IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

:: **O R D E R** ::

(1) Central Academy Society Vs. Rajasthan Non-Government Educational Institutions Tribunal, Jaipur & Ors.
D.B.Civil Special Appeal (Writ) No. 344/2001

(2) Central Academy Society Vs. Rajasthan Non-Government Educational Institutions Tribunal, Jaipur & Ors.
D.B.Civil Special Appeal (Writ) No. 345/2001

(3) Central Academy Society Vs. Rajasthan Non-Government Educational Institutions Tribunal, Jaipur & Ors.
D.B.Civil Special Appeal (Writ) No. 346/2001

DATE OF ORDER :::: 31st May 2010.

PRESENT

HON'BLE MR.JUSTICE DINESH MAHESHWARI
HON'BLE DR.JUSTICE VINEET KOTHARI
HON'BLE MR.JUSTICE SANGEET LODHA

Dr. P.S. Bhati with
Mr. Nikhil Dungawat, for the appellants.
Mr. Hemant Dutt, for the respondents.
Mr. D.P. Sharma, intervener.

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Reportable **BY THE COURT:** (*Per Dinesh Maheshwari, J.*)

INTRODUCTORY

These three intra-court appeals have been placed before this Bench by the orders of Hon'ble the Chief Justice for a reference having been made by a Division Bench of this Court on the question of applicability of Section 18 of the Rajasthan Non-Government Educational Institutions Act, 1989 [hereinafter referred to as 'the Act/'the Act of 1989'] in the case of removal or termination of services of the employee of an unaided recognised educational institution. The Hon'ble Division Bench hearing these appeals was

of the view that there had been conflict of opinions in different Division Bench decisions on the question aforesaid and observed in its reference order dated 14.01.2008 as under:-

> "Heard learned counsel for the parties.
>
> Learned counsel for the appellants has relied upon a Division Bench judgment of this Court in Educational Society of Sophia High School & Ors. Vs. Raj. Non-Govt. Educational Ins. Tri. & Ors., reported in 2003 WLC (Raj.) UC Page 638. On the other hand, learned counsel for the private respondents relied upon another Division Bench judgment of this Court in Managing Committee Through Chairman (Brig.) Dy. G.O.C. Army School & Anr. Vs. Smt. Pushpa Sharma & 4 Ors., reported in 2006 (3) WLC (Raj.) Page 504 and Saint Meera Brotherhood Society Vs. State of Rajasthan & Others, reported in 2006 (1) WLC (Raj.) Page 677.
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> In our view, from the reading of the three judgments, there appears to be apparent conflict of opinion between the different Division Benches on the question about applicability of Section 18 in the matter of removal and termination of services of recognized but un-aided educational institutions. In our view, the matters are required to be and are referred to Hon'ble the Chief Justice for constitution of appropriate Larger Bench, to decide the question as to whether requirement of Section 18 is attracted even in case of un-aided recognized educational institutions."

THE RELEVANT PROVISIONS

In view of the questions calling for determination in this reference, appropriate it shall be to take note, at the outset, of Section 18 and the other relevant provisions as contained in the Act of 1989. Section 18 reads as under:-

> **18. Removal, dismissal or reduction in rank of employees -** Subject to any rules that may be made in this behalf, no employee of a recognized institution shall be removed, dismissed or reduced in rank unless he has been given by the management a reasonable opportunity of being heard against the action proposed to be taken :
>
> **Provided that no final order in this regard shall be passed unless prior approval of the Director of Education or an officer authorised by him in this behalf has been obtained :**
>
> **Provided further that this section shall not apply,-**
>
> (i) to a person who is dismissed or removed on the ground of conduct which led to his conviction on a criminal charge, or

> (ii) where it is not practicable or expedient to give that employee an opportunity of showing cause, **the consent of Director of Education has been obtained in writing before the action is taken**, or
>
> (iii) Where the managing committee is of unanimous opinion that the services of an employee can not be continued without prejudice to the interest of the institution, the services of such employee are terminated after giving him six months notice or salary in lieu thereof **and the consent of the Director of Education is obtained in writing**.
>
> (emphasis supplied)

The relevant definitions as contained in Section 2 of the Act of 1989 read as under:-

> (a) **"aid"** means any aid granted to a recognised educational institution by the State Government;
>
> (b) **"aided institution"** means a recognised institution which is receiving aid in the form of maintenance grant from the State Government;
>
> (c) **"Board"** means the Board of Secondary Education, Rajasthan or the Central Board of Secondary Education, Delhi and shall include the Council for the Indian School Certificate Examinations;
>
> (p) **"non-Government educational institution"** means any college, school, training institute or any other institution, by whatever name designated, established and run with the object of imparting education or preparing or training students for obtaining any certificate, degree, diploma or any academic distinction recognized by the State or Central Government or functioning for the educational, cultural or physical development of the people in the State and which is neither owned nor managed by the State or Central Government or by any University or local authority or other authority owned or controlled by the State or Central Government;
>
> (q) **"recognised institution"** means a non-Government educational institution affiliated to any University or recognised by the Board, Director of Education or any officer authorised by the State Government or the Director of Education in this behalf;

Section 3 of the Act of 1989 deals with recognition of institutions and provides as under:-

> **3. Recognition of institutions.** (1) Except in the case of institution affiliated to a University or recognised or to be recognised by the Board, the Competent Authority may, on an application made to it in the prescribed form and manner,

> recognise a non-Government educational institution on fulfillment of such terms and conditions as may be prescribed :

Section 19 provides for an appeal to the Tribunal constituted under Section 22 of Act in the following terms:-

> "**19. Appeal to the Tribunal –** (1) If a managing committee is aggrieved from the order of refusal made by the Director of Education under section 18, it may prefer an appeal to the Tribunal constituted under section 22 within ninety days of the date of receipt of such order.
> (2) An employee aggrieved from an order of the managing committee made under section 18, may prefer an appeal to the said Tribunal within ninety days of the date of receipt of such order.

