
(1984) 09 KAR CK 0002
In the Karnataka High Court
Case No : Writ Petition 12324 of 1984

Bapuji Educational Association

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 03-09-1984

Acts Referred:

Constitution of India, 1950 — Article 14, 19 (1) (c), 21
Karnataka Educational Institutions Act, 1984 — Section 2 (b), 4 (2), 4 (3), 5 (1)

Citation : (1985) ILR (Kar) 80

Hon'ble Judges : Rama Jois, J

Bench : Single Bench

Advocate : K.K. Venugopal, S.G. Sundaraswamy, M. Papanna, K.S. Desai, B.T. Parthasarthy, S. Vijayashankar and N.A. Mandagi, for the Appellant; R.N. Narasimhamurthy and M.R. Achar, Government Advocate, for the Respondent

Judgement

Rama Jois, J.

In this batch of Writ Petitions, in which the Petitioners, who are the managements as also individuals, who are members of the management, of various private engineering colleges in the State, have questioned the constitutional validity of the Karnataka Educational Institutions (Prohibition of Capitation Fee) Act, 1984 ("the Act" for short) and orders issued thereunder, the following main question arises for consideration:

Whether the fundamental rights guaranteed to the citizens under Articles 19(1) (c), 19(I)(g) and 21 of the Constitution includes the right to establish and administer the Educational Institutions of their choice ? and if so, whether the Act which prohibits the collection of Capitation. Fee for admission to Educational Institutions except to the extent permitted by an order made under the proviso to Section 3 of the Act is violative of all or any of those Articles and. Articles 14, 31A and 300A of the Constitution of India ?

1. Facts of the Case:

2. Originally the Writ Petitions were presented questioning the constitutional validity of the Karnataka Educational Institutions (Prohibition of Capitation Fee) Ordinance, 1984 promulgated by the Governor on 9.7.1984 and the order dated 18.7.1984 issued thereunder fixing the intake of the petitioner-institutions and also the number of Government seats at 40% of the intake. Subsequently, during the pendency of these Petitions, the Act has come into force and consequently applications were made for amendment of the prayer in the Petitions praying for striking down the Act, as unconstitutional and also for quashing the Government Order dated 16.8.1984 issued thereunder fixing the rate of Capitation Fee and tuition fees. There is, however, no change either in the averments or pleadings or grounds as the provisions of the Act are similar to that of Ordinance.

3. The Preamble to the Act and some of the Sections, the constitutional validity of which are challenged in these Petitions, read :

" An Act to prohibit the collection of Capitation Fee for admission to educational institutions in the State of Karnataka and matters relating thereto.

Whereas the practice of collecting capitation fee for admitting students into educational institutions is wide-spread in the State;

And whereas this undesirable practice beside contributing to large scale commercialisation of education has not been conducive to the maintenance of educational standards ;

And whereas it is considered necessary to effectively curb this evil practice in public interest by providing for prohibition of collection of Capitation Fee and matters relating thereto.

Be it enacted by the Karnataka State Legislature in the Thirty-fourth Year of the Republic of India as follows :

xx xx xx xx 2(b) "Capitation fee" means any amount by whatever name, called, paid or collected directly or indirectly in excess of the fee prescribed u/s 5, but does not include the deposit specified under the proviso to Section 3.

2(c). "Educational Institution" means any institution by whatever name called, whether managed by Government, private body, local authority, trust, University or any other person carrying on the activity of imparting education in medicine or engineering leading to a degree conferred by a University established under the Karnataka State Universities Act, 1976 (Karnataka Act 28 of 1976) and any other educational institution, or class or classes of such institution, as the Government may, by notification, specify.

XX XX XX XX XX XX 2(e): " Government Seats" means such number of seats in such educational institution or class or classes of such institutions in the State as the Government may, from time to time, specify for being filled up by it in such manner as may be specified by it by general or special order on the basis of merit and reservation for Scheduled Castes, Scheduled Tribes, Backward Classes

and such other categories as may be specified, by the Government from time to time without the requirement of payment of capitation fee or cash deposit.

3. Collection of capitation fee prohibited :- Notwithstanding anything contained in any law for the time being in force, no capitation fee shall be collected by or on behalf of any educational institution or by any person who is in charge of or is responsible for the management of such institution :

Provided that subject to such rules as may be prescribed or such conditions as may be specified by general or special order, from time to time, the Government may, notwithstanding anything contained in this Act permit any educational institution established before the date of commencement of this Act and maintained or developed solely or substantially out of amounts collected as Capitation Fee or any class or classes of such institutions, to continue to receive such Capitation Fee or cash deposits in such manner, to such extent and for such period as the Government may, by order, specify, so however that such period shall not in any case extend beyond five years from such date.

4. Regulation of admission to Educational Institutions, etc.

Subject to such Rules or general or special Orders, as may be made by the Government in this behalf and any other law for the time being in force-

(1) (a) the minimum qualification for admission to any Course of study in an educational institution shall be such as may be specified by -

(i) the University, in the case of any course of study in an educational institution maintained by or affiliated to such University ;

Provided that the Government may, in the interest of excellence of education, fix any higher minimum qualification for any course of study;

(ii) the Government, in the case of other courses of study in any other educational institution ;

(b) the maximum number of students that could be admitted to a course of study in an educational institution shall be such as may be fixed by the Government from time to time;

(2) in order to regulate the capitation fee charged or collected during the period specified under the proviso to Section 3, the Government may, from time to time, by general or special order, specify in respect of each private educational institution or class or classes of such institutions --

(a) the number of seats set apart as Government seats ;

(b) the number of seats that may be filled up by the management of such institution --

(i) from among Karnataka students on the basis of merit, on payment of such cash deposits refundable after such number of years, with or without interest as

may be specified therein, but without the payment of capitation fee ; or

(ii) as its discretion ;

Provided that such number of seats as may be specified by the Government but not less than fifty per cent of the total number of seats referred to Clauses (a) and (b) shall be filled from among Karnataka students.

Explanation : For the purpose of this Section, Karnataka students means persons who have studied in such educational institutions in the State of Karnataka run of recognised by the Government and for such number of years as the Government may specify;

(3) an educational institution required to fill seats in accordance with item (i) of sub-clause (b) of Clause (2), shall form a committee to select candidates for such seats. A nominee each of the Government and the University to which such educational institution is affiliated shall be included as members in such committee.

5. Regulation of fees, etc --

(1) It shall be competent for the Government, by notification, to regulate the tuition fee or any other fee or deposit or other amount that may be received or collected by any educational institution or class of such institutions in respect of any or all class or classes of students.

(2) No educational institution shall collect any fees or amount or accept deposits in excess of the amounts notified under sub-section (1) or permitted under the proviso to Section 3.

(3) Every educational institution shall issue an official receipt for the fee or capitation fee or deposits or other amount collected by it.

(4) All monies received by any educational institution by way of fee or capitation fee or deposits or other amount shall be deposited in the account of the institution, in any scheduled bank and shall be applied and expended for the improvement of the institution and the development of the educational facilities and for such other related purposes and to such extent and in such manner as may be specified by order by the Government.

(5) In order to carry out the purposes of sub-section (4), the Government may require any educational institution to submit their programmes or plans of improvement and development of the institution for the approval of the Government.

6. Regulation of expenditure and maintenance of accounts, etc.:-

(1) The Government may regulate the expenditure of educational institutions and the maintenance of accounts by them in such manner as may be prescribed.

(2) The Government may require such educational institutions to submit such

returns or statements as it may deem necessary for carrying out the purposes of this Act. "

The other provisions, the constitutional validity of which are challenged are, Section 7 which provides that whoever contravenes the provisions of the Act or the rules or orders made thereunder, shall, on conviction, be punishable with imprisonment for a term which shall not be less than three years but which shall not exceed seven years and also be fined ; Section 8 which fixes the responsibility on individuals in the case of offences by a company which expression is defined as any body corporate and includes a trust, a firm, a Society or other association of individuals; Section 9 Which confers power of entry into the premises of any private educational institution and of inspection and seizure and the power to issue such directions as the Government considers expedient to the institutions ; and Section 10 which exempts the minority institutions covered by Article 30 of the Constitution to the extent they are inconsistent with Article 30.

II. The Pleadings :

4. The substance of the plea of the Petitioners is as follows ; There are 39 engineering colleges in the State, Out of them 2 are run by the State Government and 1 by the Bangalore University. Out of 36 private colleges, 8 of them receive financial aid from the Government. 28 private engineering colleges in the State are un-aided, i.e. they do not receive any financial grant from the Government. All the petitioners-colleges are private unaided colleges. The Government of Karnataka had published a White Paper in respect of professional colleges and institutions in March, 1983. That document furnishes the various statistics about these colleges. According to the White Paper itself, for establishing an engineering college with an intake capacity of 200 students, a minimum of Rs. 3 to Rs. 4 cores is required spread over for a period of 4 to 5 years. Such a college would also have to incur an annual recurring expenditure of Rs. 40 lakhs. Paragraph 10 of the White Paper also states that Government has recognised that in view of the heavy investment for establishment of engineering or medical colleges, the institutions have obviously to raise funds by way of capitation fee. According to the performance budget of the Education Department of the State itself, the cost of education in the case of engineering course in the Government college works out to Rs. 6.102/- per student per year, though this is really an under-estimate. As against the expenditure required to provide engineering education to one student, the tuition fee permitted to be charged is not more than Rs. 600 per annum. Even according to the higher tuition fee that could be charged by the management, it works out to less than 10 per cent of the cost required for maintenance.

(ii) It is well established all over the world that those who seek professional education must pay for it. The number of seats available in Government and aided colleges is so small compared to the number of persons seeking admission to the engineering colleges. All those deserving candidates who could not be

accommodated in such colleges would stand deprived of engineering education. This void in the field of technical education was thus filled up by the Petitioner-institutions which were established in different places with the aid of donations given and active part taken by public minded individuals. The whole object of establishing the institutions has been to provide technical education to the needy candidates and not as a commercial venture as stated in the Preamble to the Act. The provisions of the Act set out above infringe the rights of the Petitioners guaranteed under Articles 14, 19(1)(c), 19(1)(g), 21, 31A and 300A of the Constitution.

(iii) Under the impugned order dated 18th July 1984 (Annexure-B in W.P. 12324 & 12325 of 1984) made under the provisions of the Ordinance and now regarded as having been made under the provisions of the Act, by virtue of another Ordinance No. 10/1984 promulgated by the Governor, 40 per cent of the intake of the petitioner-institutions has been set apart as Government seats and are required to be filled up by admitting candidates selected by a Committee constituted by the Government on the basis of the criteria fixed and in accordance with the Rules framed by the State Government. This is nothing but an unreasonable interference in the right of the management of the petitioners in respect of the colleges established by them and having no nexus to the object and purposes of the Act. The Government Order dated 10-8-1984 which fixed the capitation fee in respect of management seats at Rs. 30,000/- per seat and also fixing the tuition fee at Rs. 1,500/- is arbitrary and amounts to an unreasonable restriction on the fundamental right guaranteed under Article 19(1)(g) of the Constitution and was also arbitrary and therefore violative of Article 14 of the Constitution.

In any event, having regard to the serious Civil consequences that would ensue to the petitioners by the fixation of the rate of capitation fee and tuition fee the order could have been made only after complying with the rules of natural justice. As that had not been done, the order was bad.

(iv) In three of the Petitions, the Petitioners have also alleged that as the provisions of the Act, both in the matter of collection of capitation fee and in respect of other matters covered by the provisions of the Act, were being enforced only against non-minority institutions, as a result of this, the right which is available to minorities is being denied to non-minorities and this was hostile discrimination violative of Article 14.

5. The plea taken in the statement of objection may be summarised thus :

(i) It is true that there are as many as 28 private unaided engineering colleges in the State. Though these colleges were started with the object of satisfying the needs of a region or of backward section of the people who could not avail themselves of the educational facilities provided by the Government and other aided engineering colleges, these institutions converted the educational institutions into commercial ventures and have been collecting enormous funds

from applicants seeking admission to these colleges as Capitation Fee for admission. The quantum of Capitation Fee that was being collected was exorbitant amounting to exploitation without regard or consideration for the claims of meritorious students who were not in a position to pay the money as demanded by these institutions. The allotment of seats in these institutions solely depended upon the quantum of Capitation Fee paid by a candidate, which made it impossible for merited but belonging to financially weaker sections of the society to seek admission into these colleges. The result has been admission of candidates with poor merit to the exclusion of more merited which was detrimental to excellence in education.

(ii) In view of such a situation brought about by these institutions, the public in general, the Educationists and Estimates Committee of Parliament in particular, expressed their grave concern against the evil system and especially concerning admission to the engineering colleges and medical colleges.

(iii) The Government of Karnataka constituted a University Review Commission to review the entire question relating to the levy of Capitation Fee. After a detailed study of the implications of the system and the harmful consequences which would affect the society by the continuation of the system any longer, the Committee recommended that within a period of five years the evil should be put to an end in a phased manner. It is after due consideration of the said recommendation, the State came forward with the Ordinance in the first instance which has been subsequently replaced by the Act.

(iv) Part IV of the Constitution lays down the Directive Principles of State Policy. A combined reading of Articles 39(b), 41 and 46 thereof indicates that it is obligatory for the State to promote the welfare of the people by securing a social order in which social justice based on individual merit and a competitive spirit and this should also inform the educational institutions. Therefore, it was the obligation of the State to eliminate the inequalities resulting from the practice of levying Capitation Fee for admitting students to the engineering colleges. It is with these objects, the Act has been enacted.

(v) The contention of the Petitioners that their fundamental rights have been affected is untenable. The fundamental right to form an association under Article 19(1)(c) of the Constitution has nothing to do with the right carry out the objects for which an association was formed. The right to establish and maintain educational institutions is no business or occupation and therefore the fundamental right guaranteed under Article 19(1)(g) of the Constitution claimed for by the Petitioners is untenable and for the same reason there is no fundamental right available to the Petitioners under Article 21 of the Constitution. The contention of the Petitioners that the provisions of the Act are in violation of Article 300-A is misconceived. The Act does not deprive the Petitioners any of their property. All that the Act does is to secure that admissions to the technical education institutions are effected in a manner that subserves the best interests of the Society.

(vi) The plea that the fundamental right guaranteed under Article 31-A of the Constitution is affected is equally untenable. The Act does not in any manner seek to either acquire the rights of the petitioners nor is it sought to take over the management of such institutions by the Government itself. The provisions of the Act are only regulatory in character and does not violate Article 31-A of the Constitution.

(vii) Entry 25 substituted by the Constitution 42nd Amendment Act expressly provides that education including technical education and medical education of the Universities is comprehensive enough to include the subject of abolition of Capitation Fee in the technical institutions and it does not fall under Entry 66 of List I, which deals with the item of co-ordination or determination of standards in the institutions for higher education and research.

(viii) As regards minority institutions, the plea taken is that Section 10 of the Act only provides that such of the provisions of the Act which comes into conflict with Article 30 of the Constitution do not apply for minority institutions. Therefore, as far as the provisions of the Act which apply to both minority and non-minority institutions is concerned, there is no discrimination. As far as provisions which cannot be applied to minority institutions also, the question of violation of equality does not arise as such a classification and special treatment is given by the Constitution itself and not by any State action.

