
(2017) 03 BOM CK 0036
In the Bombay High Court
Case No : Writ Petition No. 717 of 2016

Dr. Vikas Motewar

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 15-03-2017

Acts Referred:

Constitution of India, 1950 — Article 21A, Article 226, Article 30
Right of Children to Free and Compulsory Education Act, 2009 — Section 15, Section 16

Citation : (2017) 3 AIRBomR 293 : (2017) 3 BCR 497

Hon'ble Judges : Dr. Manjula Chellur, CJ. and M.S. Sonak, J.

Bench : Division Bench

Advocate : Mr. Jaydev Trivedi, Advocate, for the Petitioner; Mr. Navroz Seervai, Senior Advocate with Mr. Kamal Katha, Z.A. Jariwala and Ms. Jyoti Ghag, Mr. Rajendra Jain i/b Thakore Jariwala and Associates, for the Respondent Nos 2 and 3; Ms. Poornima Kantharia, Govt. Pleader, for the Respondent Nos. 1, 4 and 6

Final Decision : Disposed Off

Judgement

1. Petitioner in the status of natural guardian being father of Ms. Durva Motewar, is before this Court, seeking direction against the respondents to allow Ms. Durva to continue her future education in the institution of respondent Nos. 2 and 3 by admitting her to 7th Std to be held in the month of April 2016, and further allow her to complete her studies and examination of 4th and 6th Standard.

2. Other reliefs sought are for a direction directing Respondent No. 4 to take action against the respondent Nos. 2 and 3 to implement the order dated 29th September 2015. The petitioner has sought interim relief to allow Ms. Durva to sit in 7th Std and to give examination of 7th Std to be held in the month of April 2016.

3. The background in which the present Writ Petition is filed is as under :

The respondent No. 3 ? Lokhandwala Foundation School is an unaided minority institution, and the petitioner admitted his daughter in this school from nursery

class. When Ms. Durva was studying in 4th Std, she remained absent for three months during the second term of the school. However, shortage of attendance was condoned and management permitted her to appear for the final examination. The consequences of the same is that she was promoted to 6th Std for the Academic Year 2013-2014.

4. During the Academic year 2013-14, she attended the school between June to August, and abruptly absented from school since 30th August 2013. The petitioner was forced to go to his native place at Nanded along with his family members in order to attend to his family disputes which were pending for a long time. For about 7 months, the entire family stayed at Nanded. During the month of December 2013, petitioner was asked to pay Rs.31,731/as school fees. Then, he explained to them the family difficulties, and informed them that his daughter may not be able to attend school for some days. However, on 24th January 2014, an email was sent to the petitioner, intimating him of removal of Ms.Durva from the register of the school. He informed the school authorities that Ms. Durva was studying at home, and she is capable of attending examination of 5th Std.

5. Only in the month of March 2014, the family disputes came to an end, and the petitioner and his family returned to Mumbai in March 2014. Immediately, he met the Principal of the School on 29th March 2014, and by that time, examination of 5th Std had already commenced from 27th March. Though Principal after discussion, informed the petitioner that after discussing the matter with the management of the school, he could come back to him. Later, she, however, informed him that the Management was not keen to allow his daughter to appear for the examination. Explaining his problem, he sought intervention of the 6th respondent seeking assistance in terms of Right to Education Act, 2009 (for short "RTE Act"). 6th Respondent directed 3rd respondent to promote Ms. Durva Motewar to 6th Std.

6. On 12th June 2014, when 3rd respondent School reopened, in spite of direction to respondent Nos. 5 and 6 much prior to the reopening of the school, 3rd respondent did not heed to the request of the petitioner to allow his daughter to sit in 6th Std. Again, he had to approach respondent Nos. 5 and 6 who arranged a joint meeting on 14th July 2014. In the said meeting, 5th respondent explained to the representatives of 3rd respondent the guidelines and the provisions of RTE Act and requested them to allow Ms. Durva to continue her studies without holding her back in 5th Std.

7. In spite of repeated request and persuasion to comply with the directions of Education Department in terms of RTE Act, at last on 13th August 2014, 3rd respondent informed the petitioner that they are ready to admit her only to Class 5. After several attempts for amicable settlement, 6th respondent had to pass an order dated 12th March 2015 directing the respondent Nos. 2 and 3 to allow Ms. Durva to continue her studies from 6th Std for the Academic Year 2014-15. 3rd respondent was informed that if the orders are not complied with, they would withdraw the "NOC" granted to them. This also did not compel the respondent

No. 3 to comply with the directions.

8. According to the petitioner, on 2nd September 2015, an order came to be passed by Maharashtra State Commission for Protection of Child rights in terms of Maharashtra Right of Children for free and Compulsory Education Rules, 2011 (for short "Rules of 2011") directing the respondent authority to take action so that Ms. Durva is able to complete her elementary education. This order was also violated by respondent No. 3.

