30 days from the date of decision of the School Level Fee Committee.
> (4) The management or School Level Fee Committee aggrieved by the decision of the Divisional Fee Regulatory Committee in appeal or reference may, within thirty days from the date of such decision, prefer an appeal, in Form-VI, before the Revision Committee along with the proposal of fees submitted by management and the copy of the decision of the School Level Fee Committee and Divisional Fee Regulatory Committee."

These Rules deal with purely procedural matters and are in line with the powers and functions of the concerned Committees. The Rules provide for the manner in which the proposal is to be submitted by the school Management and to be taken forward. These provisions in no way affect the fundamental right guaranteed under Article 19(1)(g) of the Constitution much less autonomy of the school Management to determine the fee structure itself in the first place including the administration of the school as such.

50. The next challenge is to Rule 11 which obligates the private schools to maintain accounts and other records in the manner prescribed thereunder. The same reads thus:

"**11. Maintenance of accounts and other records.**- (1) Every private school shall,-
(a) maintain separate accounts for different kinds of transactions, such as, fees collected, grants received, financial assistance received, payments of salary to staff, purchase of machinery and equipment, laboratory apparatus and consumables, library books, stationery, computers, software and other expenditure incurred;
(b) keep the registers, accounts and records within the premises of their school as they shall be made available at all reasonable time for inspection; and
(c) preserve the accounts maintained, together with all vouchers relating to various items or receipts and expenditure, until the audit of accounts is over and objections, if any, raised are settled.
(2) Every private school shall, in addition to accounts and records specified in sub-rule (1), maintain the following, namely:-

(a) General Register;
(b) Admission Register;
(c) Fee Receipt;
(d) Fee Collection Register;
(e) Cash Book;
(f) Library and Reading Room Account;
(g) Staff Attendance Register and Staff Salary Register;
(h) Students Attendance Register;
(i) Voucher File;
(j) Cheque Register;
(k) Acquaintance Roll;
(1) Stock Registers;
(m) Transfer Certificate Book;
(n) Examination Fees Collection Receipt;
(o) Contingency Expenditure Register;
(p) Asset Register; and
(q) Building Rent Register.

(3) Every private school shall also maintain the other record of the institution as per the orders issued by the Government, from time to time."

In our opinion, even this provision by no stretch of imagination would affect the fundamental right of the school Management under Article 19(1)(g) of the Constitution much less to administer the

school. This provision, however, is to ensure that a meaningful inquiry can be undertaken by the SLFC or the Statutory Regulatory-cum-Adjudicatory Authorities in determination of the fact whether the fee structure propounded by the school Management results in profiteering or otherwise. If information is furnished in any other manner (other than the manner specified in Rule 11), it would become difficult for the concerned Committees/Authorities to answer the contentious issue regarding profiteering. The fee structure determined by the school Management can be altered by the Adjudicatory Authorities only upon recording a negative finding on the factum of amount claimed towards school fees relating to particular activities is an essential expenditure or otherwise; and that the fee would be in excess of reasonable profit being ploughed back for the development of the institution or otherwise. The recovery of excess amount beyond permissible limit would result in profiteering and commercialisation. In our opinion, therefore, even Rule 11 is a relevant and reasonable provision and does not impact or abridge the fundamental right under Article 19(1)(g) of the Constitution.

51. The last assail was on the argument that the field regarding (school) fee, in particular capitation fee is already covered by the law enacted by the Parliament being RTE Act and for that reason, it was not open to the State to enact law on the same subject such as the impugned Act of 2016. This argument is completely misplaced and tenuous. For, the purpose for which the RTE Act has been enacted by the Parliament is qualitatively different. It is to provide for free and compulsory education to all children of the age of 6 to 14 years, which is markedly different from the purpose for which the Act of 2016 has been enacted by the State legislature. Merely because the Central Act refers to the expression "capitation fee" as defined in Section 2(b) and also in Section 13 of the RTE Act — mandating that no school or person shall, while admitting a child, collect any capitation fee, does not mean that the Central Act deals with the mechanism needed for regulating fee structure to ensure that the schools do not collect fees resulting in profiteering and commercialisation. By its very definition, the capitation fee under the Central Act means any kind of donation or contribution or payment other than the fee notified by the school. On the other hand, fee to be notified by the school is to be done under the

impugned Act of 2016 after it is so determined by the school Management and approved by the SLFC or by the Statutory Regulatory Authorities, as the case may be. Suffice it to observe that the field occupied by the Central Act is entirely different than the field occupied by the State legislation under the impugned Act of 2016. The impugned Act of 2016 deals specifically with the subject of regulating fee structure propounded by the private unaided school management. Hence, there is no substance in this challenge.

52. Taking overall view of the matter, therefore, we uphold the conclusion of the High Court in rejecting the challenge to the validity of the impugned Act of 2016 and Rules framed thereunder. However, we do so by reading down Sections 4, 7 and 10 of the Act in the manner indicated in paragraphs 28; 37/38 and 42 respectively of this judgment. These provisions as interpreted be given effect to, henceforth, in conformity with the law declared in this judgment. For the reasons mentioned hitherto, we hold that the High Court rightly concluded that the provisions of the Act of 2016 as well as the Rules of 2017 are *intra vires* the Constitution of

India and not violative of Articles 13(2) and 19(1)(g) of the Constitution.

Re: Second Set:

53. These appeals assail the common judgment and order dated 18.12.2020 of the Division Bench of the High Court of Judicature for Rajasthan at Jaipur whereby all the connected cases involving challenge to the orders dated 09.04.2020, 07.07.2020 and 28.10.2020 issued by the State Authorities were disposed of.

54. The order dated 09.04.2020 was issued by the Director, Secondary Education, in the wake of COVID-19 pandemic, directing the private schools recognised by the Primary and Secondary Education Departments to defer collection of school fees for a period of three months. The said order reads thus:

> "OFFICE OF DIRECTOR, SECONDARY EDUCATION,
> RAJASTHAN, BIKANER
>
> **ORDER**
>
> As per the direction issued by Hon'ble Chief Minister, order is being issued in regard to collection of fees by Elementary and Secondary Education Department recognized non-government schools, which is as follows:-
>
> 1. No fee will be charged by non-government schools from the students/guardians of the period after 15th March, the

applicable fees at present and payment of advance fees which is deferred for 3 months. In case of non deposition of fees during this period, name of such student will not be struck off from the rolls of the school.
2. In case of continuation of the studies in the non-government schools, the deferred fees for the present session 2020-21 will be chargeable after deferment period is over.
3. After completion of the Lock down period, if any student of non-government school wants his Transfer Certificate for continuing studies in another school then the same can be obtained after depositing fees of the previous session 2019-20 and obtaining the no-dues certificate.

(Saurabh Swami)
I.A.S.,
Director, Secondary Education, Rajasthan, Bikaner.

No.-Shivra-Ma/PSP/Sikayat/Vetan/2019-20
dated 09.04.2020"

55. Before expiry of the period noted in the aforementioned order, the Director, Secondary Education issued another order on 07.07.2020. The same reads thus:

"OFFICE OF DIRECTOR, SECONDARY EDUCATION,
RAJASTHAN, BIKANER

ORDER

In continuation of the Government letter No.P.8(3) Shiksha-5/COVID-19 Fees Staghan/2020 dated 01.07.2020, for collection of fees by Elementary and Secondary Education Department recognized non-government schools, the following order is issued:-

1. The fee chargeable by non-government schools from the students/guardians after 15th March, the applicable fees at present and payment of advance fee was deferred for 3 months, as per the direction of the State Government the said deferment is extended till the reopening of the schools. In case of non-deposition of fees during the said period, name of such student will not be struck off from the rolls of the school.

2. Remaining all will be as per order No. (Shivra/Ma/PSP/Sikayat/Vetan/2019-20) dated 09.04.2020.

(Saurabh Swami)
I.A.S.,
Director, Secondary Education,
Rajasthan, Bikaner.

No.-Shivra-Ma/PSP-C/A-2/60566/2019-20
Dated 07.07.2020"

56. The private unaided schools then filed writ petition(s) before the High Court challenging the aforesaid orders dated 09.04.2020 and 07.07.2020. The learned Single Judge of the High Court Bench at Jaipur considered the prayer for interim relief and vide order dated 07.09.2020 directed the school Authorities to allow the students to continue their studies online and also to deposit only 70 per cent of the tuition fees element from the total fees chargeable for the period from March 2020 in three instalments. The relevant extract of the order of the learned Single Judge dealing with the prayer for interim relief at the instance of the appellants-Schools reads thus:

"13. I have considered the submissions as above and perusal the material available on record.

14. While there are myriad issues involved in the present batch of the writ petitions, which are required to be examined finally; at this interim stage, this Court finds that

a balance is required to be struck between financial difficulty of the school management relating to release of the salary of the staff and minimum upkeep of school on one side and the financial pressure, which has come on the parents due to the pandemic and lock-down as noticed above.

15. After noticing the judgments passed by the High Court of Gujarat at Ahmedabad in the case of *Nareshbhai Kanubhai Shah Versus State of Gujarat & 2 Others*: R/Writ Petition (PIL) No.**64/2020** and other connected matters decided on 31.7.2020, the High Court of Punjab and Haryana at Chandigarh in the case of *Independent Schools Association Versus State of Punjab & Others*: CWP No.**7409/2020** and other connected matters decided on 30.6.2020 and the High Court of Delhi in the case of *Rajat Vats Versus Govt. of Nct of Delhi & Another*: WP (C) No.2977/2020 decided on 20.4.2020, this Court is of the view that *prima facie*, members of the petitioner association cannot be deprived of receiving the tuition fees for the students, who continued to remain on their rolls.

16. However, this Court notices that total infrastructure cost, which the school may incur for the regular studies during normal days, has been definitely reduced day to day schools are not opening. It is noticed that the tuition fees is assessed on the basis of the infrastructure expenditure including staff salary and operation cost incurred by the schools in terms of the provisions of the Rajasthan Schools (Regulation of Fee) Act, 2016, after following the procedures laid down therein.

