

M.M.DAS, J.

W.P.(C) NO.5030 OF 2009 (With Batch)(Decided on 27.06.2011)

**MANAGEMENT OF DAV PUBLIC
SCHOOL & ORS.**

.....Petitioners.

.Vrs.

STATE OF ORISSA & ANR.

..... Opp.Parties.

CONSTITUTION OF INDIA, 1950 – ART. 19(1) (g), 6.

For Petitioners - M/s. S.S.Das, R.Sahu, K.C.Mohapatra, A.Mishra,
G.Sinha, D.K.Panda, R.K.Kar, J.K.Khuntia,
B.Routray, D.K.Mohapatra, B.B.Routray,
D.Routray, S.Das, R.N.Misra-II, U.K.Mishra,
S.M.Mohapatra-1, B.Mohanty,
T.K.Patnaik, A.Patnaik, M.K.Sahoo, A.K.Mishra,
A.K.Mohapatra, S.K.Rath, .Pradhan, O.P.Mohanty,
Mrs.D.Mishra, S.Mohapatra,
S.Patnaik, A.K.Mohanty,
P.K.Dhal, P.Ranjan & M.K.Behera
(In all the cases)

For Opp.Parties - Addl. Govt. Advocate (for State)
M/s. J.Patnaik, Sr.Advocate
A.Rath, P.K.Sahoo, R.R.Mohanty, B.K.Nayak,
B.Mohanty, T.K.Pattanaik, A.Patnaik, R.P.Roy,
M.S.Rizivi, H.M.Dhal & B.S.Raiguru.
(In all the Cases)

M. M. DAS, J. All the aforesaid writ applications, except W.P. (C) Nos. 5030 and 5113 of 2009 which will be dealt with later, relate to enhancement of fees, such as tuition fees, admission fees, readmission fees etc. by the school authorities of various DAV Public Schools of the State. All these matters were heard together and common orders were passed in the record of W.P.(C) No. 5030 of 2009.

2. The disputes raised by the petitioners in various writ applications were widely canvassed from various angles and the managements of DAV Public Schools were also heard in extenso, the parties being represented by the respective counsel. All the DAV Public Schools in the State of Orissa are affiliated to the Central Board of Secondary Education (CBSE for short) and follow the syllabus of the said Board for imparting education to the students. Such schools were established in the State after obtaining no-objection certificates as per the resolution adopted by the Department of School and Mass Education, Government of Orissa (hereinafter referred to as "Resolution, 1996").

For better of this case, the said resolution in toto is quoted hereunder:-

“No.30720 – VISSME – M – 17/96 SME
GOVERNMENT OF ORISSA
DEPARTMENT OF SCHOOL AND MASS EDUCATION
RESOLUTION

The 23rd September 1996

State Government, with concern, have observed that there is rapid growth of Private Educational Institution imparting teaching in English and other Medium in the State which are affiliated to C.B.S.E. and I.C.S.E. in O.J.C. 2951/1993 the Hon'ble High Court have also observed that Sub-Section (5) of Section 6 of Orissa Education Act provides that while according recognition to a Private Educational Institution, the Prescribed authority shall have regard to matters like provision for suitable and adequate accommodation, location of the institution, its sanitary and healthy surroundings appointment of qualified teachers, provision for equipments and teaching materials and adequate financial support for the continuous and efficient maintenance of the institution. Besides, several allegations have been received of mal-administration and mismanagement of such institutions. It has thus become imperative to prescribe certain guidelines to be followed before according N.O.C./Recognition to such institution and to withdraw such N.O.C./Recognition in the event of violation of any of the instructions issued in this Resolution.

Any Organization/Individual seeking No Objection Certificates from the State Government to open any unaided school to be affiliated to the ICSE/CBSE shall be required to fulfil the terms and conditions and satisfy the requirements prescribed hereunder.

1. (A) Accommodation

- (i) The Institution must have at least 1 acre of land in the urban areas having population of 5 lakhs and 2 acres in other areas. The land need to be recorded in the name of the institution and the copy of the record of the rights to be furnished by the applicant at the time of applying for No Objection Certificates. The Institution must have suitable building having regard to number of pupils attending the school.
- (ii) There shall be adequate equipment and furniture.
- (iii) There shall be a well equipped library for use of the staff and pupils.
- (iv) There shall be sufficient and commodious rooms to accommodate all Sections and classes.
- (v) The school shall have also a Laboratory with adequate equipment and apparatus for the teaching of Science subjects.