Section 40 gives the provisions of the Act overriding effect over anything inconsistent in any instrument having effect by virtue of any law; and reads as under:-

> **40. Overriding effect of the Act –** The provisions of this Act shall have effect notwithstanding anything inconsistent contained in any instrument having effect by virtue of any law.

THE BACKGROUND FACTS

Before adverting to the questions calling for determination in this reference, appropriate it shall be to have a glimpse of the background facts relating to these appeals. These three intra-court appeals by the appellant Central Academy Society are directed against the orders dated 07.03.2001 whereby the learned Single Judge of this Court has dismissed the writ petitions filed by the petitioner-Society in challenge to the common order dated 11.10.1999 passed by the Rajasthan Non-Government Educational Institutions Tribunal, Jaipur [hereinafter referred to as 'the Tribunal'] in the appeals preferred by the private respondents-employees against the order dated 22.02.1997 whereby their services were sought to be terminated in the purported exercise of powers under clause (iii) of second proviso to Section 18 of the Act. The Tribunal

held that the provisions contained in Section 18 of the Act and so also Rule 39 of the Rules framed thereunder were mandatory in nature and the same having not been complied with, the orders of termination were bad in law.

In challenge to the order so passed by the Tribunal, it was urged by the employer Society in the writ petitions that the order of termination having been passed by unanimous decision of the Committee, it must be deemed to be an order of termination simplicitor within the meaning of clause (iii) of the proviso to Section 18 of the Act of 1989 and not by way of punishment; and therefore, the principles of natural justice were not required to be adhered to and no opportunity of hearing was required to be given before taking action under the said clause. A Circular issued by the Government on 09.07.1998 was also relied upon under which, it was envisaged that if the District Education Officer would not communicate in writing within 30 days his disapproval of the proposed termination of services of any employee, the approval may be deemed to have been accorded; and it was submitted that on the expiry of 30 days from the date of sending the decision to the Director, it must be deemed to have received the required approval.

In the impugned orders dated 07.03.2001, the learned Single Judge of this Court referred to the requirements of the aforesaid clause (iii) of the second proviso to Section 18 of the Act; and rejected the contention based on the alleged Circular of the Government for it being not in conformity with the statutory provisions. The learned Single Judge said,-

> "Neither any such contention has been raised nor any such suggestion has been made in Ex. 2, the Circular, issued by the State Govt. in that regard that any amendment in Sec. 18 has been made. The proviso (iii) leaves no room of

> doubt. Under the Act, for operation of proviso (iii) to Sec. 18, the conditions requisite are; first is that the managing committee is of unanimous opinion, second is that such opinion must relate to the fact that the employee cannot be continued without prejudice to the interest of the institution, third is that before such unanimous decision, can be given effect to, there must be fulfilled two pre-conditions: firstly that before the services are terminated either six months notice is to be served on the concerned employee or salary in lieu there of is paid; and secondly for such termination consent of the Director of Education is obtained in writing. No rule much less executive order can dispense with the requirement of the consent by director in writing by issuing instructions to envisage that non receipt of the decision by the Director in negative within 30 days of making of application would tantamount to be deemed consent of the Director to the proposed action of termination thus doing away with the statutory requirement of such consent to be in writing. The parent provision requires that before such order became effective such consent of the authority, who has been designated the function of according or withholding such consent, must speak for itself through an order in writing. A silence to speak cannot be equated with requirement of an order in writing. It is not within the domain of the delegated authority or executive authority of the State to deviate from that and make rule of its own in derogation of parent statute. Thus, even on admitted facts in absence of any written consent by the Director the order cannot come to life at all. In the present case, even the delegated authority namely the District Education Officer has not given his consent in writing. In view of this undisputed circumstance, termination order which even if fulfils all other conditions cannot be said to have ever come in operation and become effective."

The learned Single Judge thereafter referred to the requirement of 'unanimous opinion' of the Managing Committee and observed that this requirement could not be delegated to any smaller body for reaching to the conclusion as to whether continuance of employee was not possible without prejudice to the interest of the institution. The learned Single Judge observed further, with reference to the contents of the impugned termination order, that such had not been the opinion framed by the Committee concerned but was the opinion held only by the Secretary of the Committee. The learned Judge held that the order of termination could not be considered on its own to be a unanimous decision by the Managing Committee; and further that the impugned order was punitive in nature and not an order of termination simplicitor. That

being so, learned Single Judge said, unless the decision-making authority had given an opportunity of hearing to the delinquent, no punishment of dismissal could have been imposed. The learned Single Judge also referred to the antecedents where services of the incumbents were sought to be terminated earlier and such an action was not approved and rather, the Society was directed to hold an enquiry; and held that the impugned propositions as adopted by the Society were wholly arbitrary and unfair, being calculated at nullifying the effect of binding orders.