17. This Court agrees *prima facie* with the counsel for intervenors that while the institutes had to incur certain additional expenditure for developing online classes process, the same would be less than individual expenditure being incurred by the parents for providing infrastructure to their each ward, who is undergoing online classes at home. There may be also cases where the parents may have two or three children. To each one separate laptop or computer will be required to provide as all of them would be undergoing online classes at the same time. Thus, comparative balance is required to be maintained.

18. *Prima facie*, this Court is also of the view that under the Act of 2005, the authorities would have jurisdiction to lay down policy, guideline and direction, which may be found to be suitable for the purpose of providing the relief to the persons affected by the disaster as mentioned in Section 22 of the Act of 2005. The guidelines can be laid down for mitigation of such loss to the citizens. The powers and functions of the State Executive Committee under Section 22(j) provide that the State Executive Committee shall ensure that non-governmental organizations carry out their activities in an equitable and non-discriminatory manner. The petitioners are all non-governmental organizations and are expected therefore to play their necessary role in mitigating the sufferance caused to the public at large, while at the same time also protect their own staff from facing financial difficulties. This Court is also conscious of the fact that the State-respondents, while passing the impugned orders, have not taken into consideration the difficulties, which the staff of the concerned school would face on account of non-payment of the fees. However, burdening the parents with complete tuition fees would not be appropriate and justified.

19. In view of the above, this Court by an interim measure and till the situation gets normalized, directs the school authorities to allow the students to continue their studies online and allow them to deposit 70% of the tuition fees element from the total fees being charged for the year. The said 70% of the tuition fees shall be paid for the period from March, 2020 in three installments to the respective schools. However, it is made clear that on non-payment of the said fees, the student(s) may not be allowed to join online classes, but shall not be expelled from the school. The three installments shall be fixed by depositing the first installment on or before 30.9.2020 while the second installment shall be paid by 30.11.2020 and third installment shall be paid by 31.1.2021. However, it is further made clear that the question regarding remaining fees shall be examined at the stage of final disposal of these writ petitions. The orders are being passed as interim arrangement subject to final adjudication of the case.

20. The stay applications are accordingly disposed of."

57. Against this decision, intra-court cross appeals came to be filed. In those appeals, the Division Bench vide order dated 01.10.2020 stayed the operation of the interim order passed by the learned Single Judge. The appeals were then heard on 12.10.2020 and reserved for orders. However, as representations were received from several counsel that they were unable to interact with the court through video conferencing, the matters were notified for further hearing on 14.10.2020. The Court then directed listing of appeals on 20.10.2020. However, before next date of hearing, the State Government vide order dated 16.10.2020 constituted a four-member Committee to give suggestions to the State Government in relation to recovery of fees from parents/students by Private/Non-Government Educational Institutions during the academic session 2020-21. The High Court was apprised about this development when the matters were taken up on 23.10.2020 as is noticed from the said order, which reads thus:

> "**Order**
>
> **23/10/2020**
>
> Mr. Rajesh Maharshi, AAG, submits that a committee has been constituted for determination of fees to be charged by the private schools for the period of lockdown imposed due to Covid-19 Pandemic. The Committee is in process to finalize its recommendations and accordingly the affidavit

shall be filed on behalf of the State Government on 2nd of November 2020 positively.

Mr. Kamlakar Sharma learned Senior advocate raised serious objection and prayed for interim measure in view of the great hardship being faced by the private schools to run their institutions.

Considering the hardship of the private schools, it is directed that the State Government shall issue necessary directions by 28.10.2020 positively regarding interim fees which the private schools shall be allowed to charge subject to final decision in this regard.

In the meanwhile, necessary affidavit in compliance of earlier directions shall be filed by the State Government by 02.11.2020 without fail after providing a copy of the same to all the parties.

List on 03.11.2020"

58. The appeals were, thus, directed to be notified on 3.11.2020. Before that date, however, the Director, Secondary Education issued order dated 28.10.2020, which reads thus:

"OFFICE OF DIRECTOR, SECONDARY EDUCATION,
RAJASTHAN, BIKANER

ORDER

The Hon'ble High Court in DB Special Appeal No.637/2020 Sunil Samdria versus State of Rajasthan and other Special Appeals passed an order dated 23.10.2020 directing the State Government to take a decision in regard to charging of school fees from guardians/students for academic session 2020-21 keeping in view COVID pandemic and the guidelines be issued by 28.10.2020.

In compliance of the order passed by Hon'ble Rajasthan High Court, Jaipur dated 23.10.2020 and in pursuance to the State Government's letter No. P.8(3) Shiksha-5/COVID-19 Fees Staghan/2020 dated 28.10.2020, the guidelines for charging of school fees for the **academic session 2020-21** by non-government educational institutions from students/guardians, are issued which are as follows:-

A - THE DETAILS OF THE FEES TO BE CHARGED BY THE SCHOOLS AFTER REOPENING

1. After reopening of the school only **tuition fees** will be charged from the students.
2. The tuition fees will be as per the prescribed syllabus for teaching. Like CBSE for class 9th to 12th has reduced 30% of the syllabus and has prescribed 70% of the syllabus, **hence, the fees to be charged for this session will be 70% of the tuition fees of last academic session**. Similarly, Rajasthan Board of Secondary Education for class 9th to 12th has reduced 40% of the syllabus and has prescribed 60% of the syllabus, **hence, the fees to be charged for this session will be 60% of the tuition fees of last academic session**.
3. Looking to the circumstance arising out of COVID-19 pandemic, the decision to call the students of Class 1st to 8th to school has not been taken, hence whenever the decision is taken and as per the reduction of syllabus, in the same proportion the fees will be charged.
4. The fees decided as per above payable to the school for which guardians/student will be given option of payment of fees monthly/quarterly.
5. The schools will not change the uniform prescribed in the previous academic session.
6. The facilities not being utilized by students like laboratory, sports, library, curricular activities, development fees, boarding fees etc. no fees under this head will be charged by schools.
7. For presence of the students in the school, written consent of the guardians will be required.
8. In case the student is using conveyance provided by the school like Bal Vaihani etc. then the conveyance charges can be charged but it will not be more than the conveyance fees charged during the previous academic session. The conveyance fees will be in proportion to the number of working days after reopening of the schools.
9. The conveyance being provide by the schools for students will have to follow the COVID-19 guidelines prescribed by State Government and any other directions issued by Government.
10. The SOP issued by State Government will have to be adhered to by the non-government schools.

B - THE DETAILS OF THE FEES TO BE CHARGED BY THE SCHOOLS BEFORE REOPENING

1. The schools will determine the fees to be charged from students after reopening of the school as per the prescribed syllabus for teaching.
2. Before opening of the schools the online teaching work was for making them acquainted i.e. capacity building was the objective. Hence, the fees chargeable will be termed as capacity building fees.
3. The schools which were/which are imparting online teaching then capacity building fees can be charged from such students which will be 60% of the tuition fees. For online teaching, the consent of the guardians will be necessary and capacity building charges can be charged from consenting students.
4. When the schools reopen, it will be duty of schools to impart the complete syllabus as prescribed by the board to the students who did not study in online classes and the said syllabus will have to be completed by the schools the schools will ensure equality between the online and offline students.
5. The capacity building charges will be charge from the guardians in monthly installments.
6. Till the permission is granted by Government for starting class/classes of students and online teaching is imparted regularly for that period only the capacity building fees will be charged.
7. If any student does not subscribe to the online education being provided by the school, no capacity building fees will be charged.

C - DETERMINATION OF TUITION FEES

1. The fees determined by school fee committee formed as per Rajasthan Schools (Regulation of Fees) 2016 and Rules 2017 will be the basis for aforesaid determination of fees which will clearly mention the various fees i.e. tuition fees, library fee etc.

2. The prescribed total fees and tuition fees of last year will not be increased.

3. Every guardian will be provided of receipt of tuition fees/capacity building fees. The said receipt will contain the

details of the prescribed fees and the reduced fees necessarily.

4. The students who are undergoing online classes and want to continue with online classes but their guardians are unable to pay the fees, in such cases a committee will be formed at school level which will examine such cases and will take a decision in regard to the relaxation of fees to be granted looking to the circumstances from case to case.

5. The remaining fees for the academic session 2019-20 (remaining till the schools remained open) will be charged in equal monthly installments. The guardians of such students will not compelled to pay the fees in single installment.

6. No student will be prevented from registration for Board Examination even if he has not attended the online classes and has not paid the fees, even the transfer certificate of such students will not be issued.

7. If any student wants to take transfer certificate and has attended online classes than capacity building fees as per aforesaid provision can be charged.

8. For charging fees as per aforesaid the non-government schools will pay prescribed salary to the employees had teachers and no retrenchment will be done due to circumstances of COVID-19.

The aforesaid has been approved by competent level. All concerned ensure the compliance.

(Saurabh Swami)
I.A.S.,
Director, Secondary Education,
Rajasthan, Bikaner.

No.-Shivra-Ma/PSP/C/A-2/60566/2019-20
Dated 28.10.2020"

59. This order was assailed by some of the private schools before the High Court by way of substantive writ petition(s), which, as per the High Court Rules was required to proceed before the Single

Judge in the first place. In addition, applications were filed in the pending intra-court appeals before the Division Bench seeking liberty to challenge the order dated 28.10.2020 issued by the Director, Secondary Education. As a result, the Division Bench with the consent of parties thought it appropriate to hear all the matters including involving challenge to the order dated 28.10.2020 of the Director, Secondary Education.