6. Sriyuths S. G. Sundaraswamy, K. K. Venugopal, B.T. Parthasarathy, M. Papanna and N.A. Mandagi, learned Counsel for the petitioners and Sri R.N. Narasimha Murthy learned Counsel appearing for the State and M. R. Achar, Government Advocate, have addressed arguments in support of their respective pleas.

III. Scope of Sections 3, 4 and 5 of the Act :

7. Before proceeding to consider the rival contentions as to the constitutionality of the Act, in view of the definition of the expression "Capitation Fee" in Section 2(b) of the Act, it has become necessary to understand in the first instance the scope of the key provisions of the Act, namely, Sections 3, 4 and 5. According to the said definition, Capitation Fee means "any amount, by whatever name called, paid or collected directly or indirectly in excess of the fee prescribed u/s 5 but does not include the deposit specified under the proviso to Section 3". If the expression "Capitation Fee" used in Section 3 and Section 4(2) of the Act is understood as defined in the Act, the consequences would be as follows

(a) It would be competent for the Government not only to fix tuition fee but every other kind of fees which might include money required to be paid for securing a seat in, or admission to, a college, in exercise of its powers u/s 5(1) of the Act and it is only when any amount is collected more than the amount so fixed it becomes capitation fee which would also mean until and unless any fee is fixed u/s 5(1) of the Act, the prohibition imposed by Section 3 would not at all operate.

(b) Further till the expiry of the period of five years mentioned in the proviso to Section 3 of the Act, the government could also in addition to any capitation fee permitted under proviso to Section 3 authorise by an order made u/s 5(1) the collection of any amount over and above that amount for admission and if only any amount over and above the amounts so fixed is collected, it would be regarded as capitation fee collected contrary to the provisions of the Act.

(c) Further even after the expiry of 5 years also, while Section 3 speaks of prohibition of Capitation Fee still the Government can prescribe the amount to be collected as tuition fee or any other fee by an order u/s 5(1) of the Act and such amount might include even money that could be collected for giving a seat and if only any amount is collected over and above that amount, it becomes Capitation Fee.

8. The resultant position would be, that while the Preamble of the Act speaks of the prohibition of Capitation Fee for admission to the educational institutions, actually there would be a continued existence of Capitation Fee for admission as authorised by the Act itself so long the Act is in force and that the coercive provisions of the Act intended to curb the evil would come into play if only any amount higher than the amount fixed u/s 5(1) of the Act or permitted under the proviso to Section 3 were to be collected by any private colleges as Capitation Fee for admission. Having regard to the clear legislative intention discernible from the Preamble to the Act, the expression "Capitation Fee" in Sections 3 and 4(2) of the Act cannot be given the meaning as defined in Section 2(b) of the Act, but has to be construed as Capitation Fee for admission to educational institutions. Further the word "fee" used in Section 5(1) of the Act cannot include capitation fee for admission as otherwise it would defeat the object of the Act and would be inconsistent with Section 3. It is a cardinal rule of construction that in the case of an obscurely penned statute, the construction of the provisions must be made having due regard to the legislative intention gathered from the Preamble and other provisions of the Statute and on the same basis the meaning of a word defined in the Statute need not be given to such word used in a provision if the context does not so require. In such a case, that meaning which fulfils the object of the Act must be given, than the one which defeats it. (See Craies on Statute Law, 7th Edition at p. 98-101). For ascertaining the legislative intention the Preamble is the best source as laid down by the Supreme Court in *Maharao Sahib Shri Bhim Singhji Ors. Vs. Union of India (UOI) and Others*, The Supreme Court which was interpreting Urban Land (Ceiling and Regulation) Act, 1976 said thus -

"The Preamble to the Act ought to resolve interpretational doubts arising out of the defective drafting of Section 23."

Bearing this guideline in mind, the meaning and scope of Sections 3, 4 and 5 have to be determined.

9. Learned Counsel on both sides agreed that, if the defined meaning is given to

the word "Capitation Fee" used in Sections 3 and 4(2) of the Act, it would lead to incongruous results as indicated earlier and that the provisions would not be achieving the intention expressly indicated in the Preamble. Taking the clue from the Preamble, the word "Capitation Fee" used in Sections 3 and 4(2) of the Act should be understood as "Capitation Fee" for admission to educational institutions". The wording of the definition clearly indicates that the object of the definition of "Capitation Fee" in Section 2(b) was to rope in all types of collections in whatever form in excess of the fee prescribed u/s 5(1) of the Act and was not intended to control the meaning of those words in Sections 3 and 4(2) of the Act. For the same reason, the word "fee" used in Section 5(1) has to be understood as excluding Capitation Fee for admission into educational institutions.

IV. Applicability of Articles 19(1)(g), 21, 31A(l)(b), 300-A and 19(1)(c) :

10. The next point for consideration is, whether all or any of the fundamental rights on which the petitioners rely and Article 300A of the Constitution are available to them as pleaded by them or no such right is available as pleaded by the State.

(1) Article 19(1)(g) : This Clause confers on every citizen the fundamental right to practice any profession, or to carry on any occupation, trade or business. Learned Counsel for the State, in support of his submission, that the right to establish and administer educational institutions of their choice does not flow from Article 19(1)(g), relied on the observations of the Supreme Court in the case of *Sidhrajibhai Sabbai -v.- State of Gujarat* AIR 1963 S.C. 540 which reads --

" Nor is the right of the Petitioners to practice any profession, or to carry on any occupation, trade or business guaranteed under Act. 19(1)(g) infringed by the impugned rules and directions."

The above portion of the judgment of the Supreme Court, as rightly submitted for the Petitioners does not support the stand taken by the State. The clear implication of the observations, on the other hand is, that the right is included in Article 19(1)(g) but was not infringed in that case. The Supreme Court did not say that Article 19(1)(g) could not be invoked. The decision of the Supreme Court in *The State of Maharashtra and Another Vs. Lok Shikshan Sansatha and Others*, also indicated that but for the suspension of Article 19 during that period, the right of administration of an educational institution could have been traced to Article 19(1)(g). The matter is however placed beyond any controversy in the Seven Judge Bench decision of the Supreme Court in *Bangalore Water Supply and Sewerage Board Vs. A. Rajappa and Others*, In that case the Supreme Court over-ruled its earlier decision in *The University of Delhi -v.- Ramnath* AIR 1903 S.C. 1873 and held that activity of running an educational institution was industry (see paragraphs 78, 112, 117, 121, 124, 159 and 161). The Supreme Court was considering the scope and meaning of the word "industry" used in Industrial Disputes Act. As the expression "industry" in the

Industrial Disputes Act is defined inter alia to mean "any business or service" the Supreme Court considered the question as to whether an educational establishment "can be regarded as industry. The Supreme Court expressed in clearest terms that establishing and running of an educational institution was an industry for the reason it was not only a business, but was also a service. Paragraph 121 of that judgment reads:

"The final ground accepted by the Court is that education is a mission and vocation, rather than a profession or trade or business. The most that one can say is that this is an assertion which does not prove itself. Indeed, all life is a mission and a man without a mission is spiritually still-born. The high mission of life is the manifestation of the divinity already in man. To christen education as a mission even if true, is not to negate its being an industry. We have to look at educational activity from the angle of the Act, and so viewed the ingredients of education are fulfilled. Education is, therefore, an industry and nothing can stand in the way of that conclusion."

That being the position, the word "business" in Article 19(1)(g) cannot be considered as excluding the right to establish and administer educational institution. From this it follows that this right could be curtailed only by means of reasonable restrictions imposed in public interest as provided under Clause 6 of Article 19 of the Constitution and if it is found that the restriction imposed by all or any of the provisions of the Act is unreasonable, the same can be struck down. In *Hyderabad Karnataka Education Society, Gulbarga and Others Vs. State of Karnataka*, Chandrakantaraja Urs, J. has already taken the view that the right under Article 19(1)(g) includes the right to establish and administer educational institution. I respectfully agree with the view giving additional reasons as set out above. (See : *Andhra Kesari Education Society Vs. Government of Andhra Pradesh and Others*,)

Another objection was Petitioner-institutions could not invoke Article 19(1)(g) as the right was conferred on citizens. In each of the Petitions, in addition to the societies or institutions, citizens intimately concerned and having considerable interest are also Petitioners. The objection is not sound (See : *Delhi Cloth and General Mills Co. Ltd. and Others Vs. Union of India (UOI) and Others*,) Therefore, I hold that the Petitioners have, under Article 19(1)(g), the fundamental right to establish and administer educational institutions of their choice and are entitled to maintain the Petitions.

(2) ARTICLE 21 : This Article is a general one and confers personal liberty. The width of the Article has been fully expounded by the Supreme Court in the case of *Kharak Singh Vs. The State of U.P. and Others*, In the case of *Kharak Singh*; the Supreme Court rejecting the narrow interpretation of Article 21 said thus :

".... We feel unable to hold that the term was intended to bear only this narrow interpretation but on the other hand consider that "personal liberty" is used in the Article as a compendious term to include within itself all the varieties of

rights which go to make up the "personal liberties" of man other than those dealt within the several Clauses of Article 19(1). In other words, while Article 19(1) deals with particular species or attributes of that freedom, "personal liberty" in Article 21 takes in and comprised the residue."

(Underlined by me)

This view was reiterated by the Supreme Court in the case of Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, . (See: Paragraphs 54 and 55 of the judgment) . The relevant portion at paragraph 54 of the judgment reads :

"...The expression "personal liberty" in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19."

(Underlined by me)

Therefore liberty of every kind necessary to live as human beings and to ensure all round development of one's personality are included in the expression personal liberty used in Article 21. The right of an individual to have and/or to impart education is one of the most valuable and sacred rights. In our country from ancient times, great importance was attached to education.

Neetishaktaka - 18, eulogizes education thus:

folk uke ujL; :ief/kda izPNUu xqIra /kua folk Hkksxdjh ;"kLLq[k djh folk xq:.kka xq:% folk ca/kqtuks fons"kxeus folk ijk nsork folk jktlq iwfrk u rq /kua folk foghu% i"kq%

Education is the special manifestation of man,

Education is the treasure which can be preserved without fear of loss,

Education secures material pleasure, happiness and fame,

Education is the teacher of the teacher,

Education alone is the companion to one, when one goes abroad,

Education is God incarnate,

Education secures honour at the hands of State not money,

A man without education is equal to animal.

What more can be said to stress the importance of education? Nothing. Therefore, among various types of personal liberties which can be regarded as included in the expression "personal liberty" used in Article 21, education is certainly the foremost. Therefore, Article 21 necessarily includes the right to establish and administer educational institution of the choice of the citizen or groups of citizens. This is also implicit in Article 30 of the Constitution. This

Article recognises and protects the right of linguistic and religious minorities to establish and administer educational institutions of their choice. Certainly even without Article 30, the minorities would have had the same right, under Articles 21 and 19(1)(g), Article 30, however, was introduced to allay the fears, of the linguistic and religious minorities that the State machinery in the hands of the majority might deprive the minorities of their valuable right in the matter, as had been done elsewhere. See : The Framing of Indian Constitution by B, Shiva Rao-A Study pp 272-281, and as a guarantee against interference of the right in the guise of imposing reasonable restrictions in public interest. In view of Article 30, the rights of minorities are protected against State action to a greater extent than others, but the fact remains that the Petitioners, who are non-minorities have the fundamental right under Article 21 to establish and administer educational institutions of their choice but this is subject to valid laws enacted by the Legislature.

(3) Article 31A(l)(b) : - This Article provides that no law providing for the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property, shall be deemed to be void on the ground of violation of Articles 14 and 19. From this it follows that temporary taking over of the management of property of a private educational institution in public interest cannot be regarded as offending Articles 14 and 19 of the Constitution. However, the taking over of the management of any property of an educational institution permanently would ipso facto offend the right guaranteed under Article 31A(b) of the Constitution. (See : Municipal Committee, Amritsar and Others Vs. The State of Punjab and Another, .) The question as to whether the impugned Act violates the right guaranteed under Article 31(A) of Constitution is a different issue. But there can be no doubt that the Petitioners can claim the protection of fundamental right under Article 31A of the Constitution if the management of any property belonging to them are taken over by the State.

(4) Article 300A : - The right to property was a fundamental right guaranteed under Articles 19(1)(f) and 31. But these two provisions were deleted by the Constitution (44th Amendment) Act and the right to property was made an ordinary constitutional right under Article 300A. The right could be taken away by law enacted by the Legislature. However, that law must be a valid law, in that it should be within the competence of the Legislature concerned and further it cannot come into conflict with Articles 14 and 19 and other provisions of the Constitution. Therefore, the right to property in a private educational institution belonging to its management could be traced to the right guaranteed under Article 300-A.

(5) Article 14 - Article 14 which is the most fundamental of all the fundamental rights guaranteed under Part-III of the Constitution provides that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

This Article had been interpreted by long line of decisions. Some of them are Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others, , Moti Ram Deka etc. Vs. General Manager, N.E.F. Railways, Maligaon, Pandu, etc., , Railway Board Vs. A. Pitchumani, . The scope of the Article as interpreted was as follows : -

(1) Article 14 forbids class legislation but not reasonable classification of person or things and the making of separate law as applicable to such classes of persons.

(ii) The classification must however be reasonable and therefore in a given case if the classification made by the law itself is unreasonable, the law offends Article 14.

(iii) Even if classification is valid there is a further and additional requirement, namely, that such classification must have nexus to the particular object sought to be achieved and if there is no nexus, it would be hit by Article 14 of the Constitution.

11. The most powerful and all pervasive aspect of Article 14 of the Constitution which had remained latent, was brought out by the Supreme Court in the case of E.P. Royappa Vs. State of Tamil Nadu and Another, . This aspect was reiterated in the case of Maneka Gandhi. The relevant portion of the judgment reads :

"Now, the question immediately arises as to what is the requirement of Article 14 : what is the content and reach of the great equalising principle enunciated in this Article ? There can be no doubt that it is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic. And, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and if cannot be imprisoned within traditional and doctrinaire limits.

XXX XXX XXX XXX Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades. Article 14 like a brooding omnipresence."

This position has been further reiterated in Ajay Hasia -v.- Khalid Mujib AIR 1981 S.C. 481 and in D.S. Nakara and Others Vs. Union of India (UOI), Therefore, the petitioners could certainly claim the fundamental right to equality guaranteed under Article 14 of the Constitution and contend that all or any of the provisions of the Act are liable to be struck down as offending Article 14 of the Constitution, either on the ground that they are discriminatory or arbitrary.

(6) Article 19(1)(c):- This clause confers on every citizen a fundamental right to form associations. This necessarily includes the right to form a society or a body for the purpose of establishing and administering an educational institution. Learned Counsel for the State relied on paragraph,19 of the judgment of the Supreme Court in All India Bank Employees Association -v.- National Industrial

Tribunal, Bombay AIR 1952 S.C. 171, para 19 and submitted that the right conferred under Article 19(1)(c) was only to form Association and as far as achievements of the object of the Association was concerned, the right must be traced to some other fundamental right and not to the right conferred under Article 19(1)(c) of the Constitution. He pointed out that the said view was reiterated in the judgment of the Supreme Court in *Menaka Gandhi -v.- Union of India*. These decisions fully support the submission of the Counsellor the State. Hence, I hold that for challenging the validity of the Act the right guaranteed under Article 19(1)(c) is of no assistance to the petitioners.