Aggrieved by the orders so passed by the learned Single Judge in dismissing the respective writ petitions, the appellant-Society has preferred these intra-court appeals. During the course of hearing of these appeals, the appellant-Society relied upon a Division Bench decision in the case of Educational Society of Sophia High School & Ors. Vs. Raj. Non-Govt. Educational Ins. Tri. & Ors.: 2003 WLC (Raj.) UC 638 to argue that the provisions of Section 18 ibid would not apply for itself being an unaided institution. On the other hand, the respondents relied upon the Division Bench decisions in (i) Saint Meera Brotherhood Society Vs. State of Rajasthan & Ors.: 2006 (1) WLC (Raj.) 677 and (ii) the Managing Committee through Chairman (Brid.) Dy. G.O.C., Army School & Anr. Vs. Smt. Pushpa Sharma & 4 Ors.: 2006 (3) WLC (Raj.) 504 to submit that the provisions of Section 18 are mandatory in nature and applicable to the appellant-Society as well.

As noticed, this reference came to be made when the Division Bench hearing these appeals found the views expressed in the aforesaid Division Bench decisions on the question about applicability of Section 18 of the Act in relation to an employee of an unaided recognised institution not in uniformity; and standing rather

in conflict. Hence, appropriate it shall now be to have a close look at the decisions said to be expressing different views.

THE CASE OF SOPHIA SCHOOL

The appellant had relied upon the decision of the Hon'ble Division Bench of this Court in the case of Educational Society of Sophia High School & Ors. Vs. Raj. Non-Govt. Educational Ins. Tri. & Ors.: 2003 WLC (Raj.) UC 638 [D.B. Civil Writ Petition No. 601/2002 – Decided on 07.04.2003] to submit that the requirements of Section 18 shall not apply in the case of an unaided recognised institution. In Sophia School's case, the respondent No.2 was serving as a teacher with the petitioner, a recognised private educational institution not receiving any aid from the Government; and her services were terminated by the order dated 19.02.2000 as a result of the proved misconduct in a departmental enquiry conducted by the petitioner. The respondent No.2 challenged the termination order before the Tribunal, inter alia, on the ground that before effecting such termination, prior approval of the Director Education was not obtained as required by the proviso to Section 18 ibid. Such a contention found favour with the Tribunal and solely on the ground that the petitioner had not obtained prior approval of the Director of Education or any Officer authorised by him in this behalf, the termination order was held to be void ab initio and was set aside.

In the writ petition preferred by the Institution, the Division Bench of this Court in its order dated 07.04.2003 found the question no more res integra while observing that in the case of T.M.A. Pai Foundation & Ors. Vs. State of Karnataka and Ors. (2002) 8 SCC 481 [hereinafter referred to as 'Pai Foundation' case], the Hon'ble Supreme Court had made it clear that in a recognised

private education institution not receiving any aid from the State, there has to be least interference by the State. The Division Bench was of opinion that in view of the law declared by the Hon'ble Supreme Court, the requirement in Section 18 ibid, of seeking prior approval of the Director, has to be read confined to the aided institutions only and not applicable to the unaided institution private institutions. The Division Bench said,-

> "6. The aforesaid question is now no more resintegra. In T.M.A. PAI Foundation & Ors. Vs. State of Karnataka and Ors. (2002) 8 SCC 481, the Supreme Court has made it clear that any recognised private education institution which is not receiving any aid from the State, there has to be least interference by the State in the managerial functions of such institution. Making specific reference to the requirement of obtaining prior approval before terminating services of an employee of an educational institution which is not receiving any aid from the state **in the context of disciplinary action** taken by any such institution, it was stated by the Court:
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> > "We see no reason why the management of a private unaided educational institution should seek the consent or approval of any governmental authority before taking any such action. In the ordinary relationship of master and servant, governed by the terms of a contract of employment, anyone who is guilty of breach of the terms can be proceeded against and appropriate relief can be sought. Normally, the aggrieved party would approach a court of law and seek redress."
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> 7. The Court found that in the case of private institution, the relationship between the management and the employees is contractual in nature. The Court also found that ordinarily requiring a teacher or a member of the Staff to go to Civil Court for the purpose of seeking redress. Education disputes between the management and the staff of educational institutions must be decided speedily, and without the excessive incurring of costs. It would, therefore, be appropriate that an Educational Tribunal in a State – the object being that the teacher should not suffer through the substantial costs that arise because of the location of the Tribunal. The Court also said that till a specialized tribunal is set up, the right of filing the appeal would lie before the District Judge or Additional District Judge as notified by the Government. The Court further declared:
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> > "It will not be necessary for the institution to get prior permission or ex post facto approval of a governmental authority while taking disciplinary action against a teacher or any other employee."
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> 8. In view of the aforesaid, **the Proviso to Section 18 has to be read in the light of aforesaid pronouncement of law and in a manner that it does not fall foul with the law**