9. Respondent No. 4 authority even intimated respondent No. 4 that they would proceed to take action in terms of section 12(3) and 18(3) of the RTE Act. Though 3rd respondent allowed Ms. Durva to sit in 7th Std class appropriate to her age as on 2nd December 2015, however, on 15th October 2015 at 8.00 am, when Ms. Durva went to the school, she was not allowed to enter the school premises. Repeated attempts to attend the school was not fulfilled resulting in mental agony to the minor daughter Ms. Durva and also her parents i.e. petitioner and his wife.

10. Petitioner is before this Court complaining the conduct of respondent Nos. 2 and 3, and according to him, there is intentional deprivation of Right to Education to his daughter at the instance of respondent Nos. 2 and 3 and they are liable for consequences in terms of RTE Act since they flouted the direction of the respondent authorities. He mainly relies upon provisions of section 16 of RTE Act which says that no child admitted to the school be held back in any class or expelled from school till completion of elementary education.

11. According to them, in spite of intervention of District Child Protection Officer, no solution is given to the petitioner and his daughter. Therefore, he is knocking at the doors of this Court to give relief to his daughter who sincerely intends to continue her education with third respondent school and her desire is nothing but a right conferred on her in terms of RTE Act.

12. As against this, the stand of the State is that State would request the State syllabus school in the neighbouring area where the petitioner resides for admitting the child to 8th Std in Maharashtra Board School. However, the child and the parents refused to accept the said offer by contending that Ms. Durva has to study in the 3rd respondent school. The State has expressed its inability to do any assistance in furtherance of the cause of the petitioner. According to the State, the management of the school being run by a minority community, they have protection in terms of Article 30 of the Constitution of India.

13. Learned counsel appearing for respondent Nos. 2 and 3 contends that there is no obligation on the part of the respondents to admit Ms. Durva to 8th Std in the school since they have protection as a minority institution. They have also placed reliance on *Pramati Educational and Cultural Trust v. Union of India*, [(2010) 6 SCC 102].

14. With the above facts, we proceed to analyse the facts of the present case vis-

a-vis the Right to Education Act, and the claim of the respondent Nos. 2 and 3 that they are protected as minority institution under Article 30 of the Constitution, therefore, there is no obligation to comply with the directions of the respondent authorities.

15. According to the petitioner, there is total arbitrariness on the part of respondent Nos. 2 and 3 in not complying with the provisions of RTE Act since no child admitted in the school could be held back in any class or expelled from the school till completion of elementary education. He also contends that respondent No. 4 has not taken any coercive action to complete the exercise undertaken in terms of order dated 29th September 2015. Intervention of District Child Protection Officer was also violated. Therefore, according to them, the Writ Petition has to be allowed since right of Ms. Durva under RTE Act is well established in the present case.

16. The controversy which arises for consideration of the Court is whether in terms of Act of 2009 and the Rules of 2011, they would persuade the court to conclude that the 2nd and 3rd respondents could be compelled to readmit Ms. Durva to their school since she is expelled from the school.

17. United Nations Universal Declaration of Human Rights adopted in 1948, says "Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available, and higher education shall be equally accessible to all on the basis of merit (Article 26). No doubt, the Right to Education has, therefore, long been recognised by International Treaties as encompassing not only access to educational proficiency, but also an obligation to eliminate discrimination of all levels of education systems to set minimum standard and to improve quality.

18. The Indian Constitution is a document committed to social justice as well. Literacy paves the path for equal opportunity. Therefore, education has to be recognised as the essence of social transformation of a person. The Supreme Court, while considering the right to education as a fundamental right in *Mohini Jain v. State of Karnataka* (1992) 3 SCC 666 opined that "the right to education flows directly from the right to life. The right to life and the dignity of an individual cannot be assured unless it is accompanied by the right to education." In the case of *J.P. Unnikrishnan v. State of Andhra Pradesh*, (1993) 1 SCC 645, Five Judge Bench of the Apex Court opined that the Right to Education further means that the citizen has a right to call upon the State to provide education and facilities to him within the limits of its economic capacity and development. Similarly, in the case of *Bandu Mukti Morcha etc. v. Union of India*, 1997(5) SCC 285, after referring to earlier judgments of the Apex Court, the Supreme Court opined that even right to education at the initial stage was to be fundamental right. Therefore, the State has an obligation to provide facilities and opportunities so as to prevent exploitation of childhood due to indigence and vagary.