- (B) Last date of application – Organization/individual seeking No Objection Certificates from the State Government should apply to the concerned Directors in the prescribed form latest by the 15th January of the year.
 - (C) All these applications received up to the 15th January shall be placed, by the Directors, Elementary Education and Secondary Education, before the High Power Committee to be appointed by the Government to consider each application in pursuance of the guidelines issued in this Resolution, Decision of the H.P.C. in the matter of issue of N.O.C./Recognition shall be final.
2. Recruitment and Service conditions of the staff –
- (i) Each school either affiliated or to be affiliated with the CBSE/ICSE shall frame Rules governing the recruitment and conditions of service of its employees in conformity with the Rules prescribed under the Orissa Education Act, 1969.
 - (ii) Service contract will be entered with each employee and the management of the School.
 - (iii) The appointing authority shall be competent to initiate any disciplinary action against any of the employees of the institution after following fair procedure. Appeal against such orders shall, however, lie with the Director, Elementary Education for the institution imparting Education up to Standard VII and with the Director, Secondary education for the institution imparting Education from Standard VIII and above. Where the institution imparts education from Standard I to X or XII, the Director, Secondary Education shall be the Appellate authority. The Government will be competent to review the orders passed by the appointing authority/disciplinary authority and the appellate authorities. The qualifications of Head of the institution and other teaching staff shall be the same as prescribed by the CBSE/ICSE.
3. Medium of instruction -
- Medium of instruction in these schools can be English or any other Indian Languages but Oriya as a subject shall be taught to all pupils in the institution compulsorily.
4. Fees –
- (i) Fees and charges should be commensurate with the facilities provided by the institution Fees should normally be charged under the heads prescribed by the Department of School and Mass Education. No capitation fee or voluntary donations for gaining admission in the school or for any other purpose should be charged/collected in the name of the school. In case of such malpractices the Government may take drastic action leading to withdrawal of No Objection Certificate of the school.
 - (ii) In case, a student leaves the school for such compulsion as transfer of parents or for health reason or in case of death of the student before completion of the session, pro rata return of quarterly/term/annual fees should be made.
 - (iii) The schools should consult parents through parents, representatives before revising the fees. The fee should not be revised during the mid-session.

5. Admission of students -

Admission in the school affiliated to the CBSE/ICSE shall be made without any distinction of religion, race, caste, creed, place of birth or any of them. As regards reservations for SC/ST students is concerned, it shall be governed by the law, Rules or instructions applicable to the State.

6. Miscellaneous –

- (i) The school seeking Board's affiliation/already affiliated to shall be open to inspection by the Inspection Committee deputed by the Department of School and Mass Education.
- (ii) The school shall supply information and returns called for by the Government within the prescribed time given for its furnishing to the authority concerned.
- (iii) The school shall maintain records of attendance of all students in Secondary/Senior Secondary classes for purposes of admission to the Board's examinations. The entries in these registers properly checked at the end of each session and signed. The attendance registers shall be open to inspection by the officers deputed by this department.
- (iii) The school shall arrange the medical check up of the students at least once a year and keep a proper record of the same.
- (iv) The Government may conduct an audit of the funds of the school as and when it thinks necessary to ensure that –
 - (a) The funds/fee collected by the school authorities are not diverted;
 - (b) The staff is paid salaries at par with the salaries of the State Government; and
 - (c) Any other financial irregularity.

7. Withdrawal of No Objection Certificates –

- (A) The H.P.C. shall be competent to review the N.O.C. / Recognition issued in favour of any institution and shall be competent to withdraw the same if it is satisfied that the terms and conditions as stated above for the purpose are violated.
- (B) Proceedings for withdrawal of recognition/N.O.C. shall be initiated at the level of Government in case the schools are found guilty of any of the followings after reasonable notices and refer the same to the H.P.C. for consideration :-
 - (i) Not paying salaries and allowances to teachers and ; other employees, at least at par with the employees of State Government.
 - (ii) Financial irregularities including channeling of funds for purpose other than those provided for in the bye-laws of ICSE/CBSE.

- (iii) Engagement in activities prejudicial to the interest of the State, including or promoting feelings of disloyalty or disaffection against the Government established by law.
 - (iv) Encouraging or tolerating disharmony/hatred between different Sections of the Society;
 - (v) Non-fulfillment of conditions laid down regarding deficiencies to be removed, even after due notice.
 - (vi) Disregard of rules and conditions of affiliation even after receiving warning letters.
 - (vii) Hindrance in the smooth functioning of the school on account of dispute between rivalries within the school management.
 - (viii) Absence of approved terms and conditions of service, or frequent dismissal of teachers from service.
 - (ix) Poor academic performance of the school for three consecutive years is not being able to keep at least 50 per cent of passes of the general pass percentage.
 - (x) Non-availability of proper equipment/space/staff for teaching a particular subject.
 - (xi) Any other misconduct in connection with the admissions/examinations/any other area which in the opinion of the Government warrants immediate de-recognition of the school.
- (C) Adequate time and opportunity be provided to the Management of the school served with a "Show Cause Notice", up to a maximum of six months for adequate compliance/removal of defects failing which the H.P.C. may withdraw the No Objection Certificate issued in its favour and also derecognize the school. In such an event the CBSE or the ICSE, as the case may be, shall be recommended by the Government to withdraw the affiliation of the concerned school.
8. Appeal -
- Any individual/organization not satisfied with the decision of H.P.C. may prefer on appeal before the Minister, School and Mass Education.
9. The N.O.C. issued in favour of any school shall always be subject to the terms and conditions prescribed in this Resolution.
10. All schools who have been issued N.O.C. shall fulfil the terms and conditions provided herein before and satisfy the requirements prescribed in this Resolution within period of six months from the date of issue of this Resolution failing which proceedings for withdrawal of N.O.C./recognition shall be initiated by the Government."