> **declared by the apex court** on the subject in the light of constitutional provisions. Requirement to seek approval of the Director Education before taking disciplinary action against the teacher or its employee by any recognised institution has to be read in the light of the Supreme Court's decision in T.M.A. Pai Foundation Vs. State of Karnataka's case and **the proviso has to be confined to the private recognised educational institutions which are receiving aid from the State Government to sustain its constitutional validity. Such requirement of prior approval of Director Education before final disciplinary action is taken by way of removal, dismissal or reduction in rank of any employee amounts to interference in managerial function and such power cannot extend to such recognised private Educational Institution which do not receive any aid from the State**. We accordingly do so."
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> (emphasis supplied)

For the conclusions aforesaid, and after finding that in the State of Rajasthan, an Educational Tribunal had already been established and the appeal had been preferred before the said Tribunal, the Division Bench held that there was no impediment for the respondent No.2 in seeking remedy before the Tribunal against her dismissal order. The Division Bench, accordingly, allowed the writ petition, set aside the order passed by the Tribunal and directed the Tribunal to decide the appeal of respondent No.2 afresh in accordance with law while ignoring the issue about the absence of prior approval before making an order of dismissal/removal.

THE CASES OF SAINT MEERA BROTHERHOOD SOCIETY AND ARMY SCHOOL

In counter to the submissions made by the appellants, the respondent employees had relied upon two Division Bench decisions purportedly taking a view different than that expressed in Sophia School (supra); the one being the case of Saint Meera Brotherhood Society Vs. State of Rajasthan & Ors.: 2006 (1) WLC (Raj.) 677 [D.B. Civil Special Appeal (Writ) No. 69/2001 – Decided on 16.12.2005]. In this case, the services of the respondent No.5,

who was appointed as Teacher Gr.III with effect from 01.07.1981 on ad hoc basis by the appellant Society, were terminated by the order dated 15.05.1993 because of abolition of posts but without the prior approval of the Director, Education Department. The respondent No. 5 assailed the order of termination by filing an appeal before the Tribunal; and the Tribunal proceeded to allow the appeal by its order dated 13.05.1994 essentially on the ground that the Society had not complied with the mandatory provisions of Section 18 of the Act of 1989; and quashed the order of termination. The order passed by Tribunal was challenged by the Society by filing the writ petition, which was dismissed by the learned Single Judge with a short order that the impugned order, being a well-reasoned one, required no interference; and the Tribunal had rightly reached to the conclusion that there was non-compliance of the mandatory requirement of Section 18 ibid.

The order so passed in the writ petition was challenged in intra-court appeal on the grounds that the learned Single Judge dismissed the petition with a practically non-speaking order; and that because of abolition of posts, there was no necessity of prior approval of the authority. The Hon'ble Division Bench rejected the contention that the order passed by the learned Single Judge was a non-speaking one and further rejected the contention that because of abolition of posts, the approval by the authority was not required while observing that the provisions contained in Section 18 of the Act were mandatory in nature. The Division Bench said,-

> "7. A look at section 18 of the 1989 Act and the Rules made thereunder provide that no employee of the recognised Institution shall be removed, dismissed or reduced in rank unless he has been given a reasonable opportunity of being heard against the action proposed to be taken. As per proviso (iii), Section 18 shall not apply where the managing committee is of unanimous opinion that the service of an employee cannot be continued without

> prejudice to the interest of the institution, the services of such employee are terminated after giving him six months notice or salary in lieu thereof and the consent of the Director of Education is obtained in writing.
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> 8. Since the proviso (iii) of Section 18 of 1989 Act has not been followed in letter and spirit by the Institution in terminating the services of the employee, we do not find any infirmity in the impugned order of learned Single Judge. The Tribunal has proceeded within its parameters…..
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> … … …
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> 9. We find ourselves unable to accept the arguments of learned counsel for the appellant that because of abolition of posts the provisions contained in Section 18 of 1989 Act were not applicable. **We are of the view that the provisions contained in Section 18 of 1989 Act are mandatory** and it was incumbent on the appellant society to follow the same."
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> (emphasis supplied)

The other decision relied upon by the respondents had been in the Managing Committee through Chairman (Brid.) Dy. G.O.C., Army School & Anr. Vs. Smt. Pushpa Sharma & 4 Ors.: 2006 (3) WLC (Raj.) 504 [D.B. Civil Appeal (W) No. 62/2001 with connected cases – Decided on 31.03.2006]. In this decision, the Hon'ble Division Bench considered five appeals involving common questions together. The private respondents therein had been appointed as teacher with the appellant Society on different dates and were dismissed from service by different orders issued in the year 1997. The dismissal orders were challenged before the Tribunal; and the Tribunal, by a common order dated 06.06.2001, allowed the appeals and set aside the dismissal orders. The writ petitions preferred by the Society were dismissed by the learned Single Judge of this Court after finding non-compliance of Section 18 ibid.

In the intra-court appeals, it was contended that the Society was not covered by the provisions of the Act of 1989 for having not taken any recognition from the Government under Section 3

thereof; that Section 18 was not applicable because the action taken was not penal in nature; and that the rules and regulations framed by the society will hold the field and the orders of termination were required to be adjudged as per such rules and regulations. The Hon'ble Division Bench rejected the contention on inapplicability of the Act of 1989 for alleged want of taking recognition from the State Government with reference to the definitions contained in clauses (c), (p) and (q) of Section 2 of the Act; and also rejected the contention about the effect of the rules and regulations of the society with reference to Section 40 ibid, giving the provisions of the Act overriding effect.