19. Several provisions of the Act are relevant in order to appreciate the issue before us. It is not in dispute that over a period of three months during second term when she was in 4th Std, she remained absent, but however, shortage of attendance came to be condoned. Further, she was promoted to 5th Std for the Academic Year 2013-14. Again from August 2013 onwards, she absented by not attending 5th Std for about 7 months. Ultimately, her name came to be removed from the register of the school in January 2014 which was communicated to the natural guardian of the child. The petitioner claims that from March 2014 onwards, his family shifted back to Mumbai from Nanded. She was allowed to appear for 5th Std.

20. Article 21A of the Constitution reads as under :

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

21. One has to read terms of obligation imposed on the State to provide free and compulsory education. It is well settled that the State has an obligation to provide free and compulsory elementary education. Since it is the duty of the welfare state to provide free and compulsory education, Article 21A of the Constitution was introduced by 86th Amendment which can be termed as legislative history. The question is whether any other institution or establishment or organization can be imposed with the obligation of free and compulsory elementary education. This is answered in many of the judgments which are referred to in the later part of the judgment.

22. Recognizing the obligation of the State under Article 45 (directive principles of State policy) in timebound, timeframe, State was required to provide free and compulsory education for all children till the age of 14 years. This directive principle was considered as yeomen duty of the State in various judgment of the High Courts and Apex Court. It imposes an obligation on the State alone as indicated in several judgments.

23. On one hand, we have the right to education Act which capitulates the vision and commandment of Article 21A of the Constitution. Section 3 of the Right to Education Act is a visionary plan how State shall provide free and compulsory education to all children between the age of 6 to 14 years.

24. The Right to Education Act, 2009 is a detailed and comprehensive piece of legislation which includes various provisions regarding schools, teachers, curriculum, evaluation, access and specific division of obligation and responsibility of different stakeholders. It also prohibits physical punishment, expulsion or detention of a child. It provides free and compulsory education to all children in India between the age group of 6 to 14. Until completion of elementary education, no child shall be held back or required to pass a board examination.

25. Section 4 envisages special provisions providing that where a child of about 6 years of age has not been admitted in any school, or though admitted, could not complete his or her elementary education, then he or she shall be admitted in a class appropriate to his or her age. Proviso says, if the child is directly admitted in a class appropriate to his or her age, he or she shall, in order or to be at par with others, have a right to receive special training, in such manner, and within such time limit as may be prescribed. Further proviso provides that a child who is admitted to elementary education, shall be entitled to free education till completion of elementary education even after 14 years.

26. In terms of Section 2(c) of RTE Act, child means a male or female child between the age of 6 to 14 years.

27. Section 2(f) defines elementary education as the education from 1st Class to 8th Class. Section 2(k) refers to Parents, means either the natural guardian or step or adopted father or mother of a child. Section 2(n) defines School which means any recognised institution imparting elementary education, including unaided school not receiving any kind of aid or grant to meet its expenses from the appropriate Government or local authority.

28. Section 3(1) confers right on child to have free and compulsory education. According to the petitioner, the School in question is a School in the neighborhood. Therefore, the child has every right to insist to join the same school.

29. Section 10 refers to duty of parents and guardians which reads as under :

10. Duty of parents and guardian: It shall be the duty of every parent or guardian to admit or cause to be admitted his or her child or ward, as the case may be, to an elementary education in the neighbourhood school.

30. This section imposes an obligation on every parent or guardian to admit his child or ward in the neighborhood school. Apparently, when the petitioner shifted his family to Nanded from Mumbai, he had not sent his daughter to neighborhood school at Nanded which means he neglected his responsibility and obligation to send his child to the neighborhood school at Nanded.

31. Section 15 confers an obligation on the part of the school not to deny admission to a child which reads as under:

15. No denial of admission: A child shall be admitted in a school at the commencement of the academic year or within such extended period as may be prescribed:

Provided that no child shall be denied admission if such admission is sought subsequent to the extended period:

Provided further that any child admitted after the extended period shall complete his studies in such manner as may be prescribed by the appropriate Government.

32. Section 16 refers to relevant provisions required to be considered in this petition i.e. no child admitted in a School shall be held back in any class or expelled from school till completion of elementary education and the same reads as under :

16. Prohibition of holding back and expulsion. No child admitted in a school shall be held back in any class or expelled from school till the completion of elementary education.

33. Section 29 refers to Curriculum and Evaluation procedure which indicates how the curriculum must be prepared and how the evaluation procedure must be done, which reads as under:

29. Curriculum and evaluation procedure: (1) The curriculum and the evaluation procedure for elementary education shall be laid down by an academic authority to be specified by the appropriate Government, by notification.