3. The Government in its School and Mass Education Department issued a letter to the Director of Secondary Education, Orissa and the Director, Elementary Education, Orissa under the subject enhancement of tuition fees by the school authorities of the private English medium schools in the State from the academic session 2009 – 10 intimating the said Directors, drawing reference to the department letter dated 24.01.2009 on the said subject and that the said department has received the required information, as called for from 25 school authorities out of 210 private English medium schools and in the meantime, the model code and conduct for ensuing general Lok Sabha and State Assembly Election is in force. Pending receipt of permission from the Chief Electoral Officer, Orissa, the school authorities may be advised for the present to admit the students on payment of fees at the last year rate. It was also intimated to the schools that final decision of the Government will be communicated in due course and in case of hike in the fee structure is considered, the same will be given effect to from the academic session 2009 – 10. Such letter was issued on 21.03.2009 (Annexure – 7 in W.P.(C) No. 5113 of 2009). Thereafter, on 27.03.2009 again the said Directors were intimated by the department that the managing committees of the schools were instructed to furnish the point-wise information as per the provision of School and Mass Education Department resolution dated 23.09.1996 (already quoted above). Out of 211 schools, information was received from about only 25 schools within the stipulated date. Taking the said information into consideration, the Government has decided to increase the fee structure of private managed English medium schools in the State provisionally up to 25% over the last year tuition fees, only for those schools which were paying 5th Pay Commission scale and are going to pay 6th Pay Commission scale to the staff. Similarly, development fees should not be increased beyond 15%. The Directors were requested to communicate the above decisions of the Government, so that the admission process for the academic session 2009 – 10 will take place. These letters have been challenged by the local managing committees of two of the DAV Public Schools, i.e., the Management of DAV Public School, Unit – 8, Nayapalli, Bhubaneswar and the Management of DAV Public School, Chandrasekharapur, Bhubaneswar in W.P. (C) Nos. 5113 and 5030 of 2009, simultaneously praying for a direction to implement the decision taken by the said managing committees with regard to fees structure, as fixed by the managing committees of the said schools in consultation with the representative of the parents and teachers of the respective schools. In the other batch of writ applications, the guardians/parents of the students of the respective schools, have challenged the decision of the managing committees of the respective schools in hiking the fees including the tuition fees, admission fees, readmission fees etc.

4. The writ applications were heard on various occasions and the learned counsel for the respective parties in course of hearing, raised various questions of law with regard to the legality or otherwise of the hiking of fees as well as the jurisdiction of the local managing committees of the respective schools to take such decisions inasmuch as the validity of the constitution of such local managing committees.

5. Upon considering the rival submissions made by the learned counsel for the respective parties, it is felt appropriate to note such contentions point-wise.

Before doing so, be it stated here that number of writ applications have been filed by the parents/guardians of the students of various private un-aided schools in the State, challenging the action of the school authorities in hiking the fees of the students on the allegations of unilaterality and in a manner, which can be termed as arbitrary and

unreasonable, having no nexus with the facilities provided by the institutions to the students and such challenges can be termed as mind boggling.

6. Mr. B. Routray, learned senior counsel appearing for the petitioners/parents in some of the writ applications led the argument on behalf of the petitioners in all the cases being associated by the respective counsel in the said writ applications. He vehemently urged the following points:-

- (I) As per the CBSE guidelines where the State law applies, the managing committees of the respective schools are to be constituted in accordance with law of the State, which, in the instant case, is the Orissa Education Act ;
- (II) the respective managing committee of the schools have not been constituted in accordance with the Orissa Education Act ;
- (III) even otherwise, the CBSE guidelines prescribe that a member of the local managing committee cannot remain as the member for more than two consecutive terms and if examined, it would be found that the local managing committees of the concerned schools, have been constituted illegally where some of the members have continued for more than two terms and, therefore, such committees are not also formed in accordance with the CBSE guidelines;
- (IV) in view of the above, the decision taken by such local managing committees of the schools for hiking the fees of the students having been taken by illegally constituted local managing committees, are unsustainable; and
- (V) the fee hike as prescribed by the local managing committees are not in accordance with law, as it does not commensurate with the provisions and facilities made for the students.

7. While submitting thus, Mr. Routray also supported the case of the management of the two schools in W.P.(C) Nos. 5030 and 5113 of 2009 with regard to the unreasonableness of the decision of the Government in uniformly prescribing provisional fee hike for all the English medium schools in the State in the aforesaid two letters dated 21.03.2009 and 27.03.2009, which have been impugned in W.P.(C) Nos. 5113 and 5030 of 2009. In addition to the above questions, Mr. Routray also raised a question that after coming into operation of the Right of Children to Free and Compulsory Education Act, 2009, the DAV Public Schools will be governed by the said Act.

8. Mr. J. Patnaik, learned senior counsel appearing for the management of the DAV Public School, Chandrasekhar, Bhubaneswar as well as the Regional Director, DAV Public Schools, Orissa, on the contrary, contended that the audited balance-sheet of the school has been produced before this Court, which would show the necessity for hiking the fees. Such fees hike was made in consultation with the representative of the parents. The local managing committees of the schools have been validly constituted in accordance with the CBSE guideline and the Orissa Education Act (for short "the Act") or the Right of Children to Free and Compulsory Education Act, 2009, (for short 'the Act, 2009') has no application to the DAV Public Schools in the State. He, therefore, submitted that unless the writ applications challenging the fees hike are dismissed, quality education cannot be imparted by the schools and the staff members will also be deprived of getting salary as per the prescription of the 5th and 6th Pay Commission.

9. To appreciate the above contentions of the learned counsel for the respective parties, reference to resolution dated 23.09.1996, as quoted above, the CBSE guidelines, the Orissa Education Act and the Right of Children to Free and Compulsory Education Act, 2009 are necessary. Also to appreciate the contention raised on behalf of the petitioners that some of the members in various schools have continued for more than two terms in the managing committees, the resolution books of the concerned schools were called for by this Court and perused.

Applicability of Orissa Education Act to un-aided private educational institutions imparting education up to Class – X or Class XII in relation to constitution and reconstitution of the managing committees of such schools, more specifically the schools affiliated to CBSE/ICSE.