The Hon'ble Division further rejected the contention urged on behalf of the Society that Section 18 of the Act would apply only in case of disciplinary action and not for simple termination with the observations that the main Section 18 and proviso (iii) would cover both type of cases; and that the said Section had been enacted with a view to check the arbitrary action of the management in removing, dismissing, reducing in rank and termination also. The Hon'ble Bench said,-

> "11. As regards further submission on applicability of Section 18 of the Act of 1989, only in case action is taken by way of disciplinary action and not simple termination, we are of the view that the main Section 18 and Proviso (iii) of the Act of 1989 will cover both type of cases and said Section has been enacted with a view to check the arbitrary action of the management in removing, dismissing, reducing in rank and termination also. Therefore, the provisions of reasonable opportunity/unanimous resolution of Managing Committee and approval/consent of the Director are made mandatory in the order to ensure the fairness of the action. Neither there is unanimous resolution of the Managing Committee no six months notice was given nor payment of six months salary in lieu of notice was given nor consent of the Director was taken. Therefore, even if the case is taken to be of termination, then also mandatory Proviso (iii) of Section 18 of the Act of 1989 has been violated. The said Section is applicable in respect of all the employees whose services have been dismissed by way of disciplinary action or simple termination."

WHETHER THERE IS CONFLICT OF OPINIONS

Though the Hon'ble Division Bench while making the instant reference inferred that the aforesaid two sets of decisions, Sophia School's case on one hand and Saint Meera Brotherhood Society and Army School's cases on the other, represent conflicting opinions but, after having taken into comprehension the fact situation in, and the ratio from, the aforesaid decisions, we are of the considered view that strictly speaking, they cannot be said to be expressing conflicting opinions as such. In the cases of Saint Meera Brotherhood Society and Army School, the question as to whether Section 18 or the requirements therein were applicable to unaided institution or not did not arise for consideration nor any such arguments appear to have been advanced that the concerned Societies were unaided institutions. In fact, after going through the decisions in Army School and Saint Meera Brotherhood Society, we are unable to find any reference to the fact as to whether the said education institutions were aided or unaided. Moreover, Saint Meera Brotherhood Society and Army School's cases were not relating to the disciplinary proceedings by the institution. In Saint Meera Brotherhood Society, the services of the employee were terminated because of the alleged abolition of posts. In Army School too, it was alleged that the dismissal was not punitive in nature and was not of disciplinary action. On the other hand, in Sophia School's case, the question was considered precisely with reference to the fact that the petitioner-Society was an unaided institution and it was held that for taking of disciplinary proceeding by such an unaided institution, the requirements of prior or post approval by the authorities of the Government would not apply per

the dictum of the Hon'ble Supreme Court in Pai Foundation.

In our considered view, even though in Saint Meera Brotherhood Society and Army School, the observations have been made in broad and general terms on the import and effect of Section 18 of the Act in relation to the termination of services of the employee of a recognised institution; but not in relation to the specific case of disciplinary proceedings by an unaided recognised institution. The decision in Sophia School being related to the specific case of disciplinary proceedings by an unaided institution, in our opinion, operates on such distinctive and particular class of cases irrespective of general observations in other two decisions, rendered later.

It is also noticed that in those later decisions i.e., Saint Meera Brotherhood Society and Army School, neither the decision in Sophia School nor that in Pai Foundation were referred at all. The reason for this omission essentially lies in the difference of the nature of the impugned action. The later decisions were not concerning disciplinary action, which was the subject matter in Sophia School.

Thus, strictly speaking, the two sets of decisions aforesaid cannot as such be construed as expressing discordant views. While the decisions in Army School and Saint Meera express the broad and general opinion on the mandatory nature of Section 18 in relation to all classes of institutions but relate to the cases other than those of disciplinary matters whereas Sophia School relates only to the disciplinary proceedings by an unaided institution and states the law as per the dictum of the Hon'ble Supreme Court in Pai Foundation. Hence, when it comes to the question of applicability of Section 18 in relation to the disciplinary proceedings

by an unaided institution, only the specific decision in Sophia School appears having relevance.

We do not propose to dilate further on this aspect of the matter because even when finding that the two sets of decisions cannot strictly be said to be in conflict, the question yet remains about the correctness of the view expressed in Sophia School and about the operation and effect of Section 18 of the Act qua an unaided institution particularly in the light of the principles propounded by the Hon'ble Supreme Court in Pai Foundation's case.

IMPORT AND EFFECT OF PAI FOUNDATION:

As noticed, in Sophia School, the learned Division Bench read down the provision of Section 18 in the light of the decision of the Hon'ble Supreme Court in Pai Foundation; and held that in view of the law so declared by the Hon'ble Supreme Court, the requirement of Section 18 cannot be made applicable to an unaided institution taking disciplinary action. Thus, imperative it is to refer to the relevant ratio from Pai Foundation.