60. Accordingly, the appeals and writ petitions were heard and decided together by the common judgment and order pronounced on 18.12.2020, which is impugned in the present appeals. The Division Bench vide impugned judgment opined that the State Government was competent and had jurisdiction to issue directions as given vide order dated 28.10.2020 of the Director, Secondary Education, being a policy decision necessitated due to aftermath of pandemic situation. The Court held that in absence of any legal provision to address the unprecedented difficulties faced by the parents and their wards across the State, it was open to issue administrative directions in exercise of power under Article 162 of the Constitution and especially when there was no legal provision prohibiting issuance of such directions. The Division Bench also

opined that such order could be issued even in exercise of power under Section 22 of the Disaster Management Act, 2005[21]. The Division Bench rejected the argument of the appellants that the stated order dated 28.10.2020 does not mention the source of power under which the same has been issued by the Director, Secondary Education or that it was vitiated due to lack of opportunity of hearing to the school Management(s). Instead, the Court held that even if there is no formal authentication of the order, it would be of no consequence. For, the direction was given by the Chief Minister being the administrative and political head of the State Government. It was the bounden duty of the State Government to reckon the ground realities and strike a balance between the interests of private schools as well as of the parents and students and to mitigate the plight of the citizens due to unprecedented crisis post COVID-19 pandemic. The Court did advert to the fact that the school Management was obliged to honour its commitment, rather obligation to pay salary to its staff on account of governing statutory provisions despite the pandemic situation. Further, the State of Rajasthan had adopted a different

21 for short, "the Act of 2005"

pattern of substantially reducing the school fees in comparison to other States. Nevertheless, it noted that it is always open to the school Management as well as the parents to approach the statutory forum for determination of just fee under the Act of 2016. The Division Bench finally proceeded to conclude as follows:

> "In view of the above discussion, the rest of the petitions are disposed of as under:-
>
> I. All the private schools recognized by the Primary and Secondary Education Department shall be entitled to collect school fees from the parents of their students including the students of pre-primary classes in terms of the order dated 28.10.2020 issued by the State Government subject to special determination of fees as being directed hereunder.
>
> II. All the private schools are directed to form necessary bodies required for special determination of fees within 15 days, if such bodies have not been constituted so far in terms of Rajasthan Schools (Regulation of Fee) Act 2016, and Rajasthan Schools (Regulation of Fee) Rules 2017.
>
> III. In order to safeguard the interests of the schools' management and the parents, it is further directed that all the private schools recognized by the Primary and Secondary School Education Department shall specially determine the school fees for the period in which schools remained closed due to COVID-19 pandemic and after opening of the schools in the Session 2020- 2021 in terms of the provisions of Section 8 of Rajasthan Schools (Regulation of Fee) Act, 2016 and for this purpose all the schools shall publish necessary details including the strength and salary paid to the staff during the period in which the schools remained closed for such special determination on their notice boards as well as on their websites. This special determination of school fees shall be completed within two months from the date of order positively.

IV. With the object to prevent any unfair practice of collection of fees in the process of this special determination of fees the component of tuition fees shall be specifically determined and for that purpose, all heads of the school fees shall be bifurcated as mandated under Section 6(4) of the Act of 2016.

V. Besides this, the schools' management or the parents may take recourse of the provision of appeal/reference before Divisional Fee Regulatory Committee/Revision Committee, as the case may be in case any of them are aggrieved of such special determination.

Needless to say, that in the process of above special determination of school fees, it will be open for the schools' management and the parents to determine the fees in consonance with the directions contained in order dated 28.10.2020 or they may increase or decrease the fees to be collected for the current session.

VI. The interim order dated 07.09.2020 passed by learned Single Judge stands vacated."

61. In this backdrop, the management of private unaided schools in the State of Rajasthan have approached this Court to assail the impugned judgment of the Division Bench of the High Court and also the order dated 28.10.2020 issued by the Director, Secondary Education. As a matter of fact, challenge to the orders issued by the Director, Secondary Education on 09.04.2020 and 07.07.2020 had worked out due to efflux of time. For, by these orders the school Management was merely directed to defer collection of school fees for specified period as noted therein; and that period had already expired. Thus, our focus in this judgment will be and ought

to be only on the legality and rationality of the order issued by the Director, Secondary Education on 28.10.2020 and applicable to academic year 2020-21 only, including the basis on which the same has been upheld by the High Court vide impugned judgment.

62. According to the appellants (private unaided schools), the school fee charged from their students was fixed by the SLFC in its meeting held on 28.10.2017, by following procedure prescribed under the Act of 2016 and the Rules framed thereunder. The same was to remain in force for the academic years 2018-19, 2019-20 and 2020-21. In the present appeals, as aforementioned, we are concerned only with the school fees pertaining to the academic year 2020-21, in light of the impugned order dated 28.10.2020 issued by the Director, Secondary Education.

63. The appellants would urge that being a responsive school administration and also being deeply concerned with the development of wards pursuing education in the concerned schools, the school Management "on their own" had decided to offer scholarship of 25 per cent of the annual fee to their students. That was to mitigate the difficulties faced by the parents and keeping in

mind that certain recurring expenses were not being incurred by the school Management during the lockdown period. Be that as it may, in law, it is not open to the State Authorities to modify the school fees once fixed by the SLFC for the relevant academic year that too in the manner done by the Director, Secondary Education vide order dated 28.10.2020. The fact that the parties are at liberty to challenge the modification/reduction of school fees before the statutory forum does not justify the issue of such an order — unless the State Authorities have clear mandate to do so under the governing law. The departure made by the Director, Secondary Education vide order dated 28.10.2020 was not acceptable to the school Management, being *ex facie* illegal. It does not disclose the source of power under which it has been issued. At best, it can rely on the interim observations made by the High Court in the proceedings pending at the relevant time. Those observations cannot confer power on the State Authorities when no such power exists in the State Government in relation to modification/reduction of fee structure determined by the school Management and approved by the SLFC. Moreover, it is well-established that there can be no rigid uniform fee structure for all the private unaided

schools in the State. The High Court had erroneously assumed that the power exercised by the Director, Secondary Education was ascribable to Article 162 of the Constitution. For, the subject of school fees is fully covered and governed by the provisions of the Act of 2016 and the Rules framed thereunder. Therefore, in the name of policy decision, the impugned order dated 28.10.2020 cannot be sustained, which on the face of it is not in conformity with the express statutory provisions governing the subject of school fees.

64. It is urged that there was no express provision in the Act of 2016 permitting such intervention by the State Authorities in respect of school fees already fixed under the Act of 2016. Reliance placed on Section 18 of the Act of 2016 was completely inapposite as that merely confers power upon the State Government to issue directions consistent with the provisions of the Act of 2016 and for carrying out the purposes of that Act or for giving effect to any of the provisions of that Act. Thus, recourse cannot be taken by the State Authorities to the provisions of the Act of 2016 much less Section 18 to justify the impugned order dated 28.10.2020. In any case that order, on the face of it, is unreasonable, arbitrary and

irrational. For, Section 8 provides for the parameters for determination of school fee and admittedly the school fee had already been fixed by the SLFC on 28.10.2017 which was still in force and applicable for the academic year 2020-21 as well. Therefore, it was not open to reduce the same much less limit it to only one parameter of tuition fee amongst other parameters referred to in Section 8.

65. It is urged that reliance placed on Section 18 of the Act of 2016 is completely ill-advised. There is no mechanism in the Act of 2016 to review or reduce the school fees once approved by the SLFC or determined by the Statutory Regulatory Authorities. On the other hand, as per Section 6(3) such school fee is binding on all concerned for three academic years, which in the present case was to remain in force until the academic year 2020-21. Further, the reduction of school fees has been erroneously linked to the instructions issued by the concerned Board. In fact, the Board had issued directives to complete the course including through online training/teaching. Moreover, there is no concept of “capacity building fee” under the Act of 2016. The expression “capacity building” obviously has been borrowed from the legislation such as

the Act of 2005. In any case, it is necessary to make factual enquiry school wise as to whether the concerned school had completed the entire syllabus for the relevant academic year; and also, whether the liability of the school towards teaching and non-teaching staff and their administrative and infrastructure (recurring) expenses, had been discharged by the school Management.

66. It is then urged that the High Court committed manifest error in upholding the impugned order dated 28.10.2020 as being ascribable to exercise of power under the Act of 2005. For, the stated Act provides express mechanism as to when and by whom the power to issue directions can be exercised. The Director, Secondary Education has no such power under the Act of 2005 nor the State Government could do so thereunder much less to reduce the school fees fixed after approval of the SLFC in terms of the mechanism stipulated under the Act of 2016. The provisions of the Act of 2005 are limited to providing effective management of disasters and for matters connected therewith or incidental thereto.

67. The manner and method of addressing such disaster and in particular "disaster management" as defined in Section 2(e) of the Act of 2005 is by preparation of a plan for disaster management by the authority concerned under that Act. A National Plan, State Plan or District Plan is required to be prepared under the Act of 2005. That is in respect of prevention of disasters or mitigation of their effects. It is the direct effect of disaster that is required to be mitigated and not indirect hardship caused to individuals much less in respect of contractual matters. The plan must advert to the measures to be taken for the integration of mitigation measures in the development plans and the measures to be taken for preparedness and capacity building to effectively respond to any threatening disaster situations or disaster including the roles and responsibilities of different Ministries or Departments of the Government of India. In any case, the action is to be initiated by the State Authorities, established under the Act of 2005, namely, the Disaster Management Authority at the concerned level. In the scheme of the Act of 2005, there is nothing to indicate that the Authorities can interfere with contractual matters or indirect hardships — such as inability of parents to pay school fees due to

pandemic situation. The Director, Secondary Education, in no way, is concerned with the preparation of a disaster plan or its enforcement and implementation under the Act of 2005. As a result, the order dated 28.10.2020 cannot be sustained with reference to the provisions of the Act of 2005. The provision in the form of Section 72 of the Act of 2005 is also of no avail because the same is in reference to the provisions of the Act, which, as aforesaid, in no way apply to the subject of fixation and collection of school fees. That subject is exclusively governed under the Act of 2016.