(2) The academic authority, while laying down the curriculum and the evaluation procedure under subsection (1), shall take into consideration the following, namely:

- (a) conformity with the values enshrined in the Constitution;
- (b) all round development of the child;
- (c) building up child's knowledge, potentiality and talent;
- (d) development of physical and mental abilities to the fullest extent;
- (e) learning through activities, discovery and exploration in a child friendly and child centered manner;
- (f) medium of instructions shall, as far as practicable, be in child's mother tongue;
- (g) making the child free of fear, trauma and anxiety and helping the child to express views freely;
- (h) comprehensive and continuous evaluation of child's understanding of knowledge and his or her ability to apply the same.

34. Section 30 refers to examination and completion certificate which reads as under:

30. Examination and completion certificate: (1) No child shall be required to pass any Board examination till completion of elementary education.

(2) Every child completing his elementary education shall be awarded a certificate, in such form and in such manner, as may be prescribed.

35. On the other hand, we have Articles 29 and 30 which recognises the rights of the minorities to establish and administer schools of their choice, be linguistic or

other minorities. Several judgments have analysed this enactment of the centre with the provisions of Constitution of India. There is an obligation on all the stakeholders to implement the provisions of Right to Education Act. While imposing to complete the obligation to provide free and compulsory education to all children of the specified age within the State, one should not transgress upon the rights conferred upon others under constitution. Otherwise, it would amount to transgressing the constitutional limitation. Education, no doubt is brought under the concept of Right to live under Article 21 of the Constitution.

36. In the above background, we have to analyse various judgments with regard to Education, in general, Right to Education Act and the constitutional protection conferred upon certain sections of the society.

37. We now proceed to place on record several judgments which are dealt with educational need of the citizens and how right to education becomes a fundamental right.

38. In the case of N. Kunhichekku Haji (dead) by LRs v. State of Kerala and Others, 1995 Supp(2) SCC 382, the Bench of the Apex Court held that from primary to upper primary school, application of mind must be there while considering the educational need of the locality. Their Lordships while considering the personal interest as against public interest opined that larger interest of children who have fundamental right to education must be the primary consideration while procedural technicalities should not be allowed to subsume the substance.

39. Again, in the case of Gram Vikas Shikshan Prasarak Mandal, Sondoli, v. State of Maharashtra and others, 2001 (1) Mh.L.J. 776, while considering the education of the children vis-a-vis Article 21 of the Constitution, Their Lordships opined that education until the attainment of age of 14 years is a fundamental right guaranteed under Article 21 of the Constitution since right to livelihood includes right to acquisition of knowledge. They also discussed about the basic considerations which have to be borne in mind by the State in terms of norms and standards for establishment of new primary and secondary schools.

40. In the case of Warana Education Society, Sagaon v. State of Maharashtra and Ors, 2007 (4) Mh.L.J 785, it was held that the fundamental principle that has to be borne in mind is that provision of primary education is a constitutionally protected fundamental right. The State has a constitutional duty to provide within the limits of its economic capacity and development the right to education. When private institutions which enter the arena of providing education, perform the role of supplementing the function of the State, the establishment and functioning of those institutions must therefore be subject to regulation by the State to secure the interest of the students and teachers.

41. In the case of Anil s/o Panjabrao Nahate and Anr v. State of Maharashtra, 2011 (1) Mh.L.J, 86, it was held by the Division Bench of this Court that the State Government is expected to keep in view the provisions of Article 21A so

also the provisions of Article 51A of the Constitution of India vis-a-vis the provisions of Right of Children to Free and Compulsory Education Act (35 of 2009) (for short "the Act of 2009") while dealing with the proposal for establishing/starting a new school or for shifting the established school, that it is established/shifted within such area where no school is so established. Therefore, the criterion for establishing/ shifting the school was to be with regard to convenience and need of the children for whom the school is established, and not the desire and convenience of institutions/managements.

42. After analysing the principles laid down so far as the constitutional duty of the State to provide within the limits of its economic capacity and development education to its citizens, one has to see now whether the right provided under the Right to Education Act vis-a-vis the provisions of the Act, especially with reference to Section 16 of the Act with that of provisions of Constitution protecting the rights of the minorities. Admittedly, the respondent management which is running the school in question in which Ms. Durva was studying is a minority institution. We now proceed to refer to the relevant judgments.

43. Way back in 1974, in the case of *The Ahmedabad St. Xavier's College Society and Anr. v. State of Gujarat and Anr.* (1974)1 SCC 717, Their Lordships of the Apex Court had an occasion to deal with Article 30, the scope and ambit of the rights of religious and linguistic minorities to establish and administer educational institutions of their choice. While considering the controversy whether Article 30 extends to establishing educational institutions only for conserving their language, script or culture, or whether Article 30(1) of the Constitution is to be read subject to Article 29(1), Their Lordships came out with four rights.

(i) First is the right of any section of the resident citizens to conserve its own language, script or language or culture in terms of Article 29(1).