10. The Resolution, 1996 of the School and Mass Education Department referred to above, prescribed the guideline following the observation of this Court in O.J.C. No. 2951 of 1993. Sub-sections (3) and (6) of Section – 5 of the Act having prescribed that while according permission for establishment of a private educational institution, the prescribed authority shall have regard to matters like needs of the local area, provisions for suitable and adequate accommodation, location of the institution, its sanitary and healthy surroundings, appointment of qualified teachers, provision for equipment and teaching materials and adequate financial support for the continuous and efficient maintenance of the institution. In the same guideline, in the Resolution, 1996, it was prescribed that before according No Objection Certificate/recommendation the said guidelines are to be followed by the organization/individual seeking No Objection Certificate from the State Government to open any un-aided school to be affiliated to ICSE/CBSE.

11. Section – 5 of the Act provides for grant of permission for establishment of educational institution and prescribes that no such institution, which requires recognition, shall be established except in accordance with the provisions of the Act and Rules made there under. Applications made under the said section, are to be scrutinized by the prescribed authority and if found complete in all respect and made in conformity with the Act and the Rules, shall be considered by such prescribed authority, who may make such enquiry, as he may deem necessary and thereafter, shall make a report in respect of such application with his recommendation, which shall be placed before the committee constituted in that behalf by the State Government. After obtaining such permission, recognition is required to be obtained under section 6 of the Act, which provides in sub-section (2) thereof that no private educational institution shall be eligible for recognition unless it has been established with prior permission under the Act.

Section – 6 envisages the conditions for recognition and Section – 6 – B deals with withdrawal of recognition. Constitution of the managing committee is provided under section 7 of the Act. “Private educational institution has been defined in Section 3 (o) meaning any educational institution, which is not established and managed by the Government of Orissa, the Union Government or the Government of any other State. The DAV Public Schools in question come under this definition.

12. An attempt was made by Mr. Jagannath Patnaik, learned senior counsel appearing for the school authorities that the schools being affiliated to the CBSE and some of the schools imparting education up to higher secondary class, do not come under the definition of higher secondary school as per the Act, which defines higher secondary school to mean an educational institution imparting instructions in higher secondary courses, as defined in the Orissa Higher Secondary Education Act, 19 of 1982 and may have standards or Classes – VIII, IX and X attached. In the said Orissa Higher Secondary Education Act, 1982, higher secondary school has been defined as an educational institution preparing candidates for the examination of the Council and recognized as such by the council, but does not include for the purpose of the said Act and regulation made thereunder, the part of institution, which prepares candidates for examinations other than higher secondary examination and council in the said Act has been defined as Council of Higher Secondary Education constituted under section 3 of the said Act. He, therefore, submitted that since the DAV Public schools imparting higher secondary education, are not affiliated to the council of Higher Secondary Education, Orissa, they do not come under the said Act.

13. With regard to the DAV Public schools imparting education up to Class – X, it was the submission of Mr. Patnaik that high school has been defined under the Act to mean an educational institution imparting instruction in standard or Classes – VIII to X leading to the High School Certificate Examination and may have standards of all Classes of upper primary school attached to it. According to Mr. Patnaik, High School Certificate Examination is conducted by the Board of Secondary Education, Orissa and the DAV Public schools being affiliated to the CBSE, do not come under the definition of High School. Therefore, the Act cannot be made applicable to such D.A.V. Public Schools.

14. The contention of Mr. Routray in this regard is acceptable, who submitted that private educational institution as has been defined in the Act engulfs within its fold all privately managed educational institutions, be it a High School or Higher Secondary School and Section – 5 of the Act specifically provides that no such private educational institution, which requires recognition, shall be established without obtaining permission from the prescribed authority having been allowed by the committee constituted in this behalf by the State Government. Mr. Routray drew the attention of this Court to the definition clause in Rule – 2 (f-1) of the Orissa Education (Establishment, Recognition and Management of Private High Schools) Rules, 1991, which defines “high school” to “mean a school preparing candidates for the High School Certificate Examination conducted by the Board or an equivalent examination conducted by the CBSE or the ICSE established by the Union Government or”. He further drew the attention of this Court to the definition clause where Private Higher Secondary School as defined in Rule – 2 (k) of the Orissa Education (Establishment, Recognition and Management of Private Junior Colleges/Higher Secondary schools) Rules, 1991, which defines private higher secondary school to mean any higher secondary school, which is not established and maintained by the Government of Orissa, the Union Government or the Government of any other State. He, therefore, submitted that the DAV Public schools either imparting education up to Class – X or to higher secondary level, come under the definition given in the aforesaid rules as well as the definition of a private educational institution given in the Act.

15. On considering the above, this Court is of the view that the DAV Public schools in question are admittedly established after obtaining No Objection Certificate, pursuant to the resolution referred to above. Therefore, it would be apt to conclude that the said schools are governed by the Orissa Education Act. Hence, the managing committee of the respective schools were required to be constituted in accordance with the provisions of Orissa Education Act and the Rules made therein applicable to the respective schools, be it a high school or higher secondary school.

16. With regard to the School Management Committee, the CBSE affiliation Bye-Law provides thus:-

“6. School Management Committee

Subject to relevant provision in the Education Act of the State/U.T. concerned, every affiliated school except schools run directly by the Education Department of the Government of the State/U.T. should have a scheme of management approved by the Board. It should also have a School Managing Committee as laid down under sections 20 (1), (2), (3) and 21.”