68. Even the invocation of provisions of the Rajasthan Epidemic Diseases Act, 2020[22] by the State to justify the stated order has been stoutly refuted by the appellants. The powers required to be exercised by the State Government under the Act of 2020 are delineated in Section 4 of the Act of 2020. None of these measures (referred to in Section 4) concern the subject of determination of school fees much less reduction of school fees once it is approved by the SLFC and is in force for the concerned academic year. The general provision in Section 4(2)(g) permitting the Government to

22 for short, "the Act of 2020"

regulate or restrict the functioning of offices, Government and private and educational institutions in the State, would not give authority to the State Government to decide about the fee structure of the concerned unaided private school. The regulation can be in regard to the timings when the school should be opened and closed and the protocol to be followed by the school during the working hours, as the case may be. That provision does not empower the State Government to reduce the school fees which is approved by the SLFC and is in force for the concerned academic year.

69. According to the appellants neither the order dated 28.10.2020 issued by the Director, Secondary Education can be sustained in law nor the reasons weighed with the Division Bench of the High Court in the impugned judgment to uphold the same can stand the test of judicial scrutiny.

70. Learned counsel for the minority private unaided school additionally contended that the order issued by the Director, Secondary Education violates the fundamental rights guaranteed under Article 19(1)(g) as well as Article 30(1) of the Constitution. That the right to fix the school fees is a fundamental right under

Articles 19(1)(g) and 30 of the Constitution which cannot be regulated by the State except for preventing profiteering and capitation fee. To buttress his submission, reliance was placed on the dictum in ***T.M.A. Pai Foundation***[23] (supra), ***P.A. Inamdar***[24] (supra) and ***Modern School***[25] (supra). He would submit that in the case of minorities, the State regulation on minority right has to satisfy a dual test — the test of reasonableness and the test that it is regulative of the educational character of the institution and is conducive to make the institution an effective vehicle of education for the minority community and for other persons to resort to it. Learned counsel has also relied upon the decision dated 20.05.2020 of the Delhi High Court in the case of ***Ramjas School vs. Directorate of Education***[26] wherein the High Court noted that in the case of unaided educational institutions, availability of surplus is no ground to disapprove the fee hike. Absent any charging of capitation fee/profiteering, the State Authorities cannot reject the fee proposal of the school Management and that the quantum of fee to be charged is an element of administrative functioning of the

23 paras 29-38, 45, 53-57, 61 and 122
24 paras 91-94, 104, 107 and 139-141
25 paras 16 and 17
26 Writ Petition (C) No.9688 of 2018 (paras 66, 78, 88 and 91)

school, over which the autonomy of the unaided educational institution cannot be compromised. He has also placed reliance on the decision of the Delhi High Court in ***Naresh Kumar vs. Director of Education, Delhi***[27] decided on 24.04.2020. He then invited our attention to the decision of this Court in ***Pramati Educational and Cultural Trust (Registered) & Ors. vs. Union of India & Ors.***[28] wherein the Constitution Bench opined that the RTE Act will not apply to minority educational institutions. Whereas, non-minority institutions are bound by the RTE Act to provide 25 per cent admission to economically weaker sections of the society and to get reimbursement from the Government towards unit cost. In substance, he has iterated the argument that the school Management(s) of private unaided schools has a right to fix their fee structure and to collect school fees as approved by the SLFC or the Statutory Regulatory Authority.

71. Per contra, learned counsel appearing for the State and representing the parents submit that due to extraordinary and unprecedented situation arisen due to complete lockdown for such

27 Writ Petition (C) No.2993 of 2020 (paras 18 to 21)
28 (2014) 8 SCC 1 (paras 53 to 55)

a long period, the parents are not in a position to pay the fixed school fees. It is only because of large number of representations made by them, the State Government responded by issuing orders on 09.04.2020 and later on 07.07.2020 to defer the payment of school fees and finally to reduce the school fees in terms of order dated 28.10.2020 issued by the Director, Secondary Education. The dispensation provided in the order dated 28.10.2020 is merely to take mitigating measures and to assuage the concerns of the parents who were in dire need of such assistance. The measures taken by the State Government in terms of Sections 38 and 39 of the Act of 2005, cast onerous responsibility upon the Government to take all measures for mitigation and capacity building in the wake of a pandemic. These provisions must be given widest meaning as narrow construction would result in curtailing the powers of a welfare State to undertake measures for dealing with the unprecedented situation. The spirit of the provisions must be kept in mind and the court must uphold the validity of the impugned order which has been issued in larger public interest. Reliance has been placed on the dictum of this Court in the ***State***

of M.P. & Ors. vs. Nandlal Jaiswal & Ors.[29]and ***Pathan Mohammed Suleman Rehmatkhan vs. State of Gujarat & Ors.***[30], to buttress this submission.

72. According to the respondents, Section 72 of the Act of 2005 gives an overriding effect over all other laws and, therefore, the power of the State Government exercised in terms of Sections 38 and 39 in respect of measures articulated therein, need not be constricted keeping in mind the language of the said provisions. In other words, all that is required to be done by the State to assuage the concerns of the society and citizenry related to the situation arisen from the lockdown due to pandemic, is permissible within the meaning of the said provisions.

73. It is urged that mere omission to mention the source of power will not invalidate the exercise of power itself as long as there is a valid source to that exercise of power as noted by this Court in ***High Court of Gujarat & Anr. vs. Gujarat Kishan Mazdoor***

29 (1986) 4 SCC 566 (para 34)
30 (2014) 4 SCC 156 (para 10)

Panchayat & Ors.[31], ***M.T. Khan & Ors. v. Govt. of A.P. & Ors.***[32] and ***N. Mani vs. Sangeetha Theatre & Ors.***[33].

74. It is then urged that the order dated 28.10.2020 was necessitated and was in furtherance of the observations made by the Division Bench vide order dated 23.10.2020. That was, obviously, to fulfil the *parens patriae* obligations of the court as well as of the State. It is urged that the State has a legitimate interest under its *parens patriae* powers in providing care to its citizens and since the direction issued is to fulfil that obligation which was necessitated because of the unprecedented situation coupled with the fact that even the High Court had expressed a benign hope that the State Government ought to find out some arrangement, it became necessary to issue direction vide order dated 28.10.2020. Such power could be exercised even as a policy matter and the State Government is competent to do so under Article 162 of the Constitution.

75. It is also urged that the direction given by the Director, Secondary Education vide order dated 28.10.2020 could be issued

31 (2003) 4 SCC 712 (para 53)
32 (2004) 2 SCC 267 (para 16)
33 (2004) 12 SCC 278 (para 9)

by the State in exercise of power under Section 18 of the Act of 2016 and hence, no fault can be found with the State Government having exercised that power.

76. It is urged on behalf of State that the issue in the present appeals is limited to the justness of the order dated 28.10.2020 and, therefore, the direction given to the State in the interim order passed by this Court on 08.02.2021 to ensure that all government outstanding dues towards unit cost payable to respective unaided school are settled within one month from the date of the order, was inapposite and needs to be recalled. It is urged that computation of the unit cost is complex and assessment thereof is a time-consuming process.

77. Learned counsel for the State in his written submission has finally suggested to modulate the relief to be given in these appeals in the following words:

> "**5. <u>Re: Modulation of the relief in the present matter</u>**
>
> - The initial notification issued by the State Government on 09.04.2020 and 07.07.2020 have outlived its utility and worked itself out. The Constitutional Courts do not pronounce upon any academic matter. The validity of the Circular dated 09.04.2020 and 07.07.2020 have become academic in wake of subsequent events.

- The order dated 28.10.2020 can also become passed if following relief, with utmost humility, is granted:
  (a) The management of each school shall propose the fee structure in terms of Section 6(1) and place it before the school-level committee within a period of 15 days from the date of judgment of this Hon'ble Court. This shall be exclusively for Covid Year (2020-2021) irrespective of earlier determination of fees.
  (b) The management shall take into account the special circumstances of the COVID and curtailment of expenses during COVID along with the factors mentioned in Section 8 of the Act of 2016. The management shall be reasonable and explain expenditure under each head as enjoined by the statute. Section 6(4) read in conjunction with Section 8 of the Act.
  (c) The school-level fee committee will approve the fee within a period of 30 days.
  (d) There shall be compulsory fixation of fee for COVID year 2020-21 separately (alone) for each school in accordance with the provisions of the Act of 2016.
  (e) The fixation of fee for 2021-22 can, thereafter, take place normally in accordance with the provisions of the Act of 2016.
- Thus, the final school fee shall come into existence for the COVID year 2020-21 within a period of 45 days from the date of judgment of this Hon'ble Court and the order of 28.10.2020 interim order passed by this Hon'ble Court shall subsume in the same."

78. According to Ms. Pragya Baghel, learned counsel representing the parents, the State Government had not followed proper procedure for determination of 70 per cent of the tuition fees and that decision is not backed by any tangible material on record. Moreover, the impugned decision was taken without giving opportunity to the stakeholders, in particular the parents' association. For which reason, such a decision should not be

allowed to be taken forward by the State Government. It is then urged that the action taken under the Act of 2005 was obviously in larger public interest and being a policy decision would not be amenable to judicial review. In any case, the appropriate course would be to relegate the parties before a special Committee comprising of a retired Judge of the High Court, one Chartered Accountant and retired Teachers/Officers nominated by the Director of Public Education Board, who can take an appropriate decision after hearing all the stakeholders.

79. A written submission has also been filed on behalf of parents (by Mr. Sushil Sharma and others) contending that online classes are not a recognised form of education and that is being done by the private schools on their own without any defined syllabus by the Board. No planning or infrastructure required for online education is in place. No permission has been obtained by the private schools to conduct online classes from the concerned Boards nor any feedback is taken from the parents about the efficacy of the online teaching. It is urged that there is no uniformity in the teaching methodology or any standard operating procedure or protocol prescribed by the concerned Boards to be

followed by the private schools. The focus is essentially on the disadvantage of online classes conducted by the private schools. It is also urged in the written submission that the recommendation made by the State Government and recognition of online classes as capacity building classes are inappropriate. At the end, it is urged that this Court ought to direct waiver of complete fees for the duration schools were closed and direct the State to prescribe a fixed fee for online classes to a standard uniform charge on par with NOIS across schools and to declare exams taken by the schools so far as invalid in law and to issue such other direction as may be necessary.