(ii) The second right is the right of all religious and linguistic minorities to establish and administer educational institutions of their choice as mentioned in Article 30(1).

(iii) Third right is the right of an educational institution not to be discriminated against in the matter of State aid on the ground that it is under the management of a religious or linguistic minority as mentioned in Article 30(1).

(iv) Last and the fourth one is the right of the citizen not to be denied admission into any State maintained or State-aided educational institution on the ground of religion, caste, race or language as mentioned in Article 29(1) of the Constitution.

44. While analysing Articles 29 and 30, Their Lordships were of the opinion that it would lead to wrong conclusion if one reads Article 30(1) as restricting the right of minority to establish and administer educational institutions of their choice only to cases where such institutions are concerned with language, script or culture of the minorities. Their Lordships further opined that Article 29 confers

the fundamental right on any section of the citizen which will include the majority section whereas Article 30(1) confers the right on all minorities. Again, Article 29(1) is concerned with language, script or culture while Article 30(1) deals with minorities of the nation based on religion or language. Thirdly, Article 29(1) is concerned with the right to conserve language, script or culture whereas Article 30(1) deals with the right to establish and administer educational institutions of the minorities of their choice, and lastly, the conservation of language, script or culture under Article 29(1) may be by means wholly unconnected with educational institutions and similarly, establishment and administration of educational institution by a minority under Article 30(1) may be unconnected with any motive to conserve language, script or culture. Therefore, a minority may administer an institution for religious education which is wholly unconnected with any question of conserving a language, script or culture. It is further held that the scope of Article 30 rests on linguistic or religious minorities and no other sections of citizens of India has such a right.

45. Ultimately, it was held that the whole object of conferring the right on minorities under Article 30 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. Hence, it was held that it was not possible to exclude secular education from Article 30.

46. Per Justice Khanna, one of the Judges on the bench, by these provisions, a liberal generous and sympathetic approach is reflected in the Constitution in the matter of preservation of the right of minorities so far as their educational institutions are concerned. Since constitution practices rights of the minority thereby no one could deprive the minorities of a sense of belonging, of a feeling of security, of a consciousness of equality and of the awareness that the conservation of their religion, culture, language and script as also the protection of their educational institutions is a fundamental right enshrined in the Constitution. Therefore, the same generous, liberal and sympathetic approach should weigh with the courts in construing Articles 29 and 30 as marked in the deliberations of the Constitution makers in drafting those articles and making them part of the fundamental rights. It was further held that the minorities may be based either on religion or language. The right conferred upon the said minorities is to establish and administer educational institutions of their choice. It was further held that the word "establish" indicates the right to bring into existence, while "the right to administer an institution" means the right to effectively manage and conduct the affairs of the institution. Administration connotes management of the affairs of the institution. The management must be free of control so that the founders or their nominees can mould the institution as they think fit and in accordance with their ideas of how the interest of the community in general, and the institution in particular will be served. The words "of their choice" qualify the educational institutions and opines that the educational institutions established and administered by the minorities need not be of some particular class; the minorities have the right and freedom to

establish and administer such educational institutions as they choose.

47. Justice Khanna further opined that Articles 29(1) and 30(1) deal with distinct matters. Therefore, one cannot circumscribe or restrict the right conferred by clause (1) of Article 30 by reading in it any limitation imported from clause (1) of Article 29. While referring to the distinction between Article 29(1) and 30(1) of the Constitution, Their Lordships opined that Article 29(1) confers a right on any section of citizens residing in the territory of India or any part, the right to conserve its language, script or culture, and it does not speak of any minority, religion or otherwise, while the beneficiary of the right under Article 30 is a minority, either religious or linguistic. Therefore, while under Article 29(1) confers rights in respect of three subjects viz., language, script or culture, Article 30(1) deals with only the right to establish and administer educational institutions, and further opined that Article 29(1) cannot limit the width of Article 30(1). Therefore, the right guaranteed to a religious or linguistic minority under Article 30(1) is the right to establish any educational institution of its choice. They further opined that Regulations which will serve the interest of the students, regulations which will serve the interests of the teachers are of paramount importance in good administration. Regulations in the interest of efficiency of teachers, discipline and fairness in administration are necessary for preserving harmony among affiliated institutions. Regulations are, therefore, necessary to see that there are no divisive, or disintegrating forces in administration. The right of a minority to administer its educational institutions involves, as part of it, a correlative duty of good administration. This was the view of Justice A.N. Ray and Justice D.G. Palekar, while opinion of Justice Khanna was to administer educational institutions does not, however, prevent the making of reasonable regulations in respect of those institutions. Therefore, the right to administer educational institutions can plainly not include the right to maladminister. It was further opined that Regulations are required in the true interest of efficiency of instruction, discipline, health, sanitation, morality, public order and the like may undoubtedly be imposed. Such. regulations are not restrictions on the substance of the right which is guaranteed under Article 30(1) of the Constitution. His Lordship also referred to *Sidhajbhai Sarabhai v. State of Bombay*, (1963) 3 S.C.R. 837, wherein it was held that educational institutions under the guise of exclusive right of management, if decline to follow the general pattern it cannot be allowed and should prevent minority institutions to fall below the standards of excellence expected. Though the management must be left to them, they may be compelled to keep in step with others. Therefore, minorities have the right to establish and administer their educational institutions, but balance has to be kept between the two objectives, that of ensuring the standard of excellence of the institution, and that of preserving the right of" the minorities. Therefore, the unrestricted nature of a right does not prevent the making of regulations relating to the enforcement of that right.