It may be noticed that the decision in Pai Foundation 's case (supra) was delivered by a Bench of 11 Judges of the Hon'ble Supreme Court essentially when the questions were referred on the scope of right of minorities to establish and administer educational institutions of their choice under Article 30 (1) read with Article 29 (2) of the Constitution of India; and on the correctness of the decision in St. Stephen's College case: (1992) 1 SCC 558. During the course of hearing, the questions were formulated and recast by the Hon'ble Supreme Court and various questions broadly encompassing the issues as to whether there is a fundamental right

to set up educational institutions and to what extent the rights of private minority institution to administer could be regulated etc. were taken up for consideration. For the present purpose, suffice is to notice that the Hon'ble Supreme Court in Pai Foundation dealt with the issues not only on the rights of and permissible restrictions upon the minority institutions but as well on the rights in general of non-minorities to establish and administer aided or unaided institutions. It has been in relation to such issues that one of the pertinent questions came up before the Hon'ble Apex Court as to whether in the case of private institutions, could there be government regulations in relation to disciplinary matters; and if so, to what extent? The submissions, as noticed by the Hon'ble Court on such questions, had been as under:-

> "63. It was submitted that for maintaining the excellence of education, it was important that the teaching faculty and the members of the staff of any educational institution performed their duties in the manner in which it is required to be done, according to the rules or instructions. There have been cases of misconduct having been committed by the teachers and other members of the staff. The grievance of the institution is that whenever disciplinary action is sought to be taken in relation to such misconduct, the rules that are normally framed by the Government or the university are clearly loaded against the management. It was submitted that in some cases, the rules require the prior permission of the governmental authorities before the initiation of the disciplinary proceeding, while in other cases, subsequent permission is required before the imposition of penalties in the case of proven misconduct. While emphasizing the need for an independent authority to adjudicate upon the grievance of the employee or the management in the event of some punishment being imposed, it was submitted that there should be no role for the Government or the university to play in relation to the imposition of any penalty on the employee."

It was in the context of the aforesaid questions and submissions that the Hon'ble Supreme Court in its majority opinion held against governmental interference in disciplinary matters dealt with by unaided private institutions as under:-

"64. An educational institution is established only for the purpose of imparting education to the students. In such an institution, it is necessary for all to maintain discipline and abide by the rules and regulations that have been lawfully framed. The teachers are like foster parents who are required to look after, cultivate and guide the students in their pursuit of education. The teachers and the institution exist for the students and not *vice versa.* Once this principle is kept in mind, it must follow that it becomes imperative for the teaching and other staff of an educational institution to perform their duties properly, and for the benefit of the students. Where allegations of misconduct are made, it is imperative that a disciplinary enquiry is conducted, and that a decision is taken. In the case of a private institution, the relationship between the management and the employees is contractual in nature. A teacher, if the contract so provides, can be proceeded against, and appropriate disciplinary action can be taken if the misconduct of the teacher is proved. **Considering the nature of the duties and keeping the principle of natural justice in mind for the purposes of establishing misconduct and taking action thereon, it is imperative that a fair domestic enquiry is conducted. It is only on the basis of the result of the disciplinary enquiry that the management will be entitled to take appropriate action. We see no reason why the management of a private unaided educational institution should seek the consent or approval of any governmental authority before taking any such action.** In the ordinary relationship of master and servant, governed by the terms of a contract of employment, anyone who is guilty of breach of the terms can be proceeded against and appropriate relief can be sought. Normally, the aggrieved party would approach a court of law and seek redress. In the case of educational institutions, however, we are of the opinion that requiring a teacher or a member of the staff to go to a civil court for the purpose of seeking redress is not in the interest of general education. Disputes between the management and the staff of educational institutions must be decided speedily, and without the excessive incurring of costs. It would, therefore, be appropriate that an Educational Tribunal be set up in each district in a State, to enable the aggrieved teacher to file an appeal, unless there already exists such an Educational Tribunal in a State -- the object being that the teacher should not suffer through the substantial costs that arise because of the location of the Tribunal; if the tribunals are limited in number, they can hold circuit/camp sittings in different districts to achieve this objective. Till a specialized tribunal is set up, the right of filing the appeal would lie before the District Judge or Additional District Judge as notified by the Government. **It will not be necessary for the institution to get prior permission or *ex post facto* approval of a governmental authority while taking disciplinary action against a teacher or any other employee.** The State Government shall determine, in consultation with the High Court, the judicial forum in which an aggrieved teacher can file an appeal against the decision of the management concerning disciplinary action or termination of service".

(emphasis supplied)

The learned counsel for the parties have referred to the subsequent decisions in the cases of Islamic Academy: (2003) 6 SCC 697 and P.A.Inamdar: (2005) 6 SCC 537 wherein the Hon'ble Supreme Court dealt with different issues cropping up after Pai Foundation but then, essentially such issues had been on regulation of admissions, quota in admissions, regulating of fee structure etc. Of course, observations have been made in P.A.Inamdar that merely because Article 30 (1) has been enacted, the minority educational institutions do not become immune from operation of regulatory measures because the right to administer does not include the right to maladminister; and that once an educational institution is granted aid or aspires for recognition, the State may grant aid or recognition accompanied by certain restrictions or conditions which must be followed as essential to the grant of such aid or recognition, however, noticeable it is that in P.A.Inamdar itself, the Hon'ble 7-Judges' Bench made it clear that the said decision was not of expression of any opinion variant of Pai Foundation while saying,-

> "....At the very outset, we may state that our task is not to pronounce over own independent opinion on the several issues which arose for consideration in Pai Foundation. Even if we are inclined to disagree with any of the findings amounting to declaration of law by the majority in Pai Foundation we cannot: that being a pronouncement by an eleven-Judge Bench, we are bound by it. We cannot express dissent or disagreement howsoever we may be inclined to do so on any of the issues...."