11. In the result, I hold that all citizens or classes of citizens have the right to establish and administer educational institutions of their choice, and such a right not only flows from Article 19(1)(g) as held above but is also included in Article 21. As in these Petitions, in addition to the management of institutions individual members, who are among persons who have established and/or administering educational institutions are the petitioners. They are entitled to seek enforcement of Articles 19(1)(g) and 21. They are also entitled to invoke the fundamental right in Article 31A(1)(b) and constitutional right in Article 300-A in respect of the property and management of those institutions. This is, however, subject to the provisions of law regarding the number and types of institutions, and regulatory provisions regarding the manner of administration enacted by or under an act of Legislature and which are constitutionally valid. The petitioners are therefore entitled to rely on these articles for challenging the constitutionality of the impugned Act. As under the provisions of the Act neither the right of ownership nor the right of management is taken over by the State, I proceed to consider the validity of the provisions of the Act only with reference to Articles 14 and 19(1)(g) of the Constitution.

V. Bar of Article 31C:

12. Learned Counsel for the State submitted that the Act was meant to implement the principles laid down in Articles 39(b), 41 and 46 of the Constitution and therefore even on the basis that the provisions of the Act infringe Articles 14 and 19(1)(g) of the Constitution, the petitioners cannot invoke those Articles in view of the bar engrafted in Article 31(c). He submitted that though the amendment to Article 31(c) was struck down by the Supreme Court in *Minerva Mills Ltd. and Others Vs. Union of India (UOI) and Others*, that decision was no longer good law in view of another Constitution Bench judgment of the Supreme Court in *Sanjeev Coke Manufacturing Company Vs. Bharat Coking Coal Limited and Another*, Relying on latter Judgment, he submitted that the immunity against attack engrafted in Article 31(c) extends to laws enacted not only to give effect to Article 39(b), but also Articles 41 and 46.

13. The question, therefore, for consideration is : Whether Article 31C as amended by the 42nd Constitution Amendment Act is in force or in other words the judgment of a Constitution Bench of the Supreme Court in *Minerva Mills*" case, no longer enjoys the status of law declared under Article 141 of the

Constitution in view of the observations of another Constitution Bench in Sanjeevi Coke's case. Puttaswamy, J. has considered this aspect in the case of Messrs. New Taj Mahal Cafe (Private) Limited -v.- The State of Karnataka, W.P. No. 4388 of 1979 & connected cases. D.D. 18th April. Relevant portion of the judgment reads :

"In Minerva Mills Ltd. and Others Vs. Union of India (UOI) and Others, the Supreme Court by majority, speaking through, Chandrachud, CJ. approving the ratio of the majority in Kesavanand Bharti's case has struck down these provisions. An application made for review in Minerva Mill's case is stated to be still pending before the Court. In Sanjeev Coke Manufacturing Company Vs. Bharat Coking Coal Limited and Another, another Constitution Bench has expressed doubt on the correctness of the decision rendered in Minerva Mill's case. But, this Court is bound by the decision in Minerva Mill's case which is still good law and examine the matter on that basis only."

I respectfully agree with the view taken by Puttaswamy, J. Further, it may be seen that the operative portion of the judgment in Minerva Mills" case in which the amendment to Article 31(c) was struck down, has not been recalled by the Supreme Court and therefore still in operation. Therefore, the only Article on which the Learned Counsel for the State could rely to invoke the bar of Article 31(c) is Article 39(b) which provides that the State shall in particular direct its policy to secure that the ownership and control of the material resources of the community should be so regulated as to sub-serve the common good.

14. The contention of the Learned Counsel for the Petitioners was that Article 39(b) cannot at all be invoked as private educational institutions cannot be regarded as material resources of the community. Similar submissions made before the Supreme Court have been rejected in the case of The State of Karnataka and Another Vs. Shri Ranganatha Reddy and Another, . Relevant part of the judgment reads :

"And material of the community in the context of re-ordering the national economy embraces all the national wealth, not merely natural resources, all the private and public sources of meeting material needs, not merely public possessions. Every thing of value or use in the material World is material resource and the individual being a member of the community his resources are part of those of the community. To exclude ownership of private resources from the coils of Article 39(b) is to ciphers its very purpose of re-distribution the socialist way. A directive of the State with a deliberate design to dismantle feudal and capitalist citadels of property must be interpreted in that spirit and hostility to such a purpose alone can be hospitable to the meaning which excludes private means of production or goods produced from the instruments of production. Sri A. K. Sen agrees that private means of production are included in "material resources of the community" but by some baffling logic excludes things produced. If a car factory is a material resource, why not cars manufactured ? "Material" may cover everything worldly and "resources" according to Random

House Dictionary, takes in "the collective wealth of a country or its means of producing wealth : money or any property that can be converted into money ; assets." No further argument is needed to conclude that Article 39(b) is ample enough to rope in buses. The motor vehicles are part of the material resources of the operators."

This view has been reiterated by the Supreme Court in Sanjeev Coke's case vide paragraphs 19 to 21.

14(i) An alternative submission made for the Petitioners was that Article 39(b) speaks of taking over the ownership and control of the material resources of the community and then providing for distribution, and, therefore gets attracted only to a law taking over the ownership and control of specific material sources and as the impugned law does not provide for the taking over of the private educational institutions and distribution of the resource to the community, the Law does not fall under Article 39(b) at all.

(ii) Article 39(b) reads :

"39. Certain Principles of policy to be followed by the State :-

The State shall, in particular, direct its policy towards securing -

XX XX ? XX (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good."

Learned Counsel for the State maintains that even without taking over or providing for distribution of the ownership and control of the institutions, the Law would fall under Article 39(b). In support of this submission, he relied on Sanjeevi Coke's case, in which the scope of Article 39(b) and in particular the word "distribution" has been expounded by the Supreme Court as follows :

"Ownership, control and distribution of national productive wealth for the benefit and use of the community and the rejection of a system of misuse of its resources for selfish ends is what socialism is about and the words and thought of Article 39(b) but echo the familiar language and philosophy of socialism as expounded generally by all socialists writers.

XXX XXX XXX XXX Nor do we understand the word "distribute" to be used in Article 39(b) in the limited sense in which Shri Sen wants us to say it is used, that is, in the sense only of retail distribution to individuals. It is used in a wider sense so as to take in all manner and method of distribution such as distribution between regions, distribution between industries, distribution between classes and distribution between public, private and joint sectors. The distribution envisaged by Article 39(b) necessarily takes within its stride the transformation of wealth from private-ownership into public ownership and is not confined to that which is already public-owned.

XXX XXX XXX 21. The Learned Counsel submitted that Article 39(b) would be attracted if the industry as a whole was nationalised and not if only a part of the

industry was nationalised. According to him, all the coke oven plants wherever they existed had to be nationalised and no privately owned coke oven plants could be allowed to be set up in the future, if Article 39(b) was to be applied. We are unable to see any force in this submission. The distribution between public, private and joint sectors and the extent and range of any scheme of nationalisation are essentially matters of State policy which are inherently inappropriate subjects for judicial review. Scales of justice are just not designed to weigh competing social and economic factors. In such matters legislative wisdom must prevail and judicial review must abstain. "

What the Supreme Court has held is. that Article 39(b) not only provides for distribution of ownership and control of the material resources already owned and controlled by the State, but also the ownership and control of the material resources under private ownership after transforming private ownership into public ownership. The Supreme Court further held, whether ownership of all persons should be taken, over or only of a few was a matter for Legislative wisdom.

14.A I shall now examine the validity of rival submissions in the light of the above decisions of the Supreme Court.

(i) The directive enshrined in Article 39(b) is to take steps to put an end to the monopoly or concentration of ownership and control of any of the material resources at the hands of a few and to distribute the ownership and control of such a material resource to different individuals or bodies so as to subserve common good.

(ii) To illustrate - (A) Take Land Reforms Laws :

Under those laws, lands beyond the prescribed ceiling limits owned and controlled by individuals as also lands owned and controlled by individuals within or beyond ceiling limits, who are not cultivators i.e., absentee land owners, are taken over by the State and the ownership and control in such lands is distributed to tenants already cultivating those lands or landless agriculturists. These are laws, which provide for distribution of ownership control.

(B) Take the Urban Ceiling law : This law prescribes ceiling on the extent of ownership and control on urban property and provides for acquisition by the State of the excess in the hands of individuals and provides for distribution to others, so as to sub-serve common good. It falls under Article 39(b). Upholding the validity of the law in Bhimsinghji's case the Supreme Court said thus-:

".... It shows that the Act was passed with the object of preventing concentration of urban land in the hands of a few persons and with a view to bringing about an equitable distribution of land in urban agglomerations to subserve the common good. "

(iii) Acquisition of ownership and control of any of the material sources owned by any private person whether individual or body and distribution of ownership and

control to private individuals or persons or Statutory Corporation to subserve common good is the directive of Article 39(b). This necessarily takes in the taking over by the State of the ownership and control of any of the material resources and retaining the ownership and control in itself or transferring the ownership and control so vested in the State to a Statutory Corporation if in the wisdom of the Legislature that such a step serves the common good. In view of the observations of the Supreme Court in *Sanjeevi Coke's* case that Article 39(b) takes within its stride transformation of private ownership into public ownership, the matter is beyond any controversy. This is also evident from Article 19(6)(ii) which gives immunity to the laws which affect the right of citizens guaranteed under Article 19(1)(g), but are enacted to create State monopoly, i.e. for the purpose of enabling the carrying on by the State or by a Corporation owned or controlled by the State of any trade, business, industry or service, whether to the exclusion, complete or partial of citizens or otherwise.

(iv) In any case, the law in order to fall within the directive of Article 39(b) must provide for taking over of ownership and control of any of the material resources and the distribution of ownership and control of the material resources so taken over so as to subserve the common good which could be achieved either by the retention of ownership and control with the State itself or by the distribution of ownership and control to others. Therefore there can be least doubt that it is competent for the State to make a law for the take over of the ownership and control of the Petitioner-institutions and vest it in itself or to transfer the ownership and control to any other body or to any University established or to any other person so as to sub-serve common good. But the Legislature in its wisdom has obviously considered it inexpedient to do so, for, the impugned Act does not provide for the taking over of the ownership and control of the educational institutions. In fact this fact was not and could not be disputed by the State. The question therefore for consideration is, whether even such a law falls under Article 39(b). The answer should, in my opinion, be in the negative. I shall however in considering the challenge to the provisions of the Act on the ground of violation of Articles 14 and 19, proceed on the basis that the law falls under Article 39(b), as contended for the State that even a law not providing for taking over of the ownership and control of the institutions of a material resource and providing for distribution of its ownership and control, but only providing for distribution of the product or benefit of material resource at the hands of citizens or private bodies would fall under Article 39(b) and therefore immune from attack in view of the protection of Article 31(c) of the Constitution.

15. Learned Counsel for the Petitioners, however, submitted that the provisions of the Act, in particular Section 3 which prohibits the collection of capitation fee altogether after five years, is sure to result in the closing down of the institutions and as a consequence, the educational opportunities, for the distribution of which the Legislation is purported to have been enacted, far from achieving the objects of Article 39(b) defeats it. They pointed out that even according to the White Paper, an engineering college with intake of 200 students requires Rs. 3 to 4

crores for capital expenditure, for its establishment and Rs. 30 to 40 lakhs for recurring expenditure and therefore if the Capitation Fee is abolished, there would be no other alternative to the Petitioners but to close down the institutions.

16. (i) There is considerable force in the submission of the Petitioners, based on facts and figures set out in the White Paper, that the total abolition of Capitation Fee might result in the closing down of all the unaided engineering colleges for want of financial resources to keep the institutions going.

(ii) This situation raises the question as to whether even if that would be the inevitable consequence of the law, still it could be regarded as law meant to implement the directive of Article 39(b)? The language of Article 39(b) is clear. It speaks of securing fair distribution of the material resources. Therefore, whenever the object of the law is only the securing of fair distribution of the benefit or product of a specified material resource and it can be regarded as in implementation of Article 39(b), the object of the Article presupposes the continued existence of the main resource. The following illustration highlights the submission of the Petitioners. For instance, a bicycle manufacturing factory and the bicycles manufactured in it, both constitute the material resources of the community in view of the enunciation of the term by the Supreme Court in the case of Ranganatha Reddy. If the object of a law is to secure bicycle at fair prices to all and the law compels the manufacturer to sell bicycles at half the manufacturing cost, the consequence is obvious. The main material resource, namely, the factory would suffer heavy loss, resulting in the closure of the factory. The question raised is, is such a law also one in implementation of Article 39(b) of the Constitution?

(ii) I see considerable force in the construction of Article 39(b) by the Petitioners that even if fair distribution of the produce of a main material resource without taking over the ownership and control of the main resource could be regarded as implementation of Article 39(b) then it presupposes the continued existence of the main source and, therefore, any law which provides for effecting distribution of the products of a material resource which brings about the destruction of the main material source itself, cannot be regarded as one enacted for implementing the directive enshrined in Article 39(b). However, the contention is premature as it would become a live issue only after five years in view of the proviso to Section 3 of the Act which not only empowers the State Government to fix the number of free seats but also to permit the collection of, Capitation Fee in respect of other seats at prescribed rates which undoubtedly has to be fixed on a rational basis and not arbitrarily.

17. Another aspect for consideration is, even if certain provisions of the Act is protected by Article 31(c), whether the immunity extends to the orders issued under Sections 3 and 5(1) of the Act fixing the number of free seats and management seats and the prescription of maximum amount of Capitation Fee, tuition fee and other fee which could be collected by the Petitioner-institution as contended for the State ? Answer to this contention has to be in the negative.

The immunity from attack given by Article 31-C extends to the provisions of the Act. Validity of anything done under the Act has to be tested with reference to the provisions of the Act, as also Articles 14 and 19 of the Constitution.

18. The interpretation of Article 31-B by the Supreme Court in *Prag Ice and Oil Mills -v- Union of India* AIR 1978 S.C. 1297, paragraph 10 provides the answer. In that case it was held that while Essential Commodities Act included in the 9th Schedule to the Constitution was protected by Article 31-B, an order made there under was not.

19. Applying the above ratio, I hold that the immunity from attack afforded by Article 31-C likewise is available only against the provisions of the Act and not for any rule or order made thereunder.

VI. Bar of Article 19(6)(i) :

Another hurdle, for challenge to the constitutional validity of the Act on the ground of violation of sub-clause (g) of Clause (1) of Article 19, pointed out by the Learned Counsel for the State, was clause (6)(i) of the Article. Article 19(1) (g) and (6) reads:

19. Protection of certain rights regarding freedom of speech etc,--

(1) All citizen shall have the right -

(g) to practice any profession, or to carry on any occupation, trade or business.

xx xx xx xx (6) Nothing in sub-clause (g) Of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing in so. far as it relates to, or prevents the State from making any law relating to, -

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business."