80. Another written submission filed for the intervener - Mr. Charanpal Singh Bagri, claiming to be parent in a private school in the State of Punjab. He has raised several issues including the questions pertaining to the matters concerning the schools in the State of Punjab which are *sub judice.* In our opinion, it is not necessary to dilate on this written submission as the present appeals pertain to the issues concerning the private unaided schools in the State of Rajasthan governed by the Act of

2016 and the Rules framed thereunder. It will be open to the intervener to pursue all the points raised in the written submission in the proceedings pending in the High Court or this Court concerning the private schools in the State of Punjab. We may not be understood to have expressed any opinion in that regard.

81. We also have the benefit of written submission filed by Mr. Sunil Samdaria, appearing in-person who has essentially commended us to uphold the impugned judgment and order dated 18.12.2020 of the High Court of Rajasthan and seeking directions to further reduce the school fees below the percentage specified in the order dated 28.10.2020 and as upheld by the High Court. In fact, he has gone to the extent of suggesting that no fee should be charged for the period the schools have remained closed in the academic session 2020-21 as that would result in profiteering by the school Management. According to this respondent, the schools have saved colossal amount of money towards electricity charges, water charges, stationary charges and other miscellaneous charges which are required for physical running of the school and which may not be collected by the school for the relevant period.

82. When the hearing of these appeals was in progress considering the urgency involved, we thought it appropriate to pass interim directions which were intended to address the concerns of all parties in some measure. That order was passed on 08.02.2021, which reads thus:

> "SLP (C) No(s). 619/2021
> De-linked.
> List the matter on 15th February, 2021.
>
> SLP (C) Nos.27907-27916/2019, SLP (C) No. 27987/2019 SLP (C) No. 27881/2019, SLP (C) No. 2942/2020, SLP (C) No. 5902/2020, Diary No. 6803/2020, SLP (C) No. 5470/2020, SLP (C) No. 5589/2020, SLP (C) No. 431/2021 Diary No(s). 44/2021 (XV), SLP (C) No. 577-579/2021 and SLP (C) No(s). 619/2021
>
> Special Leave Petition (C) Diary No. 3533 of 2021 is taken up along with these matters, at the request of the petitioners therein.
>
> The hearing of these cases has been commenced and is part heard. But, since the hearing is likely to take some more time, we deem it appropriate to pass interim directions which will address the concerns of all parties in some measure.
>
> We propose to stay the impugned order on the following conditions:
>
> (a) The management/school may collect fees for the academic year 2019-2020 as well as 2020-2021 from the students, equivalent to fees amount notified for the academic year 2019-2020, in six monthly installments commencing from 5th March, 2021 and ending on 5th August, 2021.
>
> (b) The Management shall not debar any student from attending either online classes or physical classes on account of non-payment of fees, arrears/outstanding fees including the installments, referred to above, and shall not withhold the results of the examinations of any student on that account.

(c) Where the parents have difficulty in remitting the fee in terms of this interim order, it will be open to those parents to approach the school concerned by an individual representation and the management of the school will consider such representation on a case-to-case basis sympathetically.

(d) The above arrangement will not affect collection of fees for the academic year 2021-2022, which would be payable by the students as and when it becomes due and payable, and as notified by the management/school.

(e) In respect of the ensuing Board examinations for classes X and XII (to be conducted in 2021) the school management shall not withhold the name of any student/candidate on the ground of non-payment of the fee/arrears, if any, on obtaining undertaking of the concerned parent/student.

(f) The above arrangements would be subject to the outcome of these matters including the final directions to be given to the parties and without prejudice to the rights and contentions of the parties in these proceedings.

(g) We also direct the State of Rajasthan to ensure that all government outstanding dues towards unit cost payable to respective unaided schools are settled within one month from the today and, in any case, before 31st March, 2021.

Ordered accordingly.

Heard in part.

Hearing of the aforesaid cases, shall continue on 15th February, 2021."

83. Learned counsel appearing for the appellants had stated that if the Court were to make this interim arrangement absolute, the appellants would be satisfied with such a direction. However, as aforesaid, the respondents, namely, the State Government and the

parents have a different perception and have addressed us fully to oppose grant of any relief to the appellants.

84. We have heard Mr. Pallav Shishodia, Mr. Shyam Divan, learned senior counsel, Mr. Puneet Jain and Mr. Romy Chacko, learned counsel for the appellants, Dr. Manish Singhvi and Mr. Devadatt Kamat, learned senior counsel for the State of Rajasthan and Mr. Sunil Samdaria, in-person.

85. At the outset, in this judgment we consciously opt to limit our analysis to the challenge/grounds concerning the legality and justness of the order dated 28.10.2020 issued by the Director, Secondary Education concerning private unaided schools in the State of Rajasthan and as applicable to the academic year 2020-21 only. We do not wish to advert to or analyse any other issue raised by the parties and we may not be understood to have expressed any opinion either way in that regard.

86. Undeniably, an unprecedented situation has had evolved on account of complete lockdown due to pandemic. It had serious effect on the individuals, entrepreneurs, industries and the nation as a whole including in the matter of economy and purchasing

capacity of one and all. A large number of people have lost their jobs and livelihood as aftermath of such economic upheaval. The parents who were under severe stress and even unable to manage their day-to-day affairs and the basic need of their family made fervent representation to the school Management(s) across the State. A public discourse in that regard surfaced in the media which impelled the political dispensation to intervene. Thus, on the directions of the Chief Minister of the State of Rajasthan, the Department initially issued order dated 09.04.2020 merely to defer the collection of school fees which restriction was extended by subsequent order dated 07.07.2020.

87. The matter had reached the High Court and by way of interim arrangement, learned Single Judge of the High Court issued certain directions against which the parties approached the Division Bench of the High Court by way of intra-court appeals. During the pendency of intra-court appeals in deference to the observations of the court, the State Authority proceeded to issue further order on 28.10.2020, which, essentially is the subject matter of assail in these appeals.

88. The State cannot be heard to rest its argument to defend the impugned order dated 28.10.2020 as having been issued in light of benign hope expressed by the High Court. It could do so only if the law permitted the State Government to intervene on the subject of school fees of private unaided schools (minority or non-minority, as the case may be). Resultantly, what we need to examine in these appeals is whether order dated 28.10.2020 issued by the Director, Secondary Education can be sustained in law.

89. Although the stated order makes no reference to the source of power under which it had been issued, four different perspectives have been invoked by the State to justify the exercise of that power. First, it is competent to do so under Section 18 of the Act of 2016 itself. Second, being a policy decision, it could issue an executive direction to mitigate the concerns of the parents in exercise of power under Article 162 of the Constitution. Third, such power can be exercised by the State Government for mitigating the concerns of the parents and for capacity building of the stakeholders as one of the measures under the Act of 2005. Lastly, such direction could

be issued also in exercise of power under the Act of 2020 by the State Authorities.

90. We now proceed to test the correctness of the pleas taken by the State Government *in seriatim*.

91. The source of power derived from Section 18 of the Act of 2016 is a flimsy argument. Section 18 of the Act of 2016 reads thus:

> "**18. Power to issue directions.** - The State Government may issue to any school such general or special directions consistent with the provision of this Act and the rules made thereunder as in its opinion are necessary or expedient for carrying out the purposes of this Act or for giving effect to any of the provisions contained therein or in any rules or orders made thereunder and the management of the school shall comply with every such direction."

This provision does bestow power on the State Government to issue general or special directions to any school within the State. However, such direction must be consistent with the provisions of the Act of 2016 and the Rules framed thereunder. It cannot be in conflict with the mandate of the Act and the Rules. Additionally, such directions must be necessitated due to expediency for carrying out the purposes of the Act and the Rules or to give effect to the applicable provisions. If the direction issued by the State Government does not qualify these parameters, it must follow that

the same has been issued in excess of power bestowed under Section 18 of the Act of 2016.

92. After analysing the scheme of the Act of 2016, at least two aspects are amply clear. The first is that a firm mechanism has been specified under the Act of 2016 regarding determination of fee structure in the form of approval by the SLFC and, if required, adjudication by the DFRC and the Revision Committee. There is no express provision in the Act or Rules authorising the stated functionaries/authorities to modify the school fees once finalised in the manner provided by the Act of 2016. Whereas, the explicit mandate in the Act of 2016 is that, the fees so fixed by the concerned functionaries/authorities shall be binding on all concerned for three academic years. This is a clear indication of not altering the school fees unilaterally after it is fixed under the Act of 2016 in any manner for the specified period. If we may say so, it is in the nature of prohibition or a mandate to continue the same fee structure for at least three academic years, after it is fixed by the concerned authority under the Act. By its very nature, the direction given by the State Government is in conflict with the scheme of finalisation of fee structure under the Act of 2016 and

also the binding effect thereof for the specified period of three academic years on all concerned. Thus understood, the direction issued by the State Government in the form of order dated 28.10.2020 does not satisfy the twin tests of being consistent with the provisions of the Act; and also being necessary or expedient for carrying out the purposes of the Act, as the case may be.

93. Suffice it to observe that the order dated 28.10.2020 being in the nature of direction, has been issued in breach of the pre-conditions specified in Section 18 of the Act of 2016. As a matter of law, the State Government had no power, whatsoever, to interdict the fee structure much less which has been finalised and fixed by the concerned functionaries/authorities under the Act of 2016 itself before expiry of the statutory period as specified. As a result, Section 18 of the Act of 2016 will be of no avail to the respondents, in particular the State Government to justify the order dated 28.10.2020.