48. In the case of *St. Stephen's College v. University of Delhi*, (1992) 1 SCC 558, after referring to *Sidhajbhai Sarabhai v. State of Bombay* (supra). and also

The Ahmedabad St. Xavier's College Society and Anr v. State of Gujarat (supra), Their Lordships opined that the administration of educational institutions of their choice under Article 30(1) means management of the affairs of the institution. This management must be free from control so that the founders or their nominees can mould the institution as they think fit, and in accordance with their ideas of how the interests of the community in general and the institution in particular will be best served. However, the standards of education are not part of the management as such. The standard concerns the body politic and is governed by considerations of the advancement of the country and its people. Such regulations do not bear directly upon management although they may indirectly affect it. The State, therefore has the right to regulate the standard of education and allied matters. Minority institutions cannot be permitted to fall below the standards of excellence expected of educational institutions. It was further held that so long as the right of minority to manage educational institution is not taken away, the State is competent to make regulatory legislation.

49. In the case of Islamic Academy of Education and Anr v. State of Karnataka and Others, (2003) 6 SCC 697, while considering the right of minorities under Article 30(1), His Lordship Justice S.B. Sinha opined that regulations can also be framed to prevent maladministration as also for laying down the standard of education, teaching, maintenance of discipline, public order, health and morality. It was further held that Article 30(1) of the Constitution does not confer an absolute right. Since exercise of such right under Article 30(1) is subject to permissible State regulations with an eye on preventing maladministration, the regulatory measures are necessary for ensuring orderly, efficient and sound administration. The regulatory measures can be laid down by the State in the administration of minority institutions. Therefore, the right to administer does not mean the right to maladminister, and the right is not free from regulation.

50. In the case of P.A. Inamdar and Others v. State of Maharashtra and Ors, (2005) 6 SCC 537, while considering the admission procedure and fee structure in the professional unaided (minority and non-minority) educational institutions, Their Lordships opined that merely because Article 30(1) has been enacted, educational institutions do not become immune from the operation of regulatory measures because the right to administer does not include the right to maladminister. They also referred to T.M.A. Pai Foundation v. State of Karnataka, (2002) 8 SCC 481, and reiterate that any regulation framed in the national interest must necessarily apply to all educational institutions, whether run by the majority or the minority. They further opined that a balance has to be struck between two objectives (i) that of ensuring the standards of excellence of the institution, and (ii) that of preserving the right of the minority to establish and administer its educational institution. Subject to reconciliation of the two objectives, any regulation accompanying affiliation or recognition must satisfy the 4(four) tests: (i) the test of reasonableness and rationality, (ii) the test that the regulation would be conducive in making the institution an effective vehicle

of education for the minority community or persons who resort to it. (iii) It is directed towards maintaining excellence of education and efficiency of administration so as to prevent the institution falling in standards. (iv) that there is no inroad on the protection conferred by Article 30(1) of the Constitution, that is, by framing the regulation the essential character of the institution being a minority educational institution, is not taken away.

51. The Regulations could be to prevent exploitation of students or the teaching community.

52. In the case of *Secretary, Malankara Syrian Catholic College v. T. Jose and others*, (2007) 1 SCC 386, it was held that aided minority educational institutions are bound by the terms and conditions of service to the extent that regulations made by the State are applicable. Therefore, all regulations that are made to regulate the administration of educational institution and grant of aid in general will apply to minority educational institutions except to the extent that they interfere with the overall administrative control by the management over the staff or abridge/dilute in any other manner, right to establish and administer educational institution.

53. In the case of *Sindhi Education Society & Another v. Chief Secretary, Government of NCT of Delhi and others*, (2010) 8 SCC 49, the basic question which arose for consideration before the Supreme Court was the extent of right to establish, administer and manage institutions by linguistic minorities, the extent of control, restrictions that can be imposed by the State and that of the right of a minority institution to receive grant in aid. It was held that the appellant being a minority institution and the society is one which enjoys status of linguistic minority and thus, is entitled to all the constitutional benefits and protection under Articles 29 and 30 of the Constitution.