(Underlined by me)

Learned Counsel for the State relying on the underlined part of the clause submitted that that the impugned law was a law relating to professional or technical qualification necessary for practising any profession or carrying on any occupation, trade or business and therefore the Petitioners cannot question the validity of the law relying on sub clause (1) of Clause (g) of Article 19 of the Constitution.

(ii) Though this point was not pleaded in the statement of objection, being a pure question of law, learned Counsel for the State was permitted to argue the point.

(iii) Elaborating his submission, Learned Counsel pointed out that prior to the amendment of clause (6) by the Constitution First Amendment Act, the wording

of the relevant part of clause (6) was :

"prescribing or empowering any authority to prescribe, the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business."

The change brought about, according to the learned Counsel, would take in every Law relating to technical or professional qualification and as the impugned law, according to him, was also a law relating to technical qualification, Petitioners cannot rely on sub-clause (g) of Article 19(1) of the Constitution.

20. As against this, Learned Counsel for the Petitioners submitted that this was not a law relating to professional or technical qualification, but was only a law prohibiting the Collection of Capitation Fee for admission, inter alia, to engineering colleges and on allied matters.

21. A reading of the Preamble to the Act and the provisions thereof indicates that the Act is a law intended to eradicate the evil of collection of Capitation Fee for admission to professional or technical courses as also to other courses. The Law could be regarded as one relating to professional or technical qualification if it regulates items like the courses of study, the syllabus, the duration and the like all relating to qualification and would also include the qualification constituting the eligibility for admission to such courses. But the law in question does not deal with any of those matters. The submission made by the Learned Counsel For the State relying on the wording of clause (6) prior to its amendment, in support of his construction of clause (6), has also no force. According to the original clause, the protection was afforded only to a law prescribing the technical qualification for carrying on any profession or occupation. The amended clause covers laws prescribing condition of eligibility for admission to technical courses, duration of the course, syllabus and the like which are related to the acquisition of qualification prescribed for carrying on any profession or qualification. This amendment was obviously intended not only to ensure that a person carrying on any profession or occupation possessed the prescribed degree or certificate but also to ensure that such degree or certificate could be given to a person only after he underwent necessary study and training and passing of the prescribed examination. The expression "related to" in the context does not in my view take in the prohibition of prescription of Capitation Fee for admission to the technical courses. I am, therefore, unable to agree that the Petitioners cannot rely on Article 19(1)(g) of the Constitution in View of Clause 6(1) of Article 19 of the Constitution.

VII.Validity of Sections 3 and 5(1), (2),& (3):

23. I shall now proceed to examine, whether these provisions infringe Articles 14 and 19(1)(g) of the Constitution.

24. The plea of the Petitioners in support of their contention that Sections 3 and 5(1), (2) and (3) are violative of Articles 14 and 19(1)(g) of the Constitution is

as follows: The State Government has published a ""White Paper on Professional Colleges and Institutions." Relevant part of it reads:

" (d) It is estimated that for a College with an intake capacity of 200 students a minimum of Rs. 3. 00 to Rs. 4. 00 crores will be required to create facilities by way of buildings, equipment and other essential facilities over a period of 4 to 5 years and each college will also require a recurring expenditure of about Rs. 40. 00 lakhs per year for maintenance.

xxx xxx xxx 19. CAPITATION FEES : With the large scale investment required for the establishment of an Engineering or Medical College most of the private institutions have obviously to raise these funds by way of capitation fee or donations from or on behalf of the students seeking admissions. As a result, it is only the richer section of people who can afford this. Merit and maintenance of high standards have generally taken the second place and it has not been possible to promote social justice by way of helping the weaker sections of the society."

Thus the fact that enormous amount is required to establish and administer engineering colleges as also the fact that private engineering colleges should, of necessity depend upon the Capitation Fee, is admitted though it is added that on account of Capitation Fee merit has receded to a secondary position in the matter of admission. The charging of Capitation Fee was no evil. Its prohibition imposes unreasonable restriction on the right conferred under Article 19(1)(g) and was also violative of Article 14 as it is also arbitrary.

" 27. I shall first set out the grounds which are relevant to test the reasonableness of the restrictions imposed. In the case of Chintaman Rao Vs. The State of Madhya Pradesh, the Supreme Court said thus :

"7. The phrase "reasonable restriction" connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word "reasonable" implies intelligent care & deliberation, that is the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness & unless it strikes a proper balance between the freedom guaranteed in Article 19(1)(g) & the social control permitted by Clause (6) of Article 19, it must be held to be wanting in that quality."

Again in the case of State of Madras Vs. V.G. Row, the Supreme Court stated as follows :

".....It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions

imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. The evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people, of their way of thinking but for all, and that the majority of the elected representatives of the people have in authorising the imposition of the restrictions, considered them to be reasonable."

On the same point, in the case of Mohammed Faruk Vs. State of Madhya Pradesh and Others, the Supreme Court stated as follows:

"10. The impugned notification though technically within the competence of the State Government, directly infringes the fundamental right of the petitioner guaranteed by Article 19(1)(g), and may be upheld only if it be established that it seeks to impose reasonable restrictions in the interests of the general public and a less drastic restriction will not ensure the interest of the general public. The Court must in considering the validity of the impugned law imposing a prohibition on the carrying on of a business or profession, attempt an evaluation of its direct and immediate impact upon the fundamental rights of the citizens affected thereby and the larger public interest sought to be ensured in the light of the object sought to be achieved, the necessity to restrict the citizen's freedom, the inherent pernicious nature of the act prohibited or its capacity or tendency to be harmful to the general public, The possibility of achieving the object by imposing a less drastic restraint."

Constitutional validity of the provisions of the Act has to be decided applying the tests laid down by the Supreme Court.

28. I shall now proceed to consider the validity of: the impugned provision applying the tests laid down in the above decision. The main part of Section 3 of the Act prohibits the collection of Capitation Fee totally. The expression "Capitation Fee" in this Section, as indicated earlier, has to be understood as Capitation Fee for admission to educational institutions and not as defined u/s 2(b) of the Act. Therefore, though according to the main part of Section 3, no money could be collected as consideration for giving a seat, under the proviso, the State Government is given the power to permit the collection of Capitation Fee for a period of five years to the extent indicated in an order made by it. The Government is also empowered to fix the rate of tuition fee and all other kinds of fees u/s 5(1) of the Act. The State is also given the power u/s 14 to make rules for giving effect to the purposes of the Act. A combined reading of these three provisions yield the following results :

(i) No money can be collected by any private educational institution existing on

the date of commencement of the Act as a consideration for giving a seat unless permitted by an order made under the proviso and to the extent permitted.

(ii) Having regard to the wording of the proviso the State Government has the power to fix.--

(a) number of seats in respect of which no Capitation Fee shall be collected.

(b) the maximum amount of Capitation Fee that could be collected in respect of other seats.

(iii) u/s 5(1) of the Act, Government is empowered to prescribe the rate of tuition fee and any other kind of fees, but it cannot include capitation fee for admission as that fee is a matter exclusively covered by Section 3.

(iv) u/s 14, which confers power on the Government to make rules necessary for carrying out the purposes of the Act, it could make rules to ensure -

(a) that no capitation fee is collected in respect of free seats, and

(b) that no amount over and above the rate of capitation fee is collected in respect of other seats and

(c) that no other fee is collected over and above the rate of fee prescribed u/s 5(1) which is clearly prohibited by Section 5(2).

Thus, it may be seen, the Legislature has taken due note of the expenditure required to be incurred by the managements of private educational institutions. Bearing this aspect in mind, the Legislature, though provided for prohibition from collecting Capitation Fee under main part of Section 3 under the proviso, empowered the Government to permit the institutions to collect Capitation Fee at the rate determined by the Government and in respect of such number of seats as fixed by the Government upto a period of five years from the date of commencement of the Act. Therefore, under this provision the catastrophe that would be caused to the institutions by the immediate abolition of Capitation Fee under main part of Section 3, is avoided.

29. Learned Counsel for the Petitioners, however, strenuously contended that the levy of Capitation Fee was not an evil at all and, therefore, could not be prohibited or restricted. In support of this submission, they relied on the judgment of the Supreme Court in D.P. Joshi Vs. The State of Madhya Bharat and Another, . The relevant part of it reads-

"This is a Petition under Article 32 of the Constitution. There is at Indore a Medical College known as the Mahatma Gandhi Memorial Medical College run by the State of Madhya Bharat. The Petitioner who is a resident of Delhi was admitted as a student of this College in July 1952, and is now studying in the third year class, M.B.B.S. Course. His complaint is that the Rules of force is this institution discriminate in the matter of fees between students who are residents of Madhya Bharat and those who are not, and that the latter have to pay in

addition to the tuition fees and charges payable by all the students a sum of Rs. 1,500/- per annum as capitation fee, and that this is in contravention of Articles 14 and 15(1) of the Constitution.

The Petitioner accordingly prays that an appropriate writ might be issued prohibiting the Respondent from collecting from him capitation fee for the current year and directing a refund of Rs. 3000/- collected from him as capitation fee for the first two years.

XX XX XX XX XX XX . It was next contended for the Petitioner that the imposition of Capitation Fee on some of the students and not on others is discriminatory, and is in contravention of Art. 14 of the Constitution and therefore void. the impugned rule divides, as already stated, self-nominees into two groups, those who are "bona fide" residents of Madhya Bharat and those who are not, and while it imposes a Capitation Fee on the latter, it exempts the former from the payment thereof. It thus proceeds on a classification based on residence within the State and the only point for decision is whether the ground of classification has a fair and substantial relation to the purpose of the law, or whether it is purely arbitrary and fanciful.

15. The object of the classification underlying the impugned rule was clearly to help to some extent students who are residents of Madhya Bharat in the prosecution of their studies, and it cannot be disputed that it is quite a legitimate and laudable objective "for a State to encourage education within its borders. Education is a State subject, and one of the directive principles declared in Part IV of the Constitution is that the State should make effective provisions for education within the limits of its economy (Vide Art. 41). The State has to contribute for the upkeep and the running of its educational institutions.

We are in this Petition concerned with a Medical College, and it is well-known that it requires considerable finance to maintain such an institution. If the State has to spend money on it, is it unreasonable that it should so order the educational system that the advantage of it would to some extent at least ensure for the benefit of the State ? A concession given to the residents of the State in the matter of fees is obviously calculated to serve that end, as presumably some of them might, after passing out of the College, settle down as doctors and serve the needs of the locality."

This decision has been reiterated in *Dr. Pradeep Jain and Others Vs. Union of India (UOI) and Others*, . When a State, having enormous financial resources, was collecting Capitation Fee, a private unaided institution could not be prevented and, therefore, prohibition or even regulation of Capitation Fee is an unreasonable restriction on the fundamental right guaranteed under Article 19(1) (g) and was also violative of Article 14 on the ground that it was arbitrary.

30. It is true that enormous amount is required for establishing and administering the educational institutions. But that does not mean the Petitioner could dispose of the seats in favour of highest bidders to the exclusion of more

merited but less mined.

31. The evil for the eradication of which the Act was enacted has been indicated in the Preamble to the Act. It has been elaborated in the statement of objections thus -

"3. The, total number of Engineering Colleges in the State of Karnataka was 39, of which 18 had come into existence prior to the year 1979. During the year 1979 and 1980, 21 more private Engineering Colleges were permitted to be started in the State of Karnataka. These and other private colleges started earlier to 1979 had not obtained the approval of the All India Council of Technical Education for starting the Engineering Colleges. In addition, even though these private engineering colleges were started with the avowed object of satisfying the needs of a region or of large sections of the public who could not avail themselves of the educational facilities provided by the Government and other aided Engineering Colleges for various reasons, and even though, such private Engineering Colleges were permitted to start instructing in engineering studies by the Government with the fond hope and belief of such institutions imparting technical education in a manner beneficial to the society, it was soon realised that these institutions started to convert the educational institutions commenced by them as institutions meant for collecting enormous funds from the public as capitation fee for admission of students in the respective colleges. The quantum of capitation fee that was thus being collected was not only exorbitant amounting to an exploitation of public, but was without regard or consideration for the claims of meritorious students, and also the legitimate claims of backward classes of citizens who were unable to secure admission in the Government and aided Engineering Colleges. The allotment of seats in these institutions solely on the basis of the quantum of capitation fee that a candidate was willing to offer made it impossible for merited and weaker sections of the society to seek admission in these colleges even though large hopes were raised when these institutions were started that they would function in the interests of the general public, particularly is the interests of the students belonging to the region in which the institutions were started and the other weaker sections of the society. The availability of seats in these institutions became the monopoly of a few rich students who could offer to pay the amount demanded by the institutions without any regard for the pernicious consequences that such system of imparting education only on the basis of collection of capitation fee would have on the interest of the State and the Nation as well. The evils following this system of collecting capitation fee by the petitioners and other institutions reached such alarming proportions that there was unequivocal public demand for abolition of the system of capitation fee so that education may be freed from the evil clutches of money-power and become available to all on the basis of merit and the reservation permissible under the Constitution of India in favour of the backward classes.

4. Apart from the demand made by several educationists and public men, the

Estimates Committee of Parliament voiced its grave concern over the existence of the evil of the capitation fee system in admitting the students to Engineering Colleges and the view of the Estimates Committee was shared by the University Grants Commission. The Government of Karnataka was apprised of the concern expressed at various levels against the evils of the system and the dangerous consequences the continuation of such a system would have on the entire technical educational system and consequently, the Government of Karnataka constituted the University Review Commission to review the entire question relating to the levy of capitation fee by the Petitioners and other institutions in the State of Karnataka. After a detailed study of the implications of the system and the harmful consequences which would affect the society by the continuation of the system any longer, the Committee recommended that within a period of five years the evil should be put an end in a phased manner. The recommendations of the Committee thus made after due deliberation and an in depth study into the various aspects of the problem, were considered by the Government of Karnataka and with the object of putting an end to the further growth of this evil system of collection of capitation fee, the Government issued the executive order dated 5-9-1981 providing for abolition of capitation fee in a phased manner. The said executive order was passed in exercise of the powers of the State under Article 162 of the Constitution of India and was not issued in exercise of the powers of the State Government under any enactment of the State Legislature. As it was considered necessary that the object of abolition of capitation fee could be properly achieved by the enactment of suitable legislation in this behalf by the State Legislature in exercise of the powers conferred upon it under Entry 25 of List III of Schedule VIII of the Constitution of India, the present Act was passed by the Karnataka State Legislature."

Thus it may be seen the Law was enacted to remedy the mischief resulting from collection of Capitation Fee at exorbitant rate.

32, I may also add that the number of cases of admission of ineligible candidates which have come up before this Court during the last two years would amply prove the unscrupulous manner in which the private colleges have been disposing of the seats which could obviously be owing to the desire to collect more Capitation Fee, highlights the evil consequences on educational standards. Some of the instances are --

(i) Candidates who had failed in the Pre-University examination had been admitted to two private engineering colleges who are petitioners and they were allowed to pass in the failed subjects in the supplementary examination, and the University concerned cancelled the admission of such students and such cancellation was upheld by this Court. (See : Order in W. P. Nos. 14377 and 14378 of 1983 - Dd. 5.10,1983).