94. A *fortiori*, even the argument of the respondents relying upon the existence of executive power under Article 162 of the Constitution, ought to fail. It is well-established position that the

executive power of a State under Article 162 of the Constitution extends to the matters upon which the legislature of the State has competency to legislate and is not confined to matters over which legislation has already been passed. It is also well-settled that the State Government cannot go against the provisions of the Constitution or any law. The subject of determination of fee structure and whether it entails in profiteering, is already covered by the legislation in the form of the Act of 2016 and the Rules framed thereunder. It is not as if there is no enactment covering that subject or any incidental aspects thereof. The Act of 2016, which in itself is a self-contained code on the said subject, not only provides for the manner in which the concerned school ought to finalise its fee structure, but also declares that the fee so finalised either by consensus or through adjudication mode shall be binding on all concerned for a period of three academic years. In any case, determination of fees including reduction thereof is the exclusive prerogative of the management of the private unaided school. The State can provide independent mechanism only to regulate that decision of the school Management to the extent that it does not result in profiteering and commercialisation.

95. Viewed thus, reliance placed on ***Union of India vs. Moolchand Kharaiti Ram Trust***[34] will be of no avail. In that case, the hospitals were obligated to render free treatment in lieu of allotment of government land to them for earning no profit and held in trust for public good. The Court opined that there was no necessity of enacting a law and the policy formulated by the State Government in that regard cannot be disregarded.

96. In the present case, we need not dilate on the factum as to whether the Director, Secondary Education could have issued such a policy document in exercise of executive power under Article 162 of the Constitution, which power exclusively vests in the State Government alone. The fact remains that the direction issued in terms of impugned order dated 28.10.2020, on the face of it, collide with the dispensation specified in the Act of 2016 in the matter of determination of school fees and its binding effect on all concerned for a period of three academic years, without any exception. The fact that in the proceedings before the High Court the State Government had ratified the impugned order, does not take the matter any further. In that, there can be no *ex post facto*

34 (2018) 8 SCC 321 (paras 90 and 91)

ratification by the State Government in respect of subject, on which, it itself could not issue such direction in law.

97. Even the exposition in ***Rai Sahib Ram Jawaya Kapur & Ors. vs. State of Punjab***[35] and ***Secretary, A.P.D. Jain Pathshala & Ors. vs. Shivaji Bhagwat More & Ors.***[36] will not come to the aid of the respondents for the same reasons. Notably, not only the subject of finalisation of fee structure and the matters incidental thereto have been codified in the form of the Act of 2016, but also a law has been enacted to deal with the matters during the pandemic situation in the form of Central Act, namely, the Act of 2005 including the State legislation i.e., the Act of 2020. In fact, the State legislation deals with the subject of epidemic diseases and its management. Even those enactments do not vest any power in the State Government to issue direction with regard to commercial or economic aspects of matters between private parties with which the State has no direct causal connection, which we shall examine later at the appropriate place. In other words, the power of the State Government to deal with matters during the pandemic situation

35 AIR 1955 SC 549
36 (2011) 13 SCC 99

have already been delineated by the Parliament as well as the State legislature.

98. As such, it is not open to the State Government to issue directions in respect of commercial or economic aspects of legitimate subsisting contracts/transactions between two private parties with which the State has no direct causal connection, in the guise of management of pandemic situation or to provide "mitigation to one" of the two private parties "at the cost of the other". This is akin to – rob Peter to pay Paul. It is a different matter, if as a policy, the State Government takes the responsibility to subsidise the school fees of students of private unaided schools, but cannot arrogate power to itself much less under Article 162 of the Constitution to issue impugned directions (to school Management to collect reduced school fee for the concerned academic year). We have no hesitation in observing that the asservation of the State Government of existence of power to issue directions even in respect of economic aspects of legitimate subsisting contracts/transactions between two private parties, if accepted in respect of fee structure of private unaided schools, is fraught with undefined infinite risk and uncertainty for the State.

For, applying the same logic the State Government may have to assuage similar concerns in respect of other contractual matters or transactions between two private individuals in every aspect of life which may have bearing on right to life guaranteed under the Constitution. That would not only open pandora's box, but also push the State Government to entertain demands including to grant subsidy, from different quarters and sections of the society in the name of mitigating measures making it financially impossible and unwieldy for the State and eventually burden the honest tax payers - who also deserve similar indulgence. Selective intervention of the State in response to such demands may also suffer from the vice of discrimination and also likely to impinge upon the rights of private individual(s) — the supplier of goods or service provider, as the case may be. The State cannot exercise executive power under Article 162 of the Constitution to denude the person offering service(s) or goods of his just claim to get fair compensation/cost from the recipient of such service(s) or goods, whence the State has no direct causal relationship therewith.

99. It is one thing to say that the State may regulate the fee structure of private unaided schools to ensure that the school

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

100. Notably, the direction given in the impugned order to the school Management is to collect only specified percentage of annual

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

101. Reverting to the provisions of the Act of 2005, no doubt Section 72 thereof predicates that the provisions of the Act will have overriding effect on other laws for the time being in force or anything inconsistent in any instrument having effect by virtue of any law other than the Act of 2005. This provision, however, would come into effect only if it is to be held that the Statutory Authorities under the Act of 2005 have power to deal with the subject of school fee structure of private unaided schools.

102. For that, we may usefully refer to Section 23 of the Act of 2005 which provides for the contents of the plan for disaster management to be prepared for every State called the State Disaster Management Plan. Section 23 reads thus:

> "**23. State Plan.—** (1) There shall be a plan for disaster management for every State to be called the State Disaster Management Plan.
> (2) The State Plan shall be prepared by the State Executive Committee having regard to the guidelines laid down by the National Authority and after such consultation with local authorities, district authorities and the people's representatives as the State Executive Committee may deem fit.
>
> (3) The State Plan prepared by the State Executive Committee under sub-section (2) shall be approved by the State Authority.
>
> (4) The State Plan shall include,—
>
> (a) the vulnerability of different parts of the State to different forms of disasters;

(b) the measures to be adopted for prevention and mitigation of disasters;

(c) the manner in which the mitigation measures shall be integrated with the development plans and projects;

(d) the capacity-building and preparedness measures to be taken;

(e) the roles and responsibilities of each Department of the Government of the State in relation to the measures specified in clauses (b), (c) and (d) above;

(f) the roles and responsibilities of different Departments of the Government of the State in responding to any threatening disaster situation or disaster;

(5) The State Plan shall be reviewed and updated annually.

(6) Appropriate provisions shall be made by the State Government for financing for the measures to be carried out under the State Plan.

(7) Copies of the State Plan referred to in sub-sections (2) and (5) shall be made available to the Departments of the Government of the State and such Departments shall draw up their own plans in accordance with the State Plan."

103. Going by the scheme of the Act of 2005, the State Authority established under Section 14 known as State Disaster Management Authority is expected to formulate policies and plans for disaster management in the State. Indeed, such policies and plans may include mitigation[37] measures in respect of persons affected by disaster. The mitigation measures, however, are aimed merely for reducing the risk/impact or effects of a disaster or threatening disaster situation. Considering the sphere of functions of the State

37 Section 2(i) "mitigation" means measures aimed at reducing the risk, impact or effects of a disaster or threatening disaster situation;

Authority including the State Executive Committee or different Authorities established at concerned level within the State, there is not even a tittle of indication that in the name of mitigating measures, the disaster management plan may comprehend issue of direction in respect of economic aspects of legitimate subsisting contracts or transactions between two private individuals with which the State has no direct causal relationship, and especially when the determination of compensation/cost/fees is the prerogative of the supplier or manufacturer of the goods or service provider of the services. The scheme of the Act of 2005 obligates the State Authority to assuage the concerns of the persons arising from "direct impact" of the disaster and to take mitigation measures to minimise the impact of such disaster and for that purpose, resort of capacity-building[38] including of its own resources[39] to wit, manpower, services, materials and provisions as noted in Section 2(p), and preparedness[40] measures referred to in Section 2(m). It is

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38 Section 2(b) "capacity-building" includes—

(i) identification of existing resources and resources to be acquired or created;

(ii) acquiring or creating resources identified under sub-clause (i);

(iii) organisation and training of personnel and coordination of such training for effective management of disasters;

39 Section 2(p) "resources" includes manpower, services, materials and provisions;

40 Section 2(m) "preparedness" means the state of readiness to deal with a threatening disaster situation or disaster and the effects thereof;

not possible to countenance the persuasive argument of the respondents that expansive meaning be assigned to the provisions of the Act of 2005 so as to include power to reduce school fees of private unaided school albeit fixed under the Act of 2016 and which by law is to remain in force until academic year 2020-21.

104. As is noticed from the preamble of the Act of 2005, it is to provide for the effective management of disasters and for matters connected therewith or incidental thereto. It extends to the whole of India. The Act is to establish Statutory Committees at different level for carrying out the purposes for which the Act has been enacted. It is essentially for effective management of disasters and for matters connected therewith or incidental thereto. The expression "disaster" has been defined in Section 2(d) of the Act of 2005, which reads thus:

> "**2. Definitions.-** In this Act, unless the context otherwise requires,-
>
> xxx xxx xxx
>
> (d) "disaster" means a catastrophe, mishap, calamity or grave occurrence in any area, arising from natural or man made causes, or by accident or negligence which results in substantial loss of life or human suffering or damage to, and destruction of, property, or damage to, or degradation of, environment, and is of such a nature or magnitude as to be beyond the coping capacity of the community of the affected area;"

105. The Authorities created under the Act of 2005 are expected to deal with matters concerning the disaster management. The expression "disaster management" has been defined as follows:

> "**2. Definitions.-** In this Act, unless the context otherwise requires,-
>
> xxx xxx xxx
>
> (e) "disaster management" means a continuous and integrated process of planning, organising, coordinating and implementing measures which are necessary or expedient for —
>
> (i) prevention of danger or threat of any disaster;
>
> (ii) mitigation or reduction of risk of any disaster or its severity or consequences;
>
> (iii) capacity-building;
>
> (iv) preparedness to deal with any disaster;
>
> (v) prompt response to any threatening disaster situation or disaster;
>
> (vi) assessing the severity or magnitude of effects of any disaster;
>
> (vii) evacuation, rescue and relief;
>
> (viii) rehabilitation and reconstruction;"

106. It is also useful to advert to Section 18 of the Act of 2005 which provides for powers and functions of State Authority established under Section 14 consisting of Chief Minister of the State, who acts as Chairperson (*Ex officio)* and other Chairpersons of the respective Authorities. Section 18 reads thus:

"**18. Powers and functions of State Authority.—** (1) Subject to the provisions of this Act, a State Authority shall have the responsibility for laying down policies and plans for disaster management in the State.