54. In the case of *T. Varghese George v. Kora K. George & Others*, (2010) 1 SCC 369, Their Lordships again affirmed the earlier view of the Apex Court that right to establish and administer educational institutions does not include right to maladminister.

55. In the case of *Society for Unaided Private Schools of Rajasthan v. Union of India*, (2010) 6 SCC 1, Their Lordships beautifully explained as to what is the role of primary or elementary education under Right to Education Act. They also referred to extent of enforceability on non Stake holders i.e. whether the provisions of the Act could be enforced against unaided minority and nonminority schools. Per majority, they opined that provisions of section 12 and section 18(3) i.e. reservation of 25% of the seats for admission in Class-I based on criterion of economic or financial backwardness from the neighbourhood, and also withdrawal of recognition under section 18(3) of the Act for noncompliance with specified norms and requirements, including noncompliance of Section 12(1)(c) and (b). Per majority, they opined that Section 12(1)(c) and Section 18(3) infringes fundamental freedom guaranteed to unaided minority schools under

Article 30(1) of the Constitution and, consequently, applying principle of severability, they opined that Right to Education Act shall not apply to such schools. They further opined that the manner in which the obligation under Article 21A has to be discharged, is left to the State to be determined by law. Thus, the State may, by law, decide to provide free and compulsory education to all children of the specified age through its own schools, or through government aided schools, or through unaided private schools. Thus, Courts are required to decide whether such impugned law infringes a fundamental right within the limits justified by the directive principles or whether it goes beyond them. They proceeded to analyse fundamental rights vis-a-vis the directive principles. In other words, Their Lordships were of the opinion that the fundamental rights have to be interpreted in the light of the directive principles of State policy. In paragraph Nos. 27, 28, 32 and 33, while analysing the two aspects of fundamental rights, Their Lordships opined that free and compulsory education under Article 45, prior to constitutional 86th Amendment Act of 2002, is not the same thing as to provide free and compulsory education. By reading the word "Education" into Article 21, it declared education to fall within the contours of right to live. In order to provide for implementation of that right to access to education, Article 21A is child centric and not institution centric. It was held that the said Act was enacted primarily to remove all barriers (including financial barriers) which impede access to education. Therefore, they opined that the restriction imposed to admit 25% children in Class-I under Section 12(1)(c) of the Right to Education Act, 2009 by imposing obligation on unaided minority, it cannot be termed as "an unreasonable restriction" since it cannot be said as a transgress of any constitutional limitation. Since the Right to Education Act of 2009 intended to set up an intrinsic regime of providing Right to Education to all children by providing the required infrastructure and compliance of all norms and standards was also intended to be imposed not only on the State, but also on the parent guardian of every child, unlike other fundamental rights. There is a reciprocal agreement between the State and the parents and placed an affirmative burden on all stakeholders in our civil society by enacting Right to Education Act of 2009. The primary obligation to provide free and compulsory education to all children of the specified age is on the State. However, the manner in which said obligation will be discharged by the State has been left to the State and determined by law. It can be achieved either through schools of the Government of the State, or through aided schools or through private schools so long as law made in the regard does not transgress any other constitutional limitation.

56. The constitutional bench of the Apex Court in the case of *Pramati Educational and Cultural Trust v. Union of India* (supra), had an occasion to deal with Articles 15(5), 19(1)(g) and Article 368, Article 14 and 30(1) of the Constitution. Their Lordships opined that power under Article 15(5) is a guided power and its use in furtherance of its objects and purpose is subject to judicial review. Therefore, Article 19(1)(g) is not affected. Their Lordships opined that if there is stealthy

encroachment into fundamental right by constitutional amendment meant for beneficial purpose, duty of Court in such cases is to protect fundamental right of private educational institutions under Article 19(1)(g) from the insertion of Article 15(5) if meant to appease political gains. It was further held that duty to maintain distinction between aided and unaided educational institution in matters of admission of Scheduled Castes and Scheduled Tribes etc, it was held that if law is made to effectuate Article 15(5) it must provide for compensation to the unaided institutions so as not to violate Article 14. It was further held that reading of preamble and Article 30(1) vis-a-vis Articles 14 and 15(5) of the Constitution, exclusion of minority aided and unaided educational institution referred to in Article 30(1) from the purview of Article 15(5) held not discriminatory, and further held that it does not destroy the secular character of India under Article 15(5). They opined that Article 15(5) promotes fraternity, unity and integrity of the nation, ordained by the preamble.