(emphasis supplied)

17. Since this Court has come to the conclusion that the Orissa Education Act is applicable to the DAV Public schools, which are private educational institutions affiliated to the CBSE, the managing committees, as already stated, were to be constituted in accordance with the Orissa Education Act and not as per the affiliation Bye-Law of the CBSE. This answers point Nos. (I) and (II) framed earlier.

18. The next question framed as point No. (III) becomes redundant, in view of my above conclusion. However, on perusal of the resolution books of some of the DAV Public schools, I have also found that some of the members have continued repeatedly for much more than four terms in the local managing committees, which is also contrary to the Bye-Laws framed by the CBSE, but has no relevance, as it is already found that the Orissa Education Act is applicable and the managing committees were to be framed under the provisions of the said Act and the Rules framed there under. The fees hike, which is impugned in most of the writ applications by the parents/ guardians of the students on different DAV Public schools having been made by local managing committees constituted contrary to law, therefore cannot be sustained. Inasmuch as no reason has been assigned for hiking such fee except stating in the pleadings and affidavits filed before me that such fee was hiked to meet the salary component of the staff members, who were required to be paid as per the 6th Pay Commission report.

19. In this respect, the Resolution, 1996 of School and Mass Education Department may also be referred, which prescribed in Clause – 4 thereof that fees and charges should be commensurate with the facility provided by the institution. It also provides that fees should normally be charged under the heads prescribed by the said department. It prohibited collection of capitation fees or voluntary donations for gaining admission in the school or for any other purpose. It also envisages that in case of such mal-practice being found, the Government may take drastic action leading to withdrawal of No Objection Certificate of the school.

20. The challenge to the letters of the Government in WP.(C) No. 5030 of 2009 and 5113 of 2009 provisionally hiking the fees by 25% over the last year tuition fees by English medium schools, which were paying 5th Pay Commission Scale and are going to pay 6th Pay Commission to the staff members and increasing development fees to an extent of 15%, appears to have been made by the Government as a stop-gap arrangement until a final decision is taken. It further appears that the Government for examining the proposed fee hikes called for reports from 210 private English medium schools, but received reports from only 25 schools. Nothing is brought to this Court nor stated in the counter affidavit filed on behalf of the State in W.P. (C) No. 5030 of 2009, as to on what basis such provisional fees hike was made neither by the Government nor as to in what manner the same is in consonance with the observations of the Supreme Court in various decisions to be referred to subsequently. The said decision of the Government in the impugned letters being unreasonable, arbitrary and ex-facie without any basis, are unsustainable.

21. Before advertizing further, it is worth-while to note that the exercise of determining fee structure is, therefore, obviously a complex one. On the one hand, the school has to be conscious of the fact that it has to be very reasonable and it cannot and should not change the parent more than what is absolutely essential and, on the other hand, it has to meet the variety of expenditure on different activities, tasks and programmes as illustrated above, so that education of high quality and for all round development of the children is imparted.

22. Mr. Patnaik in support of his contention submitted that a private un-aided educational institution will have the right to constitute its own Governing Body and its autonomy should not be tinkered with by imposing unreasonable restrictions inasmuch as no rigid fee structure should also be imposed, relied upon the Constitution Bench decision in the case of **T.M.A. Pai Foundation and others v. State of Karnataka and others**, A.I.R. 2003 SC 355.

23. A perusal of the said decision shows that the Supreme Court was reconsidering its earlier decision in the case of **Unikrishnan J.P. and others v. State of Andhra Pradesh and others** 1993 (1) SCC 645, which was overruled. In paragraphs – 53 and 54 of the judgment in the case of T.M.A. Pai (Supra), it was observed as follows:-

“53. With regard to the core components of the rights under Articles 19 and 26 (a), it must be held that while the State has the right to prescribe qualifications necessary for admission, private unaided colleges have the right to admit students of their choice, subject to an objective and rational procedure of selection and the compliance of conditions, if any, requiring admission of a small percentage of students belonging to weaker sections of the society by granting them freeships or scholarships, if not granted by the Government. Furthermore, in setting up a reasonable fee structure, the element of profiteering is not as yet accepted in Indian conditions. The fee structure must take into consideration the need to generate funds to be utilized for the betterment and growth of the educational institution, the betterment of education in that institution and to provide facilities necessary for the benefit of the students. In any event, a private institution will have the right to constitute its own governing body, for which qualifications may be prescribed by the

State or the concerned university. It will, however, be objectionable if the State retains the power to nominate specific individuals on governing bodies. Nomination by the State, which could be on a political basis, will be an inhibiting factor for private enterprise to embark upon the occupation of establishing and administering educational institutions. For the same reasons, nomination of teachers either directly by the department or through a service commission will be an unreasonable inroad and an unreasonable restriction on the authority of the private unaided educational institution.

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

In paragraphs - 56 and 61 of the said judgment, the Supreme Court observed as follows:-

“56. An educational institution is established for the purpose of imparting education of the type made available by the institution. Different courses of study are usually taught by teachers who have to be recruited as per qualifications that may be prescribed. It is no secret the better working conditions will attract better teachers. More amenities will ensure that better students seek admission to that institution. One cannot lose sight of the fact that providing good amenities to the students in the form of competent teaching faculty and other infrastructure costs money. It has, therefore, to be left to the institution, if it chooses not to seek any aid from the Government, to determine the scale of fee that it can charge from the students. One also cannot lose sight of the fact that we live in a competitive world today, where professional education is in demand. We have been given to understand that a large number of professional and other institutions have been started by private parties who do not seek any governmental aid. In a sense, a prospective student has various options open to him/her where, therefore, normally economic forces have a role to play. The decision on the fee to be charged must necessarily be left to the private educational institution that does not seek or is not dependent upon any funds from the Government.”