(ii) Candidate, who did not belong to Backward Tribe and who had secured 44% of marks in optional subjects and was therefore ineligible for admission, was given a seat in one of the Petitioner- colleges receiving Capitation Fee. The

admission of the candidate was subsequently disapproved by the University which was upheld by this Court. (See Order in W. P. No. 14379/83-Dd. 5.10.1983).

33. The other types of cases show how students, who have no capacity to pass examination are securing seats and promotions by money power indulging in malpractice--

(i) Candidates, who had failed in the Pre-University Examination produced forged certificates and secured admission to one of the Petitioner-engineering college on receipt of Capitation Fee and subsequently their admissions were cancelled and the cancellations were upheld by this Court. (See Order in W. P. Nos 4163, 9972,10072, 10172 of 1984 - Dd. 24-8-1984).

(ii) A candidate who got himself admitted to one of the Petitioner institution having successively failed in the I, II and III B.E., examinations secured fake correction slips to the effect that he had passed in all the three examinations. This fraud was unearthed and he was prevented from appearing for further examinations. The order was upheld and a direction has been issued to launch criminal prosecution against all the concerned persons. (See : Order in W. P. 9728/84 Dd. 8-8-1984).

These are only illustrative. There are quite a good number of cases which have come, up before this Court which disclose shocking state of affairs. It is pertinent to point out that all such cases have arisen only in respect of candidates admitted to private colleges and, therefore, attributable to the evil practice of collection of Capitation Fee.

34. It is true that collecting of money required for the administering the institution by charging a reasonable amount as Capitation Fee is a necessity and cannot be regarded as an evil. Without this, the right conferred under Article 19(1)(g) becomes illusory. In the Madhya Bharat case the Capitation Fee charged was only Rs. 3000/-. Of course it was by the State and was in 1955. Therefore a Capitation Fee commensurate with the present value of the rupee and the amount necessary to meet recurring expenses cannot be regarded as an evil. Learned Counsel for the Petitioners, however, maintained that they were entitled to recover capital investment also from students in the form of Capitation Fee and if that were to be taken into account in fixing the Capitation Fee under proviso to Section 3 that would satisfy them at least for five years.

35. I am unable to agree that in fixing the Capitation Fee in respect of seats other than free seats, the capital expenditure which the petitioners propose to incur should be taken into account. Even according to the petitioners, with the avowed object of catering to the needs of a particular region or classes of citizens, associations were formed, institutions were founded on the basis of donations and contributions by philanthropic individuals. Under the law governing the grant of affiliation to any of the Universities of the State, it is only after the necessary buildings, equipment and financial resources are brought into

existence, the affiliation to the concerned University has to be granted.

36. Section 53 of the Karnataka State Universities Act prescribes the conditions for grant of affiliation. Relevant part of it reads.

"53. AFFILIATION OF COLLEGES --

XX XX XX XX (2) A college applying for affiliation to the University shall send an application to the Registrar within the time limit fixed by Ordinances and shall satisfy the Syndicate and the Academic Council --

xxx xxx xxx (d) that the buildings in which the college is to be located are suitable and that provision will be made in conformity with the Ordinances for the residence in the college or in lodgings approved by the college, for students not residing with their parents or guardians and for the supervision and welfare of students.

xx xx xx xx (h) that the financial resources of the college are such as to make due provision for its continued maintenance and efficient working;"

Thus it may be seen that those are the conditions precedent for securing affiliation. Even regarding post-establishment capital expenditure, it would be unreasonable to throw the burden of future expenditure on the present students. Further, if such capital expenses were to be taken into account, then Capitation Fee is sure to become exorbitant as it could always be incurred or increased to any extent by making proposals. This again would defeat the avowed object of the Petitioners as by and large people coming from other part of the country or even abroad, who ,would have the capacity to pay such Capitation Fee and not the students for whose benefit, according to the Petitioners, the institutions were established, could secure the seats. In fact that is the evil sought to be remedied by the Act, as seats are virtually being auctioned. It is true, as held earlier, the expression "business" in Article 19(1)(g) having regard to its wide import, in the context of the right of citizens, includes the right to establish and administer educational institution. That does not mean the Petitioners could regard the right to establish and administer educational institutions as "business" as understood at common parlance and commercialise education. Therefore, the institutions would have to find funds for capital expenditure elsewhere. It could be in the form of donations from individuals or corporations in cash or in kind, like securing of equipment or gift of land etc. The Government could also make special grant for construction of building or acquiring equipment and also grant lands free of cost without any string. In this behalf it is pertinent to point out that most of the institutions could also find ways and means of securing income through rents, interest etc. It is for the managements of these institutions to secure the resources by any of the above-mentioned ways. The private agencies secured permission to start the college from the Government and affiliation from the University representing that their object was to serve the needs of the needy students of the region or class as pleaded by them and also according to the facts stated in the statement of objection. But forgetting that noble object, those

agencies have been indulging in collection of Capitation Fees for admission at exorbitant rates and admitting students who paid such amount to the exclusion of more merited but less mined students of the locality or caste or community. That evil practice has assumed dangerous proportions. This aspect has been inquired into by a committee appointed by the Karnataka University in 1980. Its findings are -

"2.32. In the case of the colleges which do not receive grants-in-aid from the State Government, the fees they have been permitted to charge have become so extortionate that, even if these fees apply only to a limited proportion of the students admitted, they offend the basic principles and values of academic organisation. The system, as it has developed over a period, appears to be also becoming cancerous, bringing discredit not only to the universities concerned (particularly in the eyes of the student community) but to the State itself. While there is a strong case for charging higher fees on students belonging to the wealthier strata of society, and even for raising somewhat the standard fees chargeable on all students (except those who are specifically exempted), there can be no place in higher education for what in effect amounts to a system of auctioneering."

The State could not remain a silent spectator to the evil which has crept into these institutions. Therefore the impugned law has been enacted.

37. One of the criteria laid down to determine as to whether a law was violative of Article 19(1) is, the nature of the right infringed and the other is the nature and extent of the evil sought to be remedied by the law. The right claimed is a right to administer the educational institutions established by the Petitioners. What is the scope and extent of this right ? Education is one of the primary functions of the State as indicated in Articles 41 and 46. Article 245 read with Entry 25 of the III List of the Seventh Schedule to the Constitution, empowers the State to make law on the topics "education, including technical education, medical education and Universities". The State has enacted the Karnataka State Universities Act, 1976. Section 53 thereby empowers the Government to accord affiliation to any college in conformity with and subject to the conditions set out in Section 53 of the Act and the Statutes framed under the Act. Thus it may be seen, it is the affiliation received under public law which constituted the soul of the petitioner-institutions. Therefore, if any citizen wants to run any educational institution including a college of his choice, he may have the right to do so without seeking affiliation to any University. But students of an institution to be eligible for admission to examinations conducted by the University and to the degrees, the institution in which they have studied must have been either established by the University or affiliated to an University established by law. Without affiliation no student would get admitted to these institutions. The institutions affiliated to any University are bound to comply with the provisions of the University Act and Statutes framed thereunder governing them which are intended to ensure proper administration of the institutions. The Legislature

which had imposed certain binding conditions on the affiliated colleges, by a Law made under Entry 25, has under the same entry enacted the impugned Act laying down the additional conditions or restrictions to be obeyed by them. The Act became necessary because the institutions took undue and unfair advantage of being affiliated colleges and began to auction the seats forgetting the public duty taken upon by them selves by establishing institutions and by securing affiliation. The ownership and right to administer educational institutions which have secured affiliation cannot be equated to right of ownership and management of purely private property or business. It is of utmost importance to bear in mind the function of affiliated colleges which have secured the privilege of sponsoring students to University examinations leading to the securing of degrees from the University is quasi-public in nature as thereby they discharge one of the basic functions of the State under Articles 41 and 46. Securing of such a privilege through affiliation under public law, carries with it the duty to comply with the conditions and restrictions imposed by law in public interest. Therefore State control to ensure educational excellence, to prevent maladministration and to prevent misapplication of funds, is essential. If education gets astray, it is injurious to public interest. For these reasons, I am unable to agree with the contention of the petitioners that Capitation Fee was no evil, having regard to the manner and to the extent it is being collected which has a deleterious effect on educational excellence and its fall out on professional competence and ethics. The State is entitled to impose restrictions to curb such undesirable practices. (See: Katra Educational Society Vs. State of Uttar Pradesh and Others, .

38. However, I do agree that the private medical educational institution cannot survive without collecting Capitation Fee unless of course it is backed by any other fund sufficient to bear the burden. This is evident from the observations of the Supreme Court in Kerala Educational Bill A.I.R. 1958 S.C. 956. They read:

".....It is, however well known that in modern times the demands and necessities of modern educational institutions to be properly and efficiently run require considerable expense which cannot be met fully by fees collected from the scholars and private endowments which are not adequate and therefore, no educational institution can be maintained in a State of efficiency and usefulness without substantial aid from the State."

This position was reiterated in the case of Sidhrajibhai. Relevant part of the judgment reads :

"Again in the circumstances prevailing in the country, no educational institution could, in actual practice, be maintained without aid from the State and if it could not get it unless it surrendered its rights, it would, because of pressure of financial necessities, be compelled to give up its rights under Article 30(1). The State could not disregard or override the fundamental right by employing indirect methods of achieving exactly the same result. Even the legislature could not do indirectly what it certainly could not do directly and the effect of the application of some of those provisions of the Bill was substantially to over-ride the

provisions of Article 30(1)."

(Underlined by me)

The observations though made in the context of rights of minorities under Article 30, apply mutatis mutandis to the rights of the Petitioners under Articles 14, 19(1)(g) and 21. But the observations indicate that Petitioner-institutions who are not taking aid from the State must of necessity depend upon the funds collected from students or their parents. From this it follows, total prohibition to collect Capitation Fee would mean a death blow to the institutions. Therefore the steps taken to eradicate the evil cannot deprive the basic fundamental right of the Petitioners to establish and administer educational institutions flowing from Article 19(1)(g). Hence there can only be a reasonable restriction on the collection of Capitation Fee but no prohibition. Section 3 minus the proviso would therefore be void as offending Articles 14, 19(1)(g) and 21, However, though main part of Section 3 speaks of prohibition of Capitation Fee, according to the proviso, collection of Capitation Fee could be regulated and restricted by declaring some of the seats as free seats and fixing the Capitation Fee in respect of others. In view of the proviso, the Section is really regulatory. As the proviso will be in force for 5 years, the validity of Section 3, without it will become a live issue after 5 years.

39. It was contended alternatively for the Petitioners that though by the addition of the proviso, the deprivation of the right under Article 19(1)(g) is averted for the present, the proviso does not lay down any criteria for fixing the number of free seats or the quantum of Capitation Fee chargeable by the private institutions and, therefore, it conferred an arbitrary power, as a result of which the Government could fix any number of seats as free seats and any amount as Capitation Fee for other seats which would virtually result in compelling the Petitioners to close down their institutions. Moreover, if the Government does not make any order under the proviso they pointed out that the prohibition would be immediate.

40. Learned Counsel for the State submitted that even if such a result was brought about, the petitioners could not complain. In support of his submission he relied on the Judgment of the Supreme Court in Cooverjee B. Bharucha Vs. The Excise Commissioner and the Chief Commissioner, Ajmer and Others, . The relevant part of it reads -

".....There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the State or of a citizen of the United States. As it is a business attended with danger to the community, it may, as already said, be entirely prohibited or be permitted under such conditions as will limit to the utmost its evils."

He maintained, just as it was held, that there was no fundamental right to sell intoxicating liquor, it should be held that the Petitioners had no fundamental right to administer educational institution levying Capitation Fee.

41. On the face of it, the submission is untenable. There is no analogy between the right claimed by the Petitioners in the present case and the right claimed in Cooverjee's case. The former relates to "Vidya" (education) and the latter relates to "Madya" (intoxicating liquor). Therefore the difference between Coverjee's case and this case is the same as between virtue and vice. The fundamental right claimed by the Petitioners is the right to administer educational institutions which receive no financial aid from the Government. I have earlier held that it is a sacred and basic right and a fundamental right under Article 19(1)(g) and 21, whereas in the case of Cooverjee the Supreme Court held that there was no inherent right to do business in intoxicating liquors which was dangerous to health and morality and therefore it could either be restricted or prohibited. The decision of the Supreme Court in State of Bombay -v.-R.M.D.C. AIR 1967 S.C. 699 on which the Learned Counsel for the State relied is not apposite as the right claimed therein was to engage in the business which amounted to gambling and betting a pastime injurious to the interest of the society. Certainly all kinds of professions, occupations or business do not stand on the same footing. The extent of restriction which could be validly imposed must depend upon the nature of the particular right and the mischief sought to be remedied. The right to establish and administer institutions of the choice of the citizens being one of the most valuable rights the restrictions must be strictly confined to eradicate the evil, and not more. As the levy of Capitation Fee at exorbitant rate is an evil, it could be restricted so as not to result in the deprivation of the basic right.

42. However, I am unable to agree that the proviso to Section 3 confers any arbitrary power in the matter of fixing free seats or maximum rate of Capitation Fee for other seats. The language of the provision unmistakably indicates that the amount of capitation Fee which the Government might fix as also the number of seats in respect of which the collection of Capitation Fee could be completely prohibited, has to be done on a rational basis, i.e., having due regard to the fact that the finance required for the maintenance of the institutions have to be substantially met out of the amount collected as Capitation Fee. Further, the quantum of Capitation Fee which the Government is required to fix under the proviso must have to be fixed having due regard to the requirement of the institutions and their financial position.

Therefore, the decision of the Government under the proviso has to be based on facts. This is evident from the Legislative recognition of the necessity of collection of Capitation Fee which is implicit in the language of the proviso to Section 3, namely.

" Government may, notwithstanding anything contained in the Act permit any educational institution established before the commencement of the Act and maintained or developed solely or substantially out of amounts collected as capitation fee to receive such capitation fee."

(Underlined by me)

Therefore, the Government is not only under a duty to pass an order regulating the collection of capitation fee, but has also a duty to fix it on rational basis. Further the facts and figures which alone would help the Government to fix the number of free seats and rate of capitation fee for other seats, could be furnished only by the institution concerned. This circumstance, as also the fact that an order fixing, the number of free seats and the capitation fee in respect of other seats, results in serious civil consequences to the institutions, it pre-supposes the giving of opportunity of hearing which could be either by way of written representation and /or by oral hearing. The principle that an administrative order resulting in serious civil consequences could be made only after complying with the rule of "audi alteram partem" is firmly established.

See : A.K. Kraipak and Others Vs. Union of India (UOI) and Others,
Maneka Gandhi -v.- Union of India

Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others,

S.L. Kapoor Vs. Jagmohan and Others,

One other argument advanced by the Learned Counsel for the Petitioners was that when admittedly the Legislature had recognised under the proviso to Section 3 that collection of capitation fee forms substantial resource for maintenance of a private college, that certain percentage of seats as prescribed by the Government should be given by the private management without collecting any capitation fee is arbitrary and infringes the right guaranteed under Article 19(1)(g) of the Constitution.