Therefore, the law as declared by the Hon'ble Supreme Court in Pai Foundation remains binding, unaltered and unaffected by any other observation made in any other decision; and hence, for the purpose of the issue at hands, there does not appear any necessity to refer to other past and later decisions as referred by the learned counsel for the parties.

A bare reference to the above-quoted passage from Pai Foundation and particularly the highlighted portions leaves nothing to doubt or even to ponder that so far unaided private educational institution is concerned, as per the dictum of the Hon'ble Supreme Court, there cannot be any requirement to seek consent or approval of any governmental authority before taking any disciplinary action; and that it is not necessary for the institution to get prior permission or even ex post facto approval while taking disciplinary action against a teacher or any other employee. Thus, so far disciplinary actions are concerned, as per the law declared by the Hon'ble Supreme Court, the matters are to be left for the unaided institution itself to take appropriate action about; and for such an action, the unaided institution need not go on seeking approval whether prior or post from the governmental authorities.

READING DOWN OF SECTION 18:

As noticed, the Division Bench of this Court in Sophia School's case has said, with reference to the law declared by the Hon'ble Apex Court in Pai Foundation, that the proviso to Section 18 is required to be read down by confining it to the private recognised educational institutions which are receiving aid from the government to sustain its constitutional validity. The Hon'ble Division Bench has said that the requirement of prior approval of the Director Education before taking final disciplinary action by way of removal, dismissal or reduction in rank of any employee amounts to interference in managerial function and such power cannot be extended over the institutions not receiving any aid from the government.

Now, a look at Section 18 ibid makes it clear that the provisions contained therein make no distinction between aided and

unaided institution and have been made as if applicable in relation to all the recognised institutions.

Though, ordinarily, it is the literal rule of interpretation that is applied for interpretation of any statutory provision. The rule of literal interpretation is that in construing a written instrument, grammatical and ordinary sense of the words is adhered to unless that would lead to some anomaly, or some oddity, or some absurdity, or some repugnancy or inconsistency. We find the position in relation to the first proviso to Section 18 to be very much that of an anomaly where, if the same be read literally and applied indiscriminately to all the recognised institutions, it would fall foul with the dictum of Pai Foundation so far the unaided institutions are concerned for whom the Hon'ble Supreme Court has laid down in no uncertain terms that for the purpose of disciplinary action against the employees, such unaided institutions need not seek prior or even ex post facto approval from the any governmental authority. In the given situation and particularly in view of the law declared by the Hon'ble Supreme Court in Pai Foundation, we are inclined to agree with the course adopted by the learned Division Bench in Sophia School (supra) so as to read the provision as contained in the first proviso to Section 18 down as being applicable only to the aided institutions and not to the unaided institutions. The Hon'ble Supreme Court in the case of Arun Kumar & Ors. Vs. Union of India & Ors.: (2007) 1 SCC 732 has indicated the doctrine of reading down in the following:-

> "55. The doctrine of 'reading down' is well-known in the field of Constitutional Law. Colin Howard in his well-known work "Australian Federal Constitutional Law" states;
>
> > Reading down puts into operation the principle that so far as it is reasonably possible to do so, legislation should be construed as being within power. It has the practical effect that where an Act is expressed in

> language of a generality which makes it capable, if read literally, of applying to matters beyond the relevant legislative power, the Court will construe it in a more limited sense so as to keep it within power."

The position obtainable in relation to the proviso to Section 18 is that it is not as such beyond the legislative competence nor could be said to be directly against any constitutional provision but then, the same would be hit by the law declared by the Hon'ble Supreme Court in Pai Foundation (supra) if sought to be employed and applied in relation to an unaided private institution. Thus, in our opinion, reading down of the same as being applicable only to aided institution is the only way of its correct interpretation so as to keep it within the legislative competence and constitutionality. For the reasons foregoing, we approve the ratio in Sophia School's case (supra).

A submission has been made on behalf of the respondents that in the scheme of the Act of 1989, there is provided an appeal under Section 19 that could be taken recourse of by the managing committee in case of refusal made by the Director of the approval required under Section 18 and hence, for sufficient safeguard having been provided in the enactment against governmental interference, the proviso to Section 18 does not offend the dictum of Pai Foundation. The submission remains untenable so far disciplinary action by an unaided private educational institution is concerned. When such an institution need not seek prior or even ex post facto approval for its disciplinary action, the question of refusal or according of such approval does not arise at all.

However, we would hasten to make it clear that what has been observed above relates only to the disciplinary action by the unaided institution and not all and other actions, as discussed infra.

COMPREHENSIVE INTERPRETATION OF SECTION 18 QUA UNAIDED INSTITUTION:

Even when have concurred with the ratio in Sophia School in reading down of first proviso to Section 18 of the Act of 1989 as being confined only to aided institutions and not applicable to the unaided institutions, this does not completely answer the real question before us about applicability of the provisions contained in Section 18 ibid to the unaided institutions.