“61. In the case of unaided private schools, maximum autonomy has to be with the management with regard to administration, including the right of appointment, disciplinary powers, admission of students and the fees to be charged. At the school level, it is not possible to grant admissions on the basis of merit. It is no secret that the examination results at all levels of unaided private schools, notwithstanding the stringent regulations of the governmental authorities, are far superior to the results of the Government-maintained schools. There is no compulsion on students to attend private schools. The rush for admission is occasioned by the standards maintained in such schools, and recognition of the fact that state-run schools do not provide the same standards

of education. The State says that it has no funds to establish institutions at the same level of excellence as private schools. But by curtailing the income of such private schools, it disables those schools from affording the best facilities because of a lack of funds. If this lowering of standards from excellence to a level of mediocrity is to be avoided, the State has to provide the difference which, therefore, brings us back in a vicious circle to the original problem, viz., the lack of State funds. The solution would appear to lie in the States not using their scanty resources to prop up institutions that are able to otherwise maintain themselves out of the fees charged, but in improving the facilities and infrastructure of State-run schools and in subsidizing the fees payable by the students there. It is in the interest of the general public that more good quality schools are established; autonomy and non-regulation of the school administration in the right of appointment, admission of the students and the fee to be charged will ensure that more such institutions are established. The fear that if a private school is allowed to charge fees commensurate with the fees affordable, the degrees would be "purchasable" is an unfounded one since the standards of education can be and are controllable through the regulations relating to recognition, affiliation and common final examinations."

24. Basically, in the said case, the Supreme Court was dealing with the case of minority educational institution and professional educational institution.

25. With regard to the other private un-aided educational institutions, i.e., undergraduate colleges that are non-technical in nature, the Supreme Court in the said decision (T.M.A. Pai Foundation (Supra)) laid down thus :-

"62. There is a need for private enterprise in non-professional college education as well. At present, insufficient number of undergraduate colleges are being and have been established, one of the inhibiting factors being that there is a lack of autonomy due to Government regulations. It will not be wrong to presume that the numbers of professional colleges are growing at a faster rate than the number of undergraduate and non-professional colleges. While it is desirable that there should be a sufficient number of professional colleges, it should also be possible for private unaided undergraduate colleges that are non-technical in nature to have maximum autonomy similar to a school."

26. From the aforesaid observation of the Supreme Court, it would be clear that an intention was expressed of granting autonomy to private un-aided professional colleges as well as under-graduate colleges with regard to managing the said institutions as well as prescribing the fees to be collected from the students. The above view appears to be laying down that the State Government should not be rigid in case of fixation of fee/fee structure of such un-aided private institutions for the reasons that such institutions are required to meet their expenses from the fees collected from the students, as they do not get any financial support from the State. However, this can never be that on the ground of meeting the expenses, fees can be prescribed and collected at a rate, which is unilaterally arrived at without assigning reasons as to why such enhancement or hike in fees is made and how such hike in fees commensurates with the facilities provided to the students.

27. However, as stated above, the Supreme Court was considering the rights of minority unaided private institutions along with non-minority unaided private institutions and, more specifically, in respect of post secondary higher education, which is evident from the facts of the case and various observations made by the Supreme Court, more specifically, in paragraphs-48 and 49 of the decision in the case of T.M.A. Pai Foundation (supra). It expressed its view in paragraph-53 quoted above that the fee structure must take into consideration the need to generate funds to be utilized for the betterment and growth of the educational institution, the betterment of education in that institution and to provide facilities necessary for the benefits of the students.

28. Be it mentioned that in the present case, the fee structures in respect of High Schools and Higher Secondary Schools are being considered. Children including the children with disabilities have a basic human and fundamental right to receive good quality education in the mainstream schools as guaranteed to them under Article 14 (Right to equality), Article 21 (Right to life with dignity), Article 21-A (Right to Education) and Article 38 (Right to Social Justice) of the Constitution of India read with the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, Right to Children to Free and Compulsory Education Act, 2009 and UN convention on the Rights of Persons with Disabilities (2008). It has been estimated that about 10 crores children are still out of school and are engaged in one or the other form of labour though their rightful place is in schools. Those children, who are in Government school system, are seen to be receiving poor quality of education for which high fees are being charged by private schools which are flourishing at the cost of Government schools. This situation is bound to happen due to the apathy of the Government towards the educational need of the children of the masses of this country. It is unfortunate as well as unconstitutional that discriminatory system of schooling exists within the public school education system. The ratio in the case of T. M. A. Pai Foundation (supra) definitely means that private schools, while being free to set their fees, cannot do so with a view to profit. They cannot charge capitation fees either. The Supreme Court no doubt in the said case has recognized the right of un-aided schools to fix fees as an essential facet of their constitutional right.