(2) Without prejudice to the generality of provisions contained in sub-section (1), the State Authority may—

(a) lay down the State disaster management policy;

(b) approve the State Plan in accordance with the guidelines laid down by the National Authority;

(c) approve the disaster management plans prepared by the departments of the Government of the State;

(d) lay down guidelines to be followed by the departments of the Government of the State for the purposes of integration of measures for prevention of disasters and mitigation in their development plans and projects and provide necessary technical assistance therefor;

(e) coordinate the implementation of the State Plan;

(f) recommend provision of funds for mitigation and preparedness measures;

(g) review the development plans of the different departments of the State and ensure that prevention and mitigation measures are integrated therein;

(h) review the measures being taken for mitigation, capacity building and preparedness by the departments of the Government of the State and issue such guidelines as may be necessary.

(3) The Chairperson of the State Authority shall, in the case of emergency, have power to exercise all or any of the powers of the State Authority but the exercise of such powers shall be subject to *ex post facto* ratification of the State Authority."

107. The obligation of the State Government for the purpose of disaster management can be culled out from Section 38, which reads thus:

"**38. State Government to take measures.—** (1) Subject to the provisions of this Act, each State Government shall take all measures specified in the guidelines laid down by the National Authority and such further measures as it deems necessary or expedient, for the purpose of disaster management.

(2) The measures which the State Government may take under sub-section (1) include measures with respect to all or any of the following matters, namely:—

(a) coordination of actions of different departments of the Government of the State, the State Authority, District Authorities, local authority and other non-governmental organisations;

(b) cooperation and assistance in the disaster management to the National Authority and National Executive Committee, the State Authority and the State Executive Committee, and the District Authorities;

(c) cooperation with, and assistance to, the Ministries or Departments of the Government of India in disaster management, as requested by them or otherwise deemed appropriate by it;

(d) allocation of funds for measures for prevention of disaster, mitigation, capacity-building and preparedness by the departments of the Government of the State in accordance with the provisions of the State Plan and the District Plans;

(e) ensure that the integration of measures for prevention of disaster or mitigation by the departments of the Government of the State in their development plans and projects;

(f) integrate in the State development plan, measures to reduce or mitigate the vulnerability of different parts of the State to different disasters;

(g) ensure the preparation of disaster management plans by different departments of the State in accordance with the guidelines laid down by the National Authority and the State Authority;

(h) establishment of adequate warning systems up to the level of vulnerable communities;

(i) ensure that different departments of the Government of the State and the District Authorities take appropriate preparedness measures;

(j) ensure that in a threatening disaster situation or disaster, the resources of different departments of the Government of the State are made available to the National Executive Committee or the State Executive Committee or the District Authorities, as the case may be, for the purposes of effective response, rescue and relief in any threatening disaster situation or disaster;

(k) provide rehabilitation and reconstruction assistance to the victims of any disaster; and

(l) such other matters as it deems necessary or expedient for the purpose of securing effective implementation of provisions of this Act."

108. The corresponding responsibilities of departments of the State Government have been delineated in Section 39, which reads thus:

"**39. Responsibilities of departments of the State Government.—** It shall be the responsibility of every department of the Government of a State to—

(a) take measures necessary for prevention of disasters, mitigation, preparedness and capacity building in accordance with the guidelines laid down by the National Authority and the State Authority;

(b) integrate into its development plans and projects, the measures for prevention of disaster and mitigation;

(c) allocate funds for prevention of disaster, mitigation, capacity-building and preparedness;

(d) respond effectively and promptly to any threatening disaster situation or disaster in accordance with the State Plan, and in accordance with the guidelines or directions of the National Executive Committee and the State Executive Committee;

(e) review the enactments administered by it, its policies, rules and regulations with a view to incorporate therein

the provisions necessary for prevention of disasters, mitigation or preparedness;

(f) provide assistance, as required, by the National Executive Committee, the State Executive Committee and District Authorities, for—

(i) drawing up mitigation, preparedness and response plans, capacity-building, data collection and identification and training of personnel in relation to disaster management;

(ii) assessing the damage from any disaster;

(iii) carrying out rehabilitation and reconstruction;

(g) make provision for resources in consultation with the State Authority for the implementation of the District Plan by its authorities at the district level;

(h) make available its resources to the National Executive Committee or the State Executive Committee or the District Authorities for the purposes of responding promptly and effectively to any disaster in the State, including measures for—

(i) providing emergency communication with a vulnerable or affected area;

(ii) transporting personnel and relief goods to and from the affected area;

(iii) providing evacuation, rescue, temporary shelter or other immediate relief;

(iv) carrying out evacuation of persons or live-stock from an area of any threatening disaster situation or disaster;

(v) setting up temporary bridges, jetties and landing places;

(vi) providing drinking water, essential provisions, healthcare and services in an affected area;

(i) such other actions as may be necessary for disaster management."

109. The State Executive Committee constituted under the Act of 2005 vide Section 20 is obligated to discharge the functions delineated in Section 22 of the Act. The same reads thus:

> "**22. Functions of the State Executive Committee.—** (1) The State Executive Committee shall have the responsibility for implementing the National Plan and State Plan and act as the coordinating and monitoring body for management of disaster in the State.
>
> (2) Without prejudice to the generality of the provisions of sub-section (1), the State Executive Committee may—
>
> (a) coordinate and monitor the implementation of the National Policy, the National Plan and the State Plan;
>
> (b) examine the vulnerability of different parts of the State to different forms of disasters and specify measures to be taken for their prevention or mitigation;
>
> (c) lay down guidelines for preparation of disaster management plans by the departments of the Government of the State and the District Authorities;
>
> (d) monitor the implementation of disaster management plans prepared by the departments of the Government of the State and District Authorities;
>
> (e) monitor the implementation of the guidelines laid down by the State Authority for integrating of measures for prevention of disasters and mitigation by the departments in their development plans and projects;
>
> (f) evaluate preparedness at all governmental or non-governmental levels to respond to any threatening disaster situation or disaster and give directions, where necessary, for enhancing such preparedness;
>
> (g) coordinate response in the event of any threatening disaster situation or disaster;
>
> (h) give directions to any Department of the Government of the State or any other authority or body in the State regarding actions to be taken in response to any threatening disaster situation or disaster;

(i) promote general education, awareness and community training in regard to the forms of disasters to which different parts of the State are vulnerable and the measures that may be taken by such community to prevent the disaster, mitigate and respond to such disaster;

(j) advise, assist and coordinate the activities of the Departments of the Government of the State, District Authorities, statutory bodies and other governmental and non-governmental organisations engaged in disaster management;

(k) provide necessary technical assistance or give advice to District Authorities and local authorities for carrying out their functions effectively;

(l) advise the State Government regarding all financial matters in relation to disaster management;

(m) examine the construction, in any local area in the State and, if it is of the opinion that the standards laid for such construction for the prevention of disaster is not being or has not been followed, may direct the District Authority or the local authority, as the case may be, to take such action as may be necessary to secure compliance of such standards;

(n) provide information to the National Authority relating to different aspects of disaster management;

(o) lay down, review and update State level response plans and guidelines and ensure that the district level plans are prepared, reviewed and updated;

(p) ensure that communication systems are in order and the disaster management drills are carried out periodically;

(q) perform such other functions as may be assigned to it by the State Authority or as it may consider necessary."

110. Having regard to the purport of the Act of 2005, it is unfathomable as to how the State Authorities established under the stated Act can arrogate unto themselves power to issue directions to

private parties on economic aspects of legitimate subsisting contractual matters or transactions between them inter se. In any case, the impugned order has not been issued by the State Authority referred to in the Act of 2005. It is not enough to say that the same was issued under the directions of the Chief Minister of the State. For, the Chief Minister is only the Chairperson (*Ex officio*) of the State Disaster Management Authority established under Section 14 of the Act of 2005. Suffice it to observe that there is no provision in the Act of 2005 which concerns or governs the subject of interdicting the school fee structure fixed under the Act of 2016.

111. Section 72 of the Act of 2005 was pressed into service. However, that cannot be the basis to justify the impugned order dated 28.10.2020. Section 72 reads thus:

> "**72. Act to have overriding effect.—** The provisions of this Act, shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."

The Act of 2005 is not a panacea for all difficulties much less not concerning disaster management [Section 2(e)] as such. As noted earlier, there is no express provision in the Act of 2005 which empowers the Director, Secondary Education (or the State

Government) to issue order and directions in respect of school fee structure because of the pandemic situation.

112. For the same reasons, reliance placed on the provisions of the State legislation, namely, the Act of 2020 dealing with epidemic diseases will be of no avail to justify the impugned order dated 28.10.2020 issued by the Director, Secondary Education. The power to take special measures and specify regulation as to epidemic disease can be exercised by the State Government under Section 4 of the Act of 2020. Section 4 reads thus:

> "**4. Power to take special measures and specify regulations as to epidemic disease.—** (1) When at any time the Government is satisfied that the State or any part thereof is visited by or threatened with an outbreak of any epidemic disease, the Government may take such measures, as it deems necessary for the purpose, by notification in the Official Gazette, specify such temporary regulations or orders to be observed by the public or by any person or class of persons so as to prevent the outbreak of such epidemic disease or the spread thereof and require or empower District Collectors to exercise such powers and duties as may be specified in the said regulations or orders.
>
> (2) In particular and without prejudice to the generality of the foregoing provisions, the Government may take measures and specify regulations,-
>
> (a) to prohibit any usage or act which the Government considers sufficient to spread or transmit epidemic diseases from person to person in any gathering, celebration, worship or other such activities within the State;

> (b) to inspect the persons arriving in the State by air, rail, road or any other means or in quarantine or in isolation, as the case may be, in hospital, temporary accommodation, home or otherwise of persons suspected of being infected with any such disease by the officer authorized in the regulation or orders;
> (c) to seal State Borders for such period as may be deemed necessary;
> (d) to impose restrictions on the operation of public and private transport;
> (e) to prescribe social distancing norms or any other instructions for the public to observe that are considered necessary for public health and safety on account of the epidemic;
> (f) to restrict or prohibit congregation of persons in public places and religious institutions or places of worship;
> (g) to regulate or restrict the functioning of offices, Government and private and educational institutions in the State;
> (h) to impose prohibition or restrictions on the functioning of shops and commercial and other offices, establishments, factories, workshops and godowns;
> (i) to restrict duration of services in essential or emergency services such as banks, media, health care, food supply, electricity, water, fuel etc.; and
> (j) such other measures as may be necessary for the regulation and prevention of epidemic diseases as decided by the Government."