As noticed, Section 18 of the Act of 1989 in its principal provision ordains that no employee of a recognised institution shall be removed, dismissed, or reduced in rank unless he has been given by the management a reasonable opportunity of being heard against the action proposed to be taken. Then, Section 18 carries two provisos, the first one being of the requirement of obtaining prior approval in relation to removal, dismissal or reduction in rank. However, the second proviso to Section 18 is essentially of exception to the provisions preceding it. The second proviso says that this Section (i.e., Section 18) shall not apply in three eventualities: (i) when a person is dismissed or removed on the ground of conduct which led to his conviction on a criminal charge; (ii) where it is not practicable or expedient to give that employee an opportunity of showing cause and the consent of Director of Education has been obtained in writing before the action is taken; and (iii) where the managing committee is of unanimous opinion that the services of an employee cannot be continued without prejudice to the interest of the institution; and the services of such employee are terminated after giving him six months notice or salary in lieu thereof and the consent of the Director of Education is obtained in writing.

The three eventualities as referred in second proviso wherefor Section 18 would be inapplicable are clearly carving out exceptions to principal provision of Section 18; and after examining the scheme of the Section 18 as a whole and applying the dictum from Pai Foundation, even when we hold the first proviso inapplicable to the unaided institution in disciplinary action, the same cannot be said to be true for the second proviso too.

The second proviso is essentially an exception whereby, in the given eventualities, the principal provision of Section 18 is altogether ruled out of application. The principal provision of Section 18 is that no employee of a recognised institution shall be removed, dismissed or reduced in rank unless he has been given a reasonable opportunity of being heard by the management. This is on the very first principles of natural justice. Even when the Hon'ble Supreme Court in Pai Foundation has ruled against the requirement of obtaining prior or post approval of the governmental authorities by an unaided institution while taking disciplinary action, the Hon'ble Court has not ruled that the institution, whether aided or unaided, could otherwise obviate the necessity of extending a reasonable opportunity of hearing to the employee concerned while taking an action prejudicial to him in his service. Even in the case of an unaided institution, the requirements of principal provision of Section 18, of extending reasonable opportunity of hearing to the employee against the proposed action, remains mandatory. However, as per the second proviso, which is essentially carving out three exceptions, such a requirement of extending reasonable opportunity of hearing could be dispensed with in the given eventualities but then, only with the given conditions. The first one is when the person is dismissed or removed for his conviction on a

criminal charge. The second one, per clause (ii), is when it would be impracticable or inexpedient to give the employee an opportunity of showing cause. For this eventuality, the requirement of obtaining the consent of Director of Education does not, in our considered opinion, contradict the dictum of Pai Foundation. The provision itself being for the purpose of dispensing with the normal procedure of opportunity of hearing, its requirements are to be strictly adhered to.

Similarly, clause (iii) of second proviso is also of dispensing with the requirement of reasonable opportunity of hearing but here the managing committee has to form unanimous opinion that services of an employee cannot be continued without prejudice to the interest of the institution; and, upon such unanimous opinion, the services of such an employee can be terminated after giving him six months notice or salary and obtaining the consent of Director of Education. Here again, for the permissibility of dispensing with regular enquiry and opportunity of hearing, the requirements as stated are to be strictly complied with and cannot be ignored. The requirement of obtaining consent in this clause is also, in our opinion, not such a consent which may stand at contradiction to the dictum in Pai Foundation. Here, in clause (iii), the Institution is not taking disciplinary action but is dispensing with the services on a unanimous decision. The necessity of obtaining consent in this provision is also a mandatory one and cannot be avoided.

Thus, we find that even while the first proviso to Section 18 of the Act of 1989 would not apply in the disciplinary action by the unaided private educational institution, the other provisions of Section 18 are, without any doubt, applicable to all the institutions, aided or unaided.

Before concluding, we may point out that a decision by the learned Single Judge of this Court in the case of Managing Comimittee S.S. Jain Subodh Siksha Samiti, Jaipur & Anr. Vs. Rajendra Kumar Rao & Ors.: 2005(5) RLW 288 has been referred during the course of arguments. In this case, the learned Single Judge observed that the decision in Pai Foundation overrules clause (iii) of the second proviso to a limited extent that it would not be necessary for the unaided institution to obtain the consent of Director of Education but other mandates of this clause (iii) ought to be followed in letter and spirit. With respect, we are unable to endorse the first part of the views so stated in this decision. In our considered opinion, as stated supra, nothing contained in second proviso to Section 18 is hit by Pai Foundation. What is eclipsed by the ratio of Pai Foundation in relation to an unaided institution is only the first proviso to Section 18; and not the other provisions contained in Section 18 viz., the principal provision, and so also the second proviso. These other provisions of Section 18 do apply, as they are and in mandatory form, to unaided institution as well.

THE ANSWERS:

In view of what has been discussed above, our answer to this reference is that the first proviso to Section 18 of the Act of 1989 does not apply in relation to the disciplinary action by private unaided recognised institution but the other provisions of Section 18 including the second proviso do apply to such unaided private recognised educational institution too.

The record be now placed before the concerned bench for decision of the appeals on their merits.

MK **(SANGEET LODHA),J. (DR. VINEET KOTHARI),J. (DINESH MAHESHWARI),J.**