29. The majority judgment in the case of T.M.A. Pai Foundation (supra) was understood by the Union of India, State Governments and educational institutions in different perspectives which led to several litigations. Under such circumstances, a Bench of five Judges was constituted in the case of **Islamic Academy of Education v. State of Karnataka**, (2003) 6 SCC 697 so that doubts/anomalies, if any, could be clarified. The Management in the said case submitted that complete autonomy has been given to the institutions not only with regard to admission of students but also with regard to the determination of their own fee structure. It was submitted that the institutions were entitled to fix their own fee structure, which could include a reasonable surplus for the purpose of development of education and expansion of the institution. So long as there was no profiteering, there could be no interference by the Government. On behalf of the Union of India, the State Governments and some of the students, on the contrary, it was submitted that the right to set up and administer an educational institution is not an absolute right which is subject to reasonable restrictions. Such right is subject to public and national interest. It was also contended that imparting education was a State function, but due to resource crunch, the States were not in a position to establish sufficient number of institutions and States were permitting establishment of

private educational institutions. Thus, the Government had a statutory right to fix the fees to ensure that there was no profiteering. Both the sides relied upon various passages from the majority judgment in *T.M.A. Pai Foundation* (supra). The Supreme Court framed four questions on the rival submissions made and with regard to the first question, i.e., whether educational institutions are entitled to fix their own fee structure, it was held that there can be no rigid fee structure. Each institution must have freedom to fix its own fee structure after taking into account the need to generate funds to run the institution and to provide facilities necessary for the benefit of the students. It was also observed that they must be able to generate surplus which must be used for betterment and growth of that educational institution. Such fee structure must be fixed keeping the infrastructure and facilities available, the investment made, salaries paid to the teachers and staff, future plans for expansion and/or betterment of the institution subject to two restrictions, namely, (a) Non-profiteering and (b) non-charging of capitation fees. It was further held that surplus /profit that can be generated shall be used for the benefit of that educational institution and cannot be diverted for any other use or purpose or for personal gains or other business or enterprise. The Supreme Court having noticed that there were various Statutes/Regulations which governed the fixation of fees, directed the respective State Government to set up a committee headed by a retired High Court Judge, who shall be nominated by the Chief Justice of that State to approve the fee structure or propose some other fees which could be charged by the institute. Pursuant to the above judgment, the State of Orissa legislated the Orissa Professional Educational Institutions (Regulation of Admission and Fixation of Fee) Act, 2007 relating to private unaided professional institutions at higher level. No similar legislation, however, has been brought with regard to general college education, Higher Secondary Schools or High Schools in the State constituting a fee Structure Committee for such institutions, as has been done under the aforesaid Act.

30. Again, in a batch of Civil Appeals before the apex Court, in the case of ***Modern School v. Union of India and others, etc etc.*** (2004) 5 SCC 583, the Supreme Court had the occasion to consider the questions framed by it as follows with reference to the Delhi School Education Act, 1973:-

- “(a) Whether the Director of Education has the authority to regulate the quantum of fees charged by unaided Schools under Section 17 (3) of the Delhi School Education Act, 1973 ?
- (b) Whether the direction issued on 15.12.1999 by the Director of Education under Section 24 (3) of the Delhi School Education Act, 1973 stating inter alia that no fees/funds collected from parents/students shall be transferred from the Recognized Unaided School Fund to the society or trust or any other institution, is in conflict with Rule 177 of the Delhi School Education Rules, 1973 ?
- (c) Whether managements of recognized unaided schools are entitled to set up a Development Fund Account under the provisions of the Delhi School Education Act, 1973 ?”

Per majority, in the judgment (Modern School etc etc. (Supra)) rendered by Hon'ble Justice S.H. Kapadia (as he then was) with regard to regulation of quantum of fees referring to T.M.A. Pai Foundation (supra) as well as Islamic Academy of Education (supra) held in paragraph -17 as follows:-

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

31. The judgment also takes a serious objection to the manner in which the schools were being used for profiteering, by managements and the societies. The Supreme Court, therefore, ultimately disposed of the Civil Appeals filed by various school managements holding that the Director of Education can regulate fees in accordance with section 17 (3) of the Delhi School Education Act, 1973 and the rules framed thereunder. Review Petitions were filed thereafter, being Review Petition (C) No. 1368 of 2004 and other petitions by various school managements. Elaborately dealing with the contentions raised by the review petitioners, the Hon'ble Judges clarifying their earlier judgment dismissed the review petitions.

(emphasis supplied)

32. It appears from the above decision of the Supreme Court in the case of Modern School (Supra) that the Delhi School Education Act, 1973 has provision empowering the Director of Education under the said Act to regulate fees as provided in Section 17 (3)

thereof. The Orissa Education Act does not contain any such provisions. The decisions of the apex Court in the case of T.M.A. Pai Foundation (Supra) and Islamic Academy of Education (Supra) are clear that private unaided educational institutions, though have a right to fix their own fees to be collected from the students, but such fixation of fees, as clarified in the case of Islamic Academy of Education (Supra), should be on taking into account the funds required to run the institution and to provide facilities necessary for the benefits of the students, but under no circumstances should amount to profiteering or collection of capitation fees. As the Orissa Education Act and the Rules are silent with regard to the Government control to regulate fee structure in such unaided private educational institutions unlike Delhi Education Act, no provision in law is available empowering any authority to examine any allegation made against any such institution with regard to fixation/hike of fees and as to whether such fixation of fees amounts to profiteering/ capitation or misutilisation of funds.