43. The power conferred under the proviso to Section 3 to fix certain number of seats as free seats and to prescribe the maximum amount of Capitation Fee that could be collected in respect of other seats are obviously intended to strike a balance between the necessity to ensure the securing of seats by more merited candidates but belonging to weaker sections, which is one of the directives enshrined in Article 46 as also the necessity to ensure adequate income to the institutions. So long the rate of Capitation Fee fixed for seats other than free seats, is such as would compensate for the loss occasioned by declaration of certain number of seats as free seats, the petitioners cannot complain against fixation of the number of free seats. This aspect is clear from the judgment of the Supreme Court in *The Lord Krishna Sugar Mills Ltd. and Another Vs. The Union of India and Another*, In that case the price fixed for the sale of sugar by the Sugar Factories for export were questioned on the ground that it amounted to infringement of fundamental right guaranteed under Article 19(1)(g) of the Constitution as such fixation had no relation to the cost of production and consequently resulted in heavy loss to the sugar factories. While that fact was not disputed by Union of India, it was pointed out on its behalf that the rate of sugar fixed for internal sale was sufficiently high to compensate the sugar factories for the loss caused to them by the rate fixed for export market.

Upholding the validity of the restrictions, the Supreme Court said thus:

"(30) We are satisfied that the object of the Act does not infringe the fundamental rights of the Petitioners. To prevent any loss to the Petitioners, countervailing additional prices were allowed on sales of sugar for internal consumption. The Petitioners did not stand to lose ultimately."

Therefore, it is clear that even if the Petitioner-institutions could be prohibited from collecting Capitation Fee in respect of certain number of specified seats, the Legislature has made provision permitting collection of Capitation Fee in respect of other seats. Such fixation undoubtedly has to be made bearing in mind the loss occasioned to the institutions by the fixation of certain number of seats as free seats. The same reasoning applies to the fixation of the quantum of tuition fee and other fee. Section 5(1) is incorporated to ensure that the institutions after having been prevented from collecting Capitation Fee at exorbitant rates would not try to collect it in the form of tuition fee or other fees. Therefore, the State Government is required to fix the rate of tuition and other fees in exercise of its powers u/s 5(1). Once the rates of those fee are fixed, sub-section (2) of Section 5 prohibits the collection of any amount under any account in violation of what is prescribed u/s 5(1) or permitted u/s 3 proviso. Section 5(3) requires the institution to give receipt for all the types of fee collected from the students. These are essential regulatory measures intended to ensure the observance of the main provision incorporated in Section 3. Hence, they are valid.

44. The fixation of rates of fee u/s 5(1) to the disadvantage of the Petitioners must, however, be for the same reasons applicable to an order u/s 3 proviso set out earlier, be preceded by the giving of an opportunity to make representation and the rate of fees fixed should also be on rational basis.

45. In the result, I hold that Section 3 and sub-sections (1), (2) and (3) of Section 5 are not violative of Article 19.

For the same reasons, I hold that the power conferred under these provisions cannot also be regarded as arbitrary and therefore violative of Article 14 of the Constitution.

46. It should, however, be made clear that an order made under proviso to Section 3 or u/s 5(1) is open to challenge if it is arbitrary and therefore ultra vires Section 3 or 5(1), as the case may be, or if it is violative of Article 14 and 19(1)(g) or if it is made without complying with principles of natural justice, if any basis to do so exists.

VIII. Validity of Government Seats (i.e. Section 2(e) and 4(2)(a).

47. Learned Counsel for the petitioners strenuously contended that even if Section 3 with its proviso were to be held as not violating Articles 14 and 19(1)(g) of the Constitution, the provisions contained in Section 4(2)(a) read with Section 2(e) which defined "Government Seats" and empowers the Government to set apart a certain number of seats in the petitioner-institutions as "

Government Seats " and to entrust the power to make selection for admission to all such seats on all-India basis to a committee constituted by it and to allot the candidates selected by the Committee constituted by the State Government to these colleges, is patently violative of Articles 14 & 19(1)(g) of the Constitution and further had no nexus to the object of the Act. Elaborating the sub-mission, Learned Counsel stated as follows : The State was under an obligation to provide facilities for education at all levels in view of Articles 41 and 46. The number of institutions established by the State were highly inadequate to provide opportunities of higher technical education. It may be, the State within the limits of its financial resources was unable to fulfil this demand. The agencies establishing private engineering institutions took over the major part of the burden. This is evident from the fact that there are 28 private colleges with total intake of 6995 seats as against two Government colleges, one university college and 8 aided colleges whose total intake is only 4334.

Each of the private institutions has been established by service-minded individuals for serving the needs of a particular region, caste or community, which are backward in education. These include classes of citizens who are declared as educationally and socially backward classes both under Article 15(4) and 16(4) which includes even Scheduled Castes and Tribes. The desire to provide higher educational facilities to the needy students belonging to the concerned region, class, caste or community has been the source of inspiration for service-minded persons to devote considerable time and energy for this public cause and to make donation of substantial amounts or land or equipment necessary for the establishment of these institutions. The agencies which have established such educational institutions have the right to regulate the admission to these institutions, keeping in view the interest of the classes of citizens of the locality for whose benefit the institution was established. Existence and the necessity of such right is recognised and declared by the Supreme Court in several decisions of the Supreme Court. Some of those decisions and the relevant part thereof are : (i) R. Chitrlekha and Another Vs. State of Mysore and Others, It reads:

"8. It is then said that Mysore University Act conferred power to prescribe Rules for admission to colleges on the University and the Government cannot exercise that power.

XXX XXX XXX Once it is conceded, and it is not disputed before us, that the State Government can run Medical and Engineering Colleges, it cannot be denied the power to admit such qualified students as pass the reasonable tests laid down by it. This is a power which every private owner of a College will have, and the Government which runs its own Colleges can-not be denied that power. "

(Underlined by me)

(ii) D.N. Chanchala Ors. Vs. The State of Mysore and Others, It reads :

There can be no manner of doubt, and it is now fairly well settled that the

Government, as also other private agencies, who found such centres for medical training, have the right to frame rules for admission so long as those rules are not inconsistent with the University statutes and regulations and do not suit or from infirmities, constitutional or otherwise."

(Underlined by me)

They also pointed out the principles laid down in these decisions have been referred to and reiterated by the Supreme Court in *Pradeep Jain -v.- Union of India*. Learned Counsel submitted that in *Pradeep Jain*'s case the Supreme Court has held that reservation of seats to persons residing in backward regions, which might result in selection of candidates who had secured lesser marks in preference to those students belonging to more fortunate classes in developed regions even by the State, it would not be violative of Article 14 and on the other hand it would be a step to ensure equality. That being the position, Counsel for the Petitioners asked why the private agencies should not have the right to regulate admission to the institutions established by them and in exercise of that right to reserve seats to the extent considered necessary in favour of students belonging to the region, caste or community for whose benefit the institutions were established?

48. There is no dispute that these institutions have been established by the private agencies collecting donations from service-minded and philanthropic individuals and the dedicated selfless service rendered by large number of individuals. The inspiration for giving donation and rendering dedicated service was the desire to provide technical educational facilities to the students in backward areas or belonging to backward classes or classes of citizens who were unable to secure such opportunities. These facts are not only stated in the petitions but are also admitted in the statement of objection. When the institutions have been established and the institutions are rendering service to the society as a whole, through these institutions, the taking over of free seats by the Government not only denies to the Petitioners their right to regulate admissions to the institutions but also defeats the very purpose with which the institutions were brought into existence. It would kill the initiative for donating money or devoting time and energy for the building and development of the institutions and the result would be the closing down of the institutions resulting in serious injury to the cause of higher education. The impugned provisions, regarding Government seats, are not merely an unreasonable restriction on the fundamental right guaranteed under Article 19(1)(g) but cause partial deprivation of the right itself. Further, the provisions are arbitrary and therefore violative of Article 14.

49. As held by the Supreme Court in the decisions referred to above, the right to regulate admission into an educational institution is an essential incidence of ownership. Devoid of the right to regulate admissions so as to ensure that the educational facilities to students belonging to the region or classes of citizens for whose benefit the agency concerned established it, the very purpose of

establishing the institution gets defeated. Taking over of the right to regulate admissions in respect of substantial number of seats that too free seats would result in the denial of opportunities to the economically weaker sections belonging to the locality or class for whose benefit the institution was established. Even if some of them get seats out of Government seats, they might be allotted to a college anywhere in the State, as pointed out for the Petitioners, and that would cause to them great hardship. It may be that if the declaration of Government seats and regulation of admission to Government seats is inevitable and necessary to give effect to the provisions of the Act, there would be considerable force in the contention of the State, Even according to the Act, Government seats will be only for five years. Thereafter all the seats would become management seats. Therefore the question is, what is the justification of Government seats in the interregnum ?

50. In this behalf, in the first instance, it is necessary to bear in mind that the petitioner-institutions are established and maintained by their own funds and they do not receive any financial aid from the State exchequer and there-fore if it is possible to achieve the object of the Act fully without depriving the right of the petitioners to regulate admission to their institutions, the power to declare certain number of seats as Government seats and the take over of the right to make admissions cannot but be regarded as an unreasonable one.

51. There can be no two opinions as to the yeoman service rendered by all those who have devoted their energy, mind and money with an intense desire to provide higher educational facilities mainly for the benefit of the needy students belonging to a specified backward region or caste or community and through it the society for whose benefit persons with higher technical education would be available. If, however, any evil practice has come into existence, the service rendered is no ground to prevent the evil. The State is in fact under a duty to eradicate such evil. While upholding Section 3, I have referred to the evil and its magnitude.

52. In fact, in the two impugned orders made by the Government in exercise of its powers u/s 3 proviso and Section 5(1) of the Act has fixed that 60 per cent of the seats in each of the educational institutions could be filled up by collection of Capitation Fee not exceeding Rs. 30.000/-and that 40 per cent of the seats which the Government, has declared as " Government Seats " are the seats in respect of which no Capitation Fee could be collected by the petitioner-institutions. The provisions of the Act confer sufficient power on the Government to make rules or orders to ensure that no money is collected in respect of free seats and no money in excess of the maximum amount of Capitation Fee prescribed in respect of other seats is collected. Therefore, once the number of seats as also the maximum amount of Capitation Fee in respect of other seats is prescribed and its strict implementation could be enforced, I fail to see the nexus between the object of the Act and Section 3, and the provisions for treating the free seats as Government seats and filling up the same on All India basis.

53. Learned Counsel for the State, however, submitted that the provision for Government seats was essential and the provisions made for that purpose were not violative of Articles 14 and 19(1)(g) of the Constitution. In support of his contention he submitted as follows : By merely declaring certain seats as free seats, the object of Section 3 would not be fulfilled. On the other hand, it would give a free hand to the institutions to collect Capitation Fee even in respect of those seats clandestinely without issuing official receipts. Therefore, the provision for Government seats was absolutely necessary to ensure the implementation of the object of the Act. Further, if there was no such provision, students seeking admission to engineering courses would have to apply separately for all the colleges and would create considerable difficulty and hardship to them.

54. I see no force in the submission. If the apprehension is that Capitation Fee would be collected even in respect of free seats clandestinely, if the selection is left to the management, then even if those seats are filled up by the Government, the managements could also collect any amount higher than the maximum Capitation Fee prescribed in respect of management seats clandestinely and the higher amount so collected might be to such extent as to compensate them selves for the loss occasioned by Government seats. Therefore, unless Rules are framed not only to ensure that no amount is collected in respect of number of seats for which the collection of Capitation Fee is prohibited, but also to ensure that no amount in excess of the maximum amount of Capitation Fee is collected in respect of other seats, the evil would continue unabated and clandestinely and might get aggravated. There-fore, I am unable to agree that declaration of Government seats and the taking over of reservation in respect of those seats are essential for achieving the object of the Act. I do agree that by mere declaration of certain number of seats as free seats and by fixing the maximum rate of Capitation Fee in respect of other seats, the evil cannot be eradicated. But, as pointed out above, in addition to such declaration, it is absolutely essential for the Government to frame rules for effective implementation of the Act. Therefore, the Government should frame rules for the purposes of the Act requiring the managements of the institutions :

(1) To submit to the State Government the rules or policy made by them if they so desire for the purpose of ensuring that the availability of substantial number of seats both free and with Capitation Fee in favour of candidates of the region or the classes for whose benefit the institutions had been established.

(2) To require the management to make selections within the group or class of persons in whose favour the management concerned is desirous of giving a seat strictly according to merit. This should be not only in respect of those who are seeking selection against free seats but also for those who are seeking selection against other seats on payment of only the prescribed amount of Capitation Fee.

Once the Statutory Rules assure the selection on the basis of merit, among the applicants to a College, and belonging to a particular class, no candidate would

pay or feel compelled to pay any amount in respect of free seats or more amount in respect of other seats.

55. It is true that in respect of 40% of seats, i.e., free seats, by declaring them as "Government Seats" and providing for selection according to rules by a Committee appointed by the Government, the non-collection of Capitation Fee is ensured. But the effect of this would be the curtailment of the fundamental right of the Petitioners under Article 19(1)(g) to administer their educational institutions, which is impermissible. The long line of decisions of the Supreme Court, cited earlier, clearly recognised the right of the private agencies who have established the institution to administer them. Every institution has its own ethos, personality or speciality built up by years of dedicated service and sacrifice. They have the right of admission and the right to develop the institution according to their choice. Admittedly, the 23 private institutions have been established, inter alia for the benefit of a backward region and backward castes and communities which have been declared by the State itself as backward classes and some of them even by members of the scheduled castes and scheduled tribes who are the most backward. Unless the agencies have the liberty to regulate admissions, the institutions would not be in a position to cater to the needs of the students for whose benefit they were established.

56. In some of the Petitions, there are specific averments as to the classes of students for whose benefit the institution concerned came to be established. They are :

(1) In W.P. No. 12869 of 1984, it is averred that the Hyderabad Karnataka Education Society, Gulbarga, which has established the H.K. Institute of Engineering, Raichur, was established for the benefit of student belonging to the Districts of Gulbarga, Raichur and Bidar which are backward parts of the State.

(2) The specific statement made in W.P. 13096 of 1984 concerning the K.L.S. Engineering College, Belgaum, established by the Karnataka Law Society, Belgaum, is that the society was established in the year 1939 and it had established in the last four decades large number of institutions and as the merited students passing the pre-university examination from the colleges under the management of the said society were not securing the seats in engineering colleges; the college, was established in order to satisfy the needs of the students passing the Pre-university examination from their own institutions.

(3) In W. P. No. 13074 of 1984 which concerns the Bangalore Institute of Technology established by Vakkaligara Sangha, Bangalore, it is averred that the Vakkaligas are predominantly agriculturists and have been declared as backward class by the State Government in the notification issued by it under Articles 15(4) and 16(4) of the Constitution and that the institution was established primarily to meet the needs of students belonging to the backward class in Vakkaliga community which itself is a backward class as also the needs of other students of the region.