The measures enunciated in Section 4 of the Act of 2020 in no way deal with the "tariffs" of air, rail, road, hospital, temporary accommodation. It only enables the Authority to prohibit any usage or activities which the Government considers sufficient to spread or transmit epidemic diseases and for that purpose to inspect various places suspected of being infected with such diseases. Indeed, it

can regulate or restrict the functioning of offices, Government and private and educational institutions in the State. That, however, would be only in respect of manner of its use and its timings including to observe standard operating procedures to ensure that epidemic diseases do not transmit or spread on account of activities carried out therein. That power to regulate cannot be invoked to control the tariffs, fees or cost of goods and services and in particular economic aspects of contractual matters between two private parties or so to say school fees of private unaided schools. Accordingly, even the last point urged by the State to justify the impugned order dated 28.10.2020 falls to the ground.

113. A *priori,* it must follow that the Director, Secondary Education had no authority whatsoever to issue direction in respect of fee structure determined under the Act of 2016 including to reduce the same for the academic year 2020-21 in respect of private unaided schools. Having failed to trace the legitimate source of power under which the directions have been issued, as aforesaid, the respondents - State Authorities cannot fall back upon the benign hope expressed by the High Court to do the needful in the backdrop of the representations made by several parents about the difficulties

encountered by them due to pandemic situation. It would have been a different matter if the Director, Secondary Education had used his good offices to impress upon the school management(s) of the concerned school(s) to explore the mitigating measures/options on their own for the academic year 2020-21 and to give concession to their students to the extent possible at least in respect of unutilised facilities and savings on overheads by the school Management in that behalf or to give concession in the form of scholarship to deserving students. It is stated by the appellants that the school Management on their own had offered scholarship of 25 per cent of the annual fee to their students. In other words, the Director, Secondary Education could have mediated between the Association of the school Management and representatives of the Parent-Teachers Association for arriving at an amicable solution due to pandemic situation for the academic year 2020-21, on humanitarian grounds, but could not issue the impugned order when even the State had no power to issue the same.

114. Accordingly, the appellants are justified in assailing the order dated 28.10.2020 issued by the Director, Secondary Education and must succeed. However, that does not give licence to the appellants

to be rigid and not be sensitive about aftermath of pandemic. The school Management supposedly engaged in doing charitable activity of imparting education, is expected to be responsive and alive to that situation and take necessary remedial measures to mitigate the hardship suffered by the students and their parents. It is for the school Management to reschedule payment of school fee in such a way that not even a single student is left out or denied opportunity of pursuing his/her education, so as to effectuate the adage "live and let live".

115. In law, the school Management cannot be heard to collect fees in respect of activities and facilities which are, in fact, not provided to or availed by its students due to circumstances beyond their control. Demanding fees even in respect of overheads on such activities would be nothing short of indulging in profiteering and commercialisation. It is a well-known fact and judicial notice can also be taken that, due to complete lockdown the schools were not allowed to open for substantially long period during the academic year 2020-21. Resultantly, the school Management must have saved overheads and recurring cost on various items such as petrol/diesel, electricity, maintenance cost, water charges,

stationery charges, etc. Indeed, overheads and operational cost so saved would be nothing, but an amount undeservedly earned by the school without offering such facilities to the students during the relevant period**.** Being fee, the principle of *quid pro quo* must come into play. However, no accurate (factual) empirical data has been furnished by either side about the extent to which such saving has been or could have been made or benefit derived by the school Management. Without insisting for mathematical exactitude approach, we would assume that the school Management(s) must have saved around 15 per cent of the annual school fees fixed by the school/adjudicated by the Statutory Regulatory Authorities for the relevant period.

116. At this stage, we must advert to the stand taken by the learned counsel for the appellants that the appellants would be content with the interim order passed by this Court on 08.02.2021, being confirmed as a final order. This suggestion is indeed attractive, but that arrangement does not provision for the amounts saved by the school Management towards unspent overheads/expenses in respect of facilities not utilised or could not

be offered by the school Management to the students due to lockdown situation. As aforesaid, we would assume that at least 15 per cent of the annual school fees would be towards overheads/expenses saved by the school Management. *Arguendo*, this assumption is on the higher side than the actual savings by the school Management of private unaided schools, yet we are inclined to fix that percentage because the educational institutions are engaged in doing charitable activity of imparting and spreading education and not make money. That they must willingly and proactively do. Hence, collection of commensurate amount (15 per cent of the annual school fees for academic year 2020-2021), would be a case of profiteering and commercialisation by the school Management.

117. Ordinarily, we would have thought it appropriate to relegate the parties before the Regulatory Authority to refix the school fees for the academic year 2020-21 after taking into account all aspects of the matter including the advantage gained by the school Management due to unspent overheads/expenses in respect of facilities not availed by the students. However, that course can be

obviated by the arrangement that we propose to direct in terms of this judgment. To avoid multiplicity of proceedings (as school fee structure is linked to school — school wise) including uncertainty of legal processes by over 36,000 schools in determination of annual fee structure for the academic year 2020-21, as a one-time measure to do complete justice between the parties, we propose to issue following directions:

(i) The appellants (school Management of the concerned private unaided school) shall collect annual school fees from their students as fixed under the Act of 2016 for the academic year 2019-20, but by providing deduction of 15 per cent on that amount in lieu of unutilised facilities by the students during the relevant period of academic year 2020-21.

(ii) The amount so payable by the concerned students be paid in six equal monthly instalments before 05.08.2021 as noted in our order dated 08.02.2021.

(iii) Regardless of the above, it will be open to the appellants (concerned schools) to give further concession to their students or to evolve a different pattern for giving concession over and above those noted in clauses (i) and (ii) above.

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

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

(vi) The above arrangement will not affect collection of fees for the academic year 2021-22, as is payable by

the students of the concerned school as and when it becomes due and payable.

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

118. We are conscious of the fact that we are issuing general uniform direction of deduction of 15 per cent of the annual school fees in lieu of unutilised facilities/activities and not on the basis of actual data school-wise. As aforesaid, we have chosen to do so with a view to obviate avoidable litigation and to give finality to the issue of determination and collection of school fees for the academic year 2020-21, as a one-time measure which is the subject matter of these appeals. We have consciously limited the quantum of deduction from annual school fees to 15 per cent although the school Management had mentioned about its willingness to provide 25 per cent scholarship to deserving students, as we have

compelled the school Management to collect annual school fees for the academic year 2020-21 as was fixed for the academic year 2019-20 on which some of the school Management(s) could have legitimately asked for increase of at least 10 per cent in terms of Section 6(5) of the Act of 2016.

119. As we are disposing of the appeals in terms of this judgment, the contempt petition(s) filed before the High Court on the basis of impugned judgment also need to be disposed of. Accordingly, we deem it appropriate to dispose of all the contempt petition(s) initiated in reference to the impugned judgment, as the same is being overturned by this decision.

120. While parting, we must note that the respondent-State of Rajasthan has moved a formal application for recall/modification of direction given in clause (g) of the order of this Court dated 08.02.2021 — to ensure payment of outstanding dues towards unit cost payable to respective unaided schools within specified time. It is urged that due to complexity of facts, it was not possible to complete the process of computation before 31.03.2021. In the first place, there is no question of recall or modification of that direction.

We were conscious of the fact that that is not the subject matter of the appeals before this Court. Nevertheless, such direction was issued taking into account totality of the situation and to give relief to the private unaided schools by directing the State of Rajasthan to discharge its statutory obligation within specified time, of paying the outstanding dues of the concerned private unaided schools towards unit cost. Accordingly, we reiterate that direction but give further time to the State Government to complete the process of calculation and disbursal of the outstanding amount payable towards unit cost to the concerned unaided schools in the State of Rajasthan before the end of July 2021. The outstanding dues to be paid in terms of this direction would be obviously in respect of academic year upto 2020-21.

121. We must also note that we have not dilated on each of the reported decisions relied upon by the parties, as it is not necessary to do so for the view taken by us. For, there is nothing inconsistent in those decisions.

ORDER

In view of the above,

(a) we dispose of the **first set** of appeals challenging the validity of the Act of 2016 and the Rules framed thereunder with observations and the conclusion recorded in paragraph 52 above by reading down Sections 4, 7 and 10 of the Act and direct that henceforth the same be applied in conformity with the law declared in this judgment.

(b) The **second set** of appeals, however, are allowed in the above terms including mentioned in paragraph 117. The impugned judgment and order of the High Court dated 18.12.2020 is quashed and set aside. Instead, the intra-court appeals preferred by the appellants questioning the decision of the learned Single Judge and the writ petitions filed before the High Court to assail the impugned order dated 28.10.2020, shall stand disposed of in terms of this judgment.

(c) The contempt petition(s) pending before the High Court in connection with the subject matter of these appeals also stand disposed of. No order as to costs.

Pending applications, if any, also stand disposed of.

.....J.
(A.M. Khanwilkar)

.....J.
(Dinesh Maheshwari)

New Delhi;
May 3, 2021.