33. In the case of ***Vishaka and others v. State of Rajasthan and others***, AIR 1997 SC 3011, the Supreme Court was considering various international covenants and conventions on the question of gender equality and guarantee against sexual harassment and abuse, more particularly, against sexual harassment at work places. Finding that law or effective enforcement of such international conventions and norms are absent in exercise of power under Article 32 of the Constitution, laid down guidelines and norms mentioning that the same should be treated as law declared under Article 141 of the Constitution, which would be applicable to both public and private sector undertakings. While laying down the guidelines, the Supreme Court observed that in the absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment at work places, the guidelines and norms specified therein are to be observed at all work places, unless and until a legislation is enacted for the purpose. It clarified that the said guidelines are framed in exercise of power under Article 32 of the Constitution for enforcement of the Fundamental Rights. This Court is aware of the position of law and its limitations with regard to giving a direction to the legislature to enact a law as it has been consistently held by the Supreme Court that the writ Court in exercise of its powers under Article 226 of the Constitution has no power, even indirectly requiring the Executive to exercise its law making power, as the same is within the exclusive domain of the Executive under the Constitution. The Constitution does not permit the Court to direct or advice the Executive in the matter of policy or to sermonize qua any matter, which under the Constitution lies within the sphere of Legislature or Executive (See ***Mullikarjuna Rao and others v. State of Andhra Pradesh and others***, AIR 1990 SC 2151 and ***Asis Hameed v. State of J & K***, AIR 1989 SC 1899). However it is trite law that in exercise of power under Article 226 of the Constitution, if the Court finds that fundamental rights of the subject has been infringed, the Court has jurisdiction to undo such injustice by passing appropriate direction on that behalf. It is further to be noted that as observed by the Supreme Court that the authorities of the private un-aided educational institutions have a fundamental right to fix their fee structure, which should not amount to profiteering, capitation or misappropriation or mis-utilization of the funds, it is implied that such fundamental right of the institution to fix its fee structure is subject to reasonable restriction and such action of fixation of fee, if made without assigning any reason, is also subject to judicial review. This Court finds that fixing irrational amount of fees without assigning any reason amounts to violation of the fundamental rights of the

students envisaged under Articles 14, 21 and 21 – A of the Constitution of India and statutory rights provided in the enactments, such as Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 as well as Right to Children to Free and Compulsory Education Act, 2009. Further, the State in its counter affidavit filed in W.P. (C) No. 5030 of 2009 has specifically stated in paragraph-7 thereof that hike of tuition fees is not only concerned to the petitioner in the said case, but to the State as a whole for which reason the Government must have to take a policy decision in the matter as per the provisions in the Resolution dated 23.9.1996 and without any policy decision, the Management has no right to give extra burden on the students/parents in hiking the fees without following due procedure as required, by hiking the tuition fees and other fees. Hence, in view of the findings arrived at as above as well as keeping the statement made in the counter affidavit filed by the State that the Government is to take a policy decision with regard to hike in fees, this Court is of the view that till such a policy decision is taken by the Government, a Committee should be constituted, which shall look into the matter of fee hike by a private unaided educational institution (High Schools and Secondary Schools) and for the above purpose, any school intending to hike/raise its fees from the existing rate to higher rate shall make an application through its Principal/Headmaster/Headmistress to such committee constituted along with documents and materials that are relevant to be examined to fix a fee structure, which shall not be contrary to the law laid down by the Supreme Court, i.e., there should be absence of profiteering collection of capitation fees/donations and such fee should be fixed at a rate which is necessary to meet its expenditure and general surplus which can only be used for betterment and growth of the concerned institution. Such fee structure is to be fixed keeping in mind the infrastructure and facilities available, the investment made, salaries paid to the teachers and staff, future plans for expansion and/or betterment of the institution. The committee on examining the materials made available to it shall fix the fee structure of the applicants-schools. Till such fee structure is fixed by the committee constituted, the D.A.V. Public Schools before this Court and as the Regional Manager of the D.A.V. Public School of the State, who stated to be having control over all such schools in the State is a party before this Court, all the D.A.V. Public Schools, which are also not before this Court, which are functioning in the State, shall continue to collect fees from the students at the rate which was being collected for the session 2008-09. This Court constitutes the committee consisting of the Commissioner-cum-Secretary, School & Mass Education Department, Government of Orissa, Inspector of Schools of the locality of the applicant-school, the Principal/Headmaster of the concerned schools, two representatives of the parents association of the concerned school and the head of the local self-government, i.e., Mayor of Municipal Corporation, Chairman of the Municipality or NAC or Sarpanch of the Grama Panchayat, in which area, the school is functioning. The Commissioner-cum-Secretary may act in person or through his/her nominee not below the rank of the Deputy Secretary. The Committee, if required, may cause a spot enquiry of the school and collect materials and evidence from the staff members with regard to the actual salary being received by them and may also collect informations from the parents, if required, where the school does not have a registered association of parents with regard to the facilities being provided to the students of such school. All such materials shall be taken into consideration while fixing the fee structure for the applicant-school. In the event of filing any application by any school before the aforesaid committee, the final decision thereon shall be taken within a period of 90 days from the date of filing of such application.

34. As already held above, as the local managing committees of the schools, who are before this Court, are not constituted in accordance with the Orissa Education Act, the fee hike as made, which are impugned in the writ application are struck down. Also as held above, the impugned letters of the Government being unsustainable are struck down. As this Court has found that the local managing committees of the respective D.A.V. Public Schools are not constituted in accordance with law, the school authorities as well as the State authorities under the Orissa Education Act and the Rules applicable to the institutions shall take immediate steps for constitution/reconstitution of the managing committees in accordance with the Orissa Education Act and the relevant rules framed thereunder. This shall be done within a period of four months from today. Till such reconstitution of the managing committees is made, the respective D.A.V. Public Schools shall be managed by the local managing committees though the said committees have been already held to have been illegally constituted, as directing managements of such schools by any Government official would be onerous considering the multifarious duty which is being discharged by such Government officials.

All the writ applications are disposed with the above observations and directions. Consequently, all the pending Misc. Cases in all the connected writ applications also stand disposed of.

Writ petition disposed of.