(4) the petitioner in W. P. No 13143 of 1984 which concerns the Jawaharlal Nehru College of Engineering, Shimoga, established by Rashtriya Shikshana Samiti, it is averred that the college was established mainly to meet the needs of the students of the backward region of Malnad.

57. Learned Counsel for the petitioners submitted that the agencies having established the institutions for the benefit of the students belonging to the specified region, caste or community have an absolute right to lay down admission policy and the impugned provisions which interferes with the said right is unreasonable and violative of Articles 14 and 19(1)(g) of the Constitution. Learned Counsel pointed out that in the case of minority institutions though seats are made available to all the citizens, generally they give preference to candidates belonging to the particular minority by reserving substantial number of seats in their favour and similarly if the backward castes and communities including persons belonging to Scheduled Castes and Scheduled Tribes who are most backward establish institutions out of their own funds, there is no reason as to why they should be denied of the right to regulate admission into those institutions.

58. The contention of the Petitioners is well founded in view of the decisions of the Supreme Court in Chitralekha's case and D. N. Chanchala's case which is also reiterated in Pradeep Jain's case 28.

59. The practical difficulty pointed out by the Learned Counsel for the State is not only unreal but also untenable. The students belonging to the region or caste or community for whose benefit the college is established which are situated near their villages or home towns and particularly those who are belonging to financially weaker sections and who seek selection against free seats, would seek admission only in those colleges. Disposing of such free seats on All India basis by the Government would result in denial of seats to such students and further even if some of them get selected but are given seats at a college at a distant place, they would be put to financial and other kinds of hardships. Apart from this, such a provision would be an unreasonable curtailment of the right of administration of the college. Counsel for the State relied on the decision of the Supreme Court in Siddaraj Bhai's case in support of 40% Government seats and pointed out that in that case reservation of 80% of the seats in private teachers' training institutions by the Government for itself was upheld. The ratio is of no assistance as the institutions concerned in those were receiving financial aid from the Government to a substantial extent and the institutions concerned in these cases do not receive any financial aid from the Government.

60. The Capitation Fee by itself is no evil. But certainly the manner in which it is being collected by the private unaided institutions and its extent, is certainly a social evil. The evil must go, but not the institutions. Therefore, when the evil can be eradicated by regulation and reasonable restriction without depriving the Petitioners of their right to regulate admission which exists as held in the series of decisions of the Supreme Court, only such restrictions as are essential could

be imposed and not more. As pointed out above, the evil could be eradicated by framing rules u/s 14, and by vigilant supervision by the nominees of the Government and the University who are compulsory members in view of Section 4(3) When this is clearly possible, such a measure alone could be regarded as reasonable restriction on the right guaranteed under Article 19(1)(g) of the Constitution.

61. For these reasons, I hold that the agencies which have established private educational institutions mainly for the benefit of a particular region or classes of citizens have the liberty of reserving sufficient number of seats for the benefit of students coming from such region or classes which they must indicate in the rules or policy submitted to the Government, the selection inters among the students belonging to each of those classes must be required to be made strictly according to merit and only a specified small number of seats could be disposed of purely at the discretion of Managements in favour of nominees of donors or other persons of the choice of the management concerned.

62. In the result, I hold that the provision for filling up free seats as Government seats made under sub-clause (a) of Clause (2) of Section 4 and the definition of Government Seats in Clause (e) of Section 2 are unreasonable restrictions and even tantamount to partial curtailment or abridgement of the right of the Petitioners under Article 19(1)(g) of the Constitution and also violative Article 14, as these provisions are, in my view, arbitrary. However, the right of the Petitioners to regulate admission would be subject to their conforming to the orders made under Sections 3 and 5(1) and the Rules made u/s 14 for the effective implementation of the object of the Act.

63. Even on the basis that the object of Section 3 falls under Article 39(b) and therefore entitled to protection of Article 31-C by the declaration that no Capitation Fee could be collected in respect of 40 per cent of the seats the object is achieved, the managements cannot be required to admit the students permitted to be admitted by the Government in respect of other seats. Such a provision has no nexus to the object and therefore not entitled to the protection of Article 31-C. Just as Section 27 of the Urban Ceiling Act which required the permission of the Government to sell the lands falling within ceiling limits was held to be invalid by the Supreme Court in Bhim Singh's Case, though it was held that Urban Ceiling Act was protected by Article 31-C, it should be held that Section 2(e) and 4(2)(a)(i) of the Act is not protected by Article 31-C and therefore being severable is liable to be struck down.

IX. Validity of Section 5(4) and (5) and Sections 6, 7, 8 & 9:

64. Sub-section (1) of Section 5 empowers the Government to fix the tuition or other fee which could be collected by the institutions. Sub-section (2) of Section 5 prohibits collection of any amount higher than the rate fixed u/s 5(1) and permitted under proviso to Section 3. Sub-section (3) of Section 5 requires the institutions to issue receipt for every amount collected. Sub-section (4) of

Section 5 not only provides that all amounts received by the educational institutions should be deposited in a scheduled bank and should be expended for the improvement of the institutions and development of educational facilities and for such other related purposes but also provides that the funds should be applied to such extent and in such manner as may be specified by order of the Government. The grievance of the Petitioner-institutions is against the latter part of Section 5(4) which places the management of the institutions under the management of the Government. The petitioners' contention is that though the agencies which have established the institutions are the owners of the institutions, they have to function according to the dictates of the Government and therefore violative of Article 19(1)(g) of the Constitution. The contention of the petitioners is that this is an unreasonable restriction in the right to management and therefore not saved by clause (6) of Article 19 and had no nexus to the object sought to be achieved. The contention, in my opinion, is well founded. The provision requires that a private institution established entirely at private funds must act according to the directions of the Government. These provisions are patently unreasonable and totally unrelated to the object of the Act. The Section converts owners of the institution into subordinates of the Government. Sub-section (5) of Section 5 which requires the submission of the programmes or plans for improvement of the institution for approval of the Government also suffers from the vice of unreasonableness. I am also of the view that even on the basis that the object of the Act as set out in the preamble falls within the directive of Article 39(b), the protection of Article 31C is not available to these provisions as they have no nexus to the directive under Article 39(b). Once a provision is made prohibiting the Petitioner from collecting Capitation Fee except to the extent permitted under proviso to Section 3, how the finances of the petitioner-institutions should be utilised, is a matter entirely for the Petitioners. The Petitioners cannot be required to act according to the fiat of the Government. The reasons given for striking down the provision for Government seats, that is, Section 2(e) and 4(2)(a), equally apply to these provisions also. Therefore, I am of the view that the words "and to such extent and in such manner as may be specified by order by the Government" in sub-section (4) of Section 5 which are severable from the rest of the sub-section and the entire sub-section (5) of Section 5 are arbitrary and imposes unreasonable restriction on the right of the petitioner-institutions guaranteed under Article, 19(1)(g) and therefore violative of Article 14 of the Constitution.

65. Section 6(1) empowers the Government to regulate the expenditure of educational institutions and the maintenance of accounts by them in such manner as may be prescribed. This again is an unreasonable restriction on the fundamental right guaranteed under Article 19(1)(g) of the Constitution for the same reasons for which I have held that last part of sub-section (4) of sub-section (5) of Section 5 violate Article 19(1)(g) and is not entitled to the protection of Article 31C as it has also no nexus to the directive enshrined in Article 39(b) of the Constitution.

66. Sub-section (2) of Section 6 empowers the Government to require the educational institutions to submit such returns or statements as it may deem necessary for carrying out the purposes of the Act. This provision does not in any way infringe the right of the petitioners under Article 14 or under Article 19(1)(g) of the Constitution as contended for the petitioners. It may be seen from the language of the provision that the returns or statements which the Government could call for from the educational institutions are extremely stated to be for the purposes of the Act. In fact, it is on the basis of such returns or statements, the Government would be in a position to effectively exercise its powers regarding fixation of tuition fee and other fee and also to make or amend rules u/s 14 or issue direction u/s 9 for the effective implementations of the provisions of the Act. Therefore, in my opinion, challenge to the validity of sub-section (2) of Section 6 must fail.

67. Section 9(1) of the Act confers power to enter and inspect any premises belonging to educational institutions.

Sub-section (3) of Section 9 provides for the application of Criminal Procedure Code relating to searches and seizures u/s 9(1). Sub-section (2) of Section 9 empowers the Government to ascertain the finances and resources and assets of an institution by invoking the powers under sub-section (1) of Section 9 and after such ascertainment to give such directions to the management as they deem fit. As pointed out earlier, sub-section (2) of Section 6 authorises the Government to require any educational institution to submit returns or statements as it might deem necessary for carrying out the purposes of the Act. From this it follows, if in a given case inspite of the Government requiring the management of an educational institution to furnish returns or statements, the institution fails to do so, the Government must have the power to secure such information by force. It is with this object the power under sub-section (1) and (2) of Section 9 is conferred. Therefore it is constitutional as such a provision is essential for effective implementations of the provisions of the Act.

68. However, it was contended that last part of Section, i.e., "and after such ascertainment to give such directions to the management as they deem fit" constitute an unreasonable restriction on the right of the Petitioners under Article 19(1) of the Constitution. I find no substance in the contention. If after receipt of the information as called for under sub-section (2) of Section 6 or securing information under sub-section (2) of Section 9 if the Government finds that there has been violations of the provisions of the Act or Rules or there has been diversion of funds of the College for purposes unconnected with educational institutions or waste of funds, the provision authorises the Government to issue appropriate directions. Giving of such direction could only be in the interest of the institution and not to its detriment. Further, there can be no doubt that principles of natural justice would also apply for the giving of the direction u/s 9(2) of the Act. Therefore, before issuing the directions, the institutions ought to be given a hearing either through writ-ten representation or oral. In the nature

of things the directions which are permissible u/s 9(2) could only be such which would be in the interest of the institutions. From this it follows if any arbitrary or discriminatory direction and direction not for the purposes of the Act, the person concerned could question the validity of those directions. For these reasons, I am of the view that the provisions incorporated in sub-section (2) of Section 6 and sub-section (2) of Section 9 of the Act are not violative of Articles 14 and 19(1) (g) of the Constitution.

69. Considerable arguments were addressed with reference to Section 7. Punishment by way of imprisonment for a term which shall not be less than three years, but not exceeding 7 years in addition to fine, has been prescribed u/s 7 for violation of the provisions of the Act or the Rules or orders made thereunder. Learned Counsel for the Petitioners pointed out that even for a minor violation of the provisions of the Act or a Rule or even an order made by the Government, punishment not less than three years imprisonment is prescribed and therefore the Section is patently violative of Article 14 on the ground of it being arbitrary.

70. There is considerable force in this contention As can be seen from the preamble to the Act, the evil sought to be prohibited is the collection of Capitation Fee. This is sought to be achieved by Section 3. Therefore, if the punishment prescribed u/s 7 was confined to the violation of Section 3 or even violation of Section 5(2) of the Act which prohibits collection of any fee in excess of the amount prescribed under sub-section (1) or permitted under the proviso to Section 3, the provision as contained in Section 7 of the Act might be justified, But Section 7 is very widely worded. For instance, sub-section (3) of Section 5 provides that every educational institution shall issue receipts for having received the money and there are also various other provisions of the Act under which the Government could frame rules or orders. For instance, if in a given case the amount is received by cheque or draft from any person and such receipt is not in violation of any of the provisions of the Act, but a receipt as required u/s 5(3) is not issued owing to a mistake or negligence on the part of an employee, punishment by way of imprisonment for a minimum period of three years could be imposed. However, I consider it unnecessary to examine the constitutional validity of the said provision now, because Section 11 of the Act provides that No Court shall take cognizance of any offence under the Act except with the sanction of the Government or such officer as it might authorise in this behalf. Therefore, it is reasonable to infer that when discretion to sanction prosecution is vested in the highest authority, namely, the State Government u/s 11 of the Act, the power would be used reasonably and that sanction would be given only in cases of serious and conscious violation of the provisions of the Act. Therefore, if and when sanction for prosecution is given u/s 11 of the Act for any minor violation of the provisions of the Act or the Rules or orders made thereunder, it would be open for the person aggrieved to challenge the constitutional validity of Section 7 because it is only in such a case the battle line would be marked specifically and the Court would be in a better position to appreciate the contention as to the validity of the provision. Therefore, I leave the question of validity of Section 7

open. For the same reason I also leave the question of validity of Section 8 which provides for prosecution of individuals for offences committed by companies, open.

X. Discrimination vis a vis minority and non-minority institutions:

71. The contention of the Petitioners in some of the Petitions has been that provisions of the Act and the orders made thereunder are being enforced only against no minority institutions and not minority institutions and therefore violative of Article 14.

72. Elaborating the submission, the Learned Counsel for the Petitioners in those Petitions submitted as follows : Section 10 of the Act provides that nothing in the Act or the Rules or orders made thereunder shall apply to any minority educational institution to the extent to which they are consistent with the rights guaranteed under Article 30 of the Constitution. The Legislature has failed to specify which were the provisions which were not applicable to minority institutions. The result would be, the Government would be free not to enforce any of the provisions of the Act against minority institution and enforce all the provisions against the majority. It is true that Article 30 was incorporated to allay the fears of minorities that majority having the control of state machinery might deprive them of their basic right to have education of their choice. The right conferred on them under Article 30 is on the basis that such a right exists in the majority. The observations in *Monte De Guirim Educational Society -v.- Union of India* AIR 1980 GOA 1 which supports the submission reads :

"11. The object of conferring the right on minorities under Article 30 of the Constitution is to ensure that there will be equality between the majority and the minority. If the minorities do not have such special protection, they will be denied equality. "

The Constitution makers cannot be accused of having made invidious discrimination against majority. Therefore, it is appropriate that provision which could not be enforced against minority should not and could not be enforced against majority. Paragraph -20 of the judgment of the Supreme Court in *State of Kerala -v.- Mother Provincial* AIR 1979 S.C. 2079 supports this submission. It reads :

"The majority institutions invoked Article 14 and complained of discrimination. However at a later stage of proceedings Mr. Mohan Kumaramangalam stated that he had instructions to say that any provisions held inapplicable to minority institutions would not be enforced against the majority institutions also. Hence, it relieves us of the task of considering the matter under Article 19(1)(f) not only in respect of minority institution but in respect of majority institutions also. The provisions of Section 63 affect both kinds of institutions alike and must be declared ultra vires in respect of both. "

Learned Counsel for the Petitioners submitted that the above concession made

for the State of Kerala also supports their contention that provisions which cannot be enforced against minorities cannot also be enforced against majority. Hence, Section 3 of the Act and the impugned order made thereunder are violative of Article 14 of the Constitution.

73. I am unable to agree that no provision of the Act including Section 3 which prohibits the evil of Capitation Fee for violation of which is made a punishable offence u/s 7, is applicable to minority institutions or that no provision is enforced against those institutions. In fact, the clear implication of Section 10 is that certain provisions of the Act which do not come into conflict with Article 30 apply uniformly to minority as well as non-minority institutions. It is true that as a consequence of affording of protection to the minorities under Article 30 in respect of their right to establish and administer educational institutions, provisions which impose even reasonable restrictions in public interest in the matter of administration of the institutions, would be unenforceable against them, but could be enforced against majority, but only reasonable restriction in the interest of the minority institutions could be imposed. This is an inevitable consequence flowing from the constitutional protection afforded to them in national interest and integrity for ensuring them against any sense of insecurity in their minds about their educational rights. Apart from this there is no difference between the rights of minority flowing from Article 30 and of majority flowing from Articles 21, 19(1)(g) and 14 of the Constitution, for, as far as law or regulations which are enacted or made, in the interest of excellence in education or morality as also those intended to prevent mal-administration are concerned, they are binding not only on majority but also on minority institutions as is evident from long line of decisions in which the Supreme Court has interpreted the scope of Article 30 and has considered the validity of the laws challenged on the ground of violation of Article 30 of the Constitution, which is summarised at paragraph 65 of the judgment of the Supreme Court in All Saints High School -v.- Government of A.P. Section 3 of the Act is, as indicated in the Preamble not only in the interest of excellence in education and morality but is also intended to prevent mal-administration. Further, violation of Section 3 is an offence punishable u/s 7. Hence this provision is enforceable against minority institutions also and in fact is enforced.

The operative portion of the Government Order dated 16th August 1984 made u/s 3 reads :

ORDER

"In exercise of the powers under Sections 3, 4 and 5 of the Karnataka Educational Institutions (Prohibition of Capitation Fees) Act, 1984 as amended by Karnataka Ordinance No. 10 of 1984, Government hereby specifies the Capitation Fees payable in respect of seats in the management pool by the private un-aided Engineering Colleges as shown below:

1. Not more than Rs. 5,000/- per seat for students satisfying the requirements

specified in Clauses (a) and (c) of sub-rule 4.3 of the rules annexed to G.O. No. ED 23 TEC 84 dated 10-8-1984

. 2. Not more than Rs. 30.000/- per seat for others.

The rate of tuition fee or other fee or other amount that may be charged all taken together shall not exceed Rs. 1500/- per annum for Karnataka students (including 40 per cent of Government merit pool seats) and Rs. 3,000/- per annum in the case of non-Karnataka students. The fees to be charged is applicable to all private un-aided Engineering Colleges.

No capitation fees shall be charged by the private unaided Engineering Colleges for the Government Merit Pool seats. "

Thus it may be seen the order applies to all private unaided institutions and therefore the very basis of the contention does not exist.

XI : Validity of Fixation of The Number of Free Seats: and of rate of Capitation Fee

74. As a consequence of my holding that Section 3 is invalid and that the Government has the power to fix the number of seats in respect of which no Capitation Fee could be collected, 40 per cent of the intake in each of the Petitioner-institutions which are declared as Government seats by the Government Order dated 19th July 1984 would have to be regarded as seats in respect of which the Capitation Fee is prohibited. In other words, they could be termed as free seats. But the Petitioners contend that as the number was fixed without giving opportunity of hearing, the order to that extent should be struck down and further if Section 2(3) and 4(2)(a) are invalid the Petitioners would have the right to make selection for admission to those seats and for this reason also the order should be struck down. Certainly that would have been the consequential order which I would have made. But, I consider it inexpedient to issue such consequential order for the following reasons :

(1) The Petitioners had, during the last academic year, agreed that 20 per cent of the intake in each of these institutions be treated as Government seats to be filled up by the Selection Committee constituted by the Government.

(2) On the basis of the consent given by the Petitioners during the last academic year, the State Government has taken all the steps necessary for filling up the Government seats through a Selection Committee constituted by it as it did last year and according to the Selection Rules framed by it for this year includes the conducting of an entrance-test-which has been held at considerable expense of public time and money.

(3) The striking down of the two orders and preventing the Government from filling up the seats earmarked as Government seats would, apart from frustrating all the steps taken so far would result in great inconvenience and hardship to the students as it would take considerable time for each of the institutions to

formulate their policy for admission and for the Government to frame appropriate Rules u/s 14 of the Act, keeping in view such policy, for the purpose ensuring obedience to the provisions of the Act.

(4) As far as the total intake fixed in the order dated 19th July 1984 is concerned, there is no reduction of the intake compared to last year's intake.

(5) In respect of the current academic year, before fixing the total intake as also the percentage of seats to be treated as Government seats, an Intake Committee constituted by the State Government visited each of the petitioner institutions ; an intimation had also been sent to each of the institutions in this behalf, a copy of the same is produced as Annexure-"B" in W. P. No. 13096 of 1984. It is not disputed that the Committee had visited each of the petitioner-institutions and had discussion with its representatives. Therefore, there is no doubt that principles of natural justice to some extent had been complied with in fixing the total intake and the number of Government seats.

(6) The income which a college with an intake of 200 calculated at the rate of Capitation Fee in respect of 60 per-cent of the seats and the tuition fee fixed in the Government Order gets, has been furnished in a statement filed by the Counsel for the State at the time of hearing. It reads :

"Capitation Fee and Tuition Fee in Private Unaided Engineering Colleges Strength - 200

Capitation Fee :

40 percent Merit Pool

60 percent Management Pool

Management Pool Seats :-

10 percent Karnataka @ Rs. 5,000/-

20X 5,000 1,00,000

50 percent Non-Karnataka @ Rs. 30,000

100 X 30,000 30,00,000

Fee:

50 per cent Karnataka @ Rs. 1,500

100 X 1,500 1,50,000

50 percent Non-Karnataka @ Rs. 3,000

100 X 3,000 3,00,000

Total Collection : 35,50,000"

These figures are not disputed. Further in the statement tuition fee is calculated

for 200. This has to be for 800 because it is a four year course and students in I, II, III and IV year classes also pay tuition fee at prescribed rate. Therefore the total amount Rs. 40 lakhs for an institution having an intake of 200 students and therefore according to the White Paper, on which the Petitioners had based their case, the amount is sufficient to meet recurring expenditure.

(7) The rate of tuition fees was only Rs. 600/- per student per annum. The rate now fixed is Rs. 1500/- per student if he is from Karnataka and Rs. 3,000/- per student if he is from outside the State.

(8) As stated by the Learned Counsel for the Petitioners in the course of hearing, some of the institutions have collected Capitation Fee in respect of all the 60 per cent of the seats and some of the institutions have collected Capitation Fee for some of the seats before the impugned order dated 16-8-1984 fixing the maximum rate of Capitation Fee, which could be only higher than the rate prescribed by the Government, in view of their complaint against the rate.

75. The question is, whether this Court, having due regard to the above reasons decline to strike down the impugned orders and postpone the benefit arising out of striking down of Section 4(2)(a) and the interpretation as to the scope of the proviso to Section 3 to the Petitioners to the next year.

76. The order of the Supreme Court dated 26-7-1984 in the case of Dr. Pradeep Jain -v.- Union of India, indicates that such an order could be made to avoid great inconvenience to the public, parents and to the students and dislocation of University calendar. In that case by the main order, the Supreme Court has directed that at least 30 per cent of the seats in each of the States should be made available for being filled up on all-India basis. The Judgment was delivered on 22nd June 1984.

When the difficulties in implementing the Judgment, during the Current academic year was brought to the notice of the Supreme Court, it made the Order dated 26th July, 1984 It reads :

ORDER DATED 26-7-1984

"It has been directed (a) that the judgment be given effect to only from the next academic session ; (b) the provisional and other admissions made in current session should not be disturbed ; and further that (c) inasmuch as special constitutional provisions are applicable to the Universities and Medical Colleges in Andhra Pradesh and Jammu and Kashmir it would need independent consideration ."

On consideration of all the facts and circumstances and in particular the grounds set out above, I am of the view that it is not just and expedient to interfere with the filling up of 40 per cent of seats in the petitioner-institutions during this academic year by the Selection Committee constituted by the State Government and in accordance with the Rules framed by the State Government and that it is also not expedient to strike down the order regarding the fixation of Capitation

Fee.

77. From next academic year, however, the seats both in respect of which the prescribed Capitation Fee is chargeable by the petitioner-institutions and also in respect of seats in respect of which no Capitation Fee could be collected by the Petitioners, the right to make selection for admission shall be only with the management of each of the petitioner-institutions, but subject to the Rules framed by the State Government u/s 14 of the Act.

78. Before concluding, I should invite the attention of the Petitioners and all those persons who are instrumental in the establishment and administering of the institutions, to the first paragraph of judgment of the Supreme Court in Pradeep Jain's case, on which they relied. After noticing the fissiparous tendencies raising their heads in recent times, the Court stated thus:

XX XX XX XX XX XX We find that to-day the integrity of the nation is threatened by the divisive forces of regionalism, linguistic and communalism and regional linguistic and communal loyalties are gaining ascendancy in national life and seeking to tear apart and destroy national integrity. We tend to forget that India is one nation and we are all Indians first and Indians last. It is time we remind ourselves what the great Visionary and builder of Modern India, Jawaharlal Nehru said, "who dies if India lives; who lives if India dies ?" We must realise, and this is unfortunately that many in public life tend to overlook, sometimes out of ignorance of the forces of history and sometimes deliberately with a view to promoting their self interest, that national interest must inevitably and for ever prevail over any other considerations proceeding from regional, linguistic or communal attachments. If only we keep these basic consideration's uppermost in our minds and follow the sure path indicated by the founding fathers of the Constitution, we do not think the question arising in this group of Writ Petitions should present any difficulty of solution. "

(Underlined by me)

The unity of the country and its people had been an article of faith with us for times immemorial irrespective of the existence of many states, castes and communities. The unity which had suffered a set back in the meandering course of history was rejuvenated during freedom struggle. In the wake of independence when the sense of unity was strong, the establishment of students' hostel on caste or community basis was being discouraged. But the recent trend has been the establishment of educational institutions for higher education by caste, community or regional interests. Out of 28 private un-aided engineering colleges, 23 of them have been established between 1979 and 1982 and some of them representing caste, community and regional interests. Whether the establishing of institutions representing caste or community or regional interests should have been permitted, is a matter of policy and wisdom of the State Government. However, there can be no doubt that the mere establishment of educational institutions representing such interests does not

mean that they are injurious to national interest. If the institutions are developed on sound lines and the desire to serve the society at large through these institutions is strong and the interest of the nation as a whole is kept upper-most in the minds of all concerned, as exhorted by the highest Court of the country and they are developed in a competitive spirit, the institutions would not only benefit the particular class of citizens but also nation as a whole. However, in view of the disturbing trends pointed out by the Supreme Court, it is necessary that all those who are instrumental in the establishment and administering of such institutions as also the students should take care that these institutions do not become centres of centrifugal forces.

SUMMARY OF CONCLUSIONS

78. 1. Right to establish and administer educational institutions of the citizens-petitioners is part of the fundamental right guaranteed under Article 19(1)(g) and 21 of the Constitution. This right is subject to the law made by the Legislature which is not violative of Article and is within the permissible limits specified in Clause (6) of Article 19.

2. The Act is not a law falling within the purview of Article 39(b) of the Constitution as it is not a law meant to provide for the distribution of ownership and control of private educational institutions and therefore not entitled to the immunity afforded by Article 31-C of the Constitution and therefore its validity can be questioned on the ground of violation of Articles 14 and 19(1)(g) of the Constitution.

3. The provisions of Section 3 read with Section 5(2) of the Act prohibiting the collection of Capitation Fee for admission to educational institutions except to the extent permitted by an Order made by the State Government under proviso to Section 3 are not violative of Article 14 and 19(1)(g) of the Constitution.

4. Section 2(e) and Clause (a) of Section 4(2) of the Act which empowers the Government to fix certain number of seats out of the total intake of private un-aided educational institutions as Government seats for being filled up by a Committee appointed by the State Government, are violative of Articles 14 and 19(1)(g) of the Constitution. Even on the basis that the object of the Act falls under Article 39(b) and therefore entitled to the immunity of Article 31-C, these provisions have no nexus to the object sought to be achieved and therefore not entitled to the immunity given under Article 31-C.

5. Section 5(1) of the Act which empowers the Government to fix rate of tuition fee and other fees does not violate Articles 14 and 19(1)(g) of the Constitution.

6. The power to permit collection of Capitation Fee for admission is available to the Government only under proviso to Section 3 of the Act and only so long the proviso exists and the rate of various kinds of fee which could be fixed u/s 5(1) does not include Capitation Fee for selection for admission to educational institutions.

7. Under proviso to Section 3, the State Government has not only the power to fix the number of seats in respect of which collection of Capitation Fee for admission is prohibited, but also the power to fix maximum rate of Capitation Fee for admission which could be collected in respect of other seats.

8. The Government either before fixing the number of seats in respect of which no Capitation Fee could be collected or in fixing the maximum rate of Capitation Fee permitted to be collected in exercise of the power under proviso to Section 3 or before fixing the rate of tuition fee or other fees u/s 5(1) has to comply with the rules of natural justice.

9. Proviso to Section 3 not only creates a duty in the Government to fix the number of seats in respect of which no Capitation Fee could be collected but also to fix the maximum rate of Capitation Fee in respect of other seats and to fix the same having due regard to the fact that the institutions substantially depend for their maintenance on Capitation Fee and tuition fee. Therefore, if the Government does not choose to make any order under proviso to Section 3 for next academic year as it would result in immediate prohibition of collection of Capitation Fee, if the Government is requested to fix the same by representation made by all or any of the educational institutions, the Government is under a duty to consider those representations and make appropriate order having due regard to the scope and intendment of these provisions as interpreted in this order.

In the light of the above conclusions, I make the following :

ORDER

(i) The challenge to the constitutional validity of Section 3 of the Karnataka Educational Institutions (Prohibition of Capitation Fee) Act, 1984, which prohibits the collection of Capitation Fee for admission except to the extent permitted by an order made by the Government and other provisions necessary for enforcing Section 3, fails and the Writ Petitions are dismissed to that extent.

(ii) A declaration shall issue to the effect that:

(a) Section 2(e) and sub-clause (a) of Clause (2) of Section 4 of the Act which empowers the Government to declare a part of the intake of the seats in the educational institutions as Government seats and to make selection for those seat;

(b) The last portion of sub-section (4) of Section 5 of. the Act, namely, the words "and to such extent and in such manner as may be specified by order by the Government;"

(c) Sub-section (5) of Section 5 of the Act and sub-section (1) of Section 6 of the Act, which require the Petitioners to carry on the management of their educational institutions in the manner prescribed and directed by the Government,

are void as offending Articles 14 and 19(1)(g) of the Constitution.

A writ in the nature of Mandamus shall issue to the respondents not to enforce the aforesaid provisions against the petitioners.

(iii) The Writ Petitions in so far they relate to the challenge to the Government Order dated 19-7-1984 fixing 40 per cent of the intake as Government seats for the academic year 1984-85 and the Government Order dated 16-8-84 fixing the rate of Capitation Fee and tuition fee is concerned, they are dismissed.

(iv) A Writ in the nature of Mandamus shall issue to the respondents to give opportunity to the petitioners before passing any orders under the proviso to Section 3 of the Act fixing the number of seats in respect of which collection of Capitation Fee for admission is prohibited and the maximum amount of Capitation Fee which could be collected in respect of management seats or fixing the rate of tuition and other fees u/s 5(1) of the Act for the next academic year.