57. After referring to the Three Bench judgment in *Society for Unaided private schools of Rajasthan*, 2010(6) SCC 1, which is already referred to above, Their Lordships opined that the power under Article 21A of the Constitution vesting in the State cannot extend to making any law, which will abrogate the rights of the minorities to establish and administer schools of their choice. The relevant paragraphs are 48, 49, 51, 52, 53, 55 and 56. Their Lordships in the concluding paragraphs held as under :

48. It is submitted that the Right of Children to Free and Compulsory Education Act, 2009 (the RTE Act, for short) will result in the effacement of education and will lead to the destruction or extinction of private unaided schools.

49. The provisions of the RTE Act make grave and unconstitutional inroads into the fundamental rights of private unaided schools and completely destroy their autonomy, violate the free choice and volition of parents, and gravely erode, with the distinct possibility of destroying altogether, the financial independence and survival of unaided private schools.

51. In short, Section 3 of the Act delineates its operational mandate, and encapsulates the underlying philosophy, as well as the legislative vision, which informs Article 21A. Sections 6, 7, 8, 9 and 11 in Chapter III of the Act when read as a whole, make the legislative scheme for achieving the constitutional goal abundantly clear that Parliament was aware, and intended, that the entire scheme of Article 21A must be fulfilled by the Central Government, the appropriate Governments, and the local authorities.

Submissions

Article 21A in its plain terms imposes the obligation to provide free and compulsory elementary education upon the State.

52. The words of Article 21A are plain, without ambiguity, and susceptible of only one meaning, namely, that "the State shall provide". Use of the words "in such

manner as the State may, by law, determine" does not enlarge, alter, or change in any way the clear mandate and requirement that it is the State which shall provide free and compulsory elementary education. The latter portion of Article 21A only lays down the modality or mechanism by which the State shall provide. But that latter portion does not empower the State to make a law which requires that somebody other than the State shall provide. Indeed, to read the latter portion in such manner would be to do grave violence to the plain language of the constitutional provision.

53. The legislative history which led to the Constitution (Eightysixth Amendment) Act, 2002 also clearly supports the interpretation which flows from the plain words of Article 21A, namely, that it is the State alone which is required to provide free and compulsory elementary education throughout India. Article 45 was the only directive principle which was time bound and required the State to endeavour to provide, within ten years of the commencement of the Constitution, for free and compulsory education for all children until they complete the age of 14 years. This directive principle was consistently construed as imposing an obligation solely upon the State. Ultimately, in *Unni Krishnan, J.P. v. State of Kerala*, (1993) 1 SCC 645, a Constitution Bench held that this directive principle had to be read into and treated as a part of Article 21 of the Constitution. Even Unnikrishnan makes it clear that the obligation and duty to provide free and compulsory elementary education was of the State alone.

55. Section 3 of the RTE Act encapsulates the vision and mandate of Article 21A, and lays down the road map for how "the State shall provide free and compulsory education to all children of the age of six to fourteen years". The right is conferred by upon every child of that age group to have free education in a neighbourhood school till the completion of elementary education. Coupled with Section 10, which imposes a duty upon every parent and guardian, Section 3 is intended to fulfil the laudatory goal of Article 21A.

56. Section 6 mandates that "for carrying out the provisions of this Act", it is the appropriate Government and the local authority which have to establish neighbourhood schools within a period of three years from 1-4-2010 i.e. by 31-3-2013. Section 7 contains elaborate provisions to ensure that finances have to be raised by the Centre and the States for the aforesaid purpose, and leaves the Government with no leeway or escape routes. Section 8(a) and Section 9(a) mandate that it is the duty of the appropriate Government and the local authority to provide free and compulsory elementary education to every child, and the use of the word "shall" makes it clear that this is a mandatory duty. If there were any doubt or ambiguity in this behalf, it is dispelled by the Explanation to Section 8(a), which clarifies that the term "compulsory education" means the obligation of the appropriate Government to provide free elementary education to every child of the age of six to fourteen years, and to ensure compulsory admission, attendance and completion of elementary education.

58 In the case of *Pramati Educational and Cultural Trust v. Union of India*,

(supra), the issue was with regard to implementation of Section 12(1)(c) of Right to Education Act which refers to an obligation to admit children belonging to weaker section and disadvantage groups in the neighbourhood who need not be the children of the minority community which has established the school.

59. In clear terms, they opined that the application of 2009 Act, to minority schools (aided and unaided) would lead to abrogation of right of the minorities under Article 30(1) of the Constitution. Therefore, it was further held that the 2009 Act insofar as it is made applicable to minority schools referred to clause 1 of Article 31 of the Constitution is ultra vires of the Constitution and further opined that the law or the view held in society for unaided private school is not the correct law.

60. On one hand, we have the rights and obligations conferred upon the State run educational institutions, institutions run with the financial assistance of the State and without the financial assistance of the State. It is also well settled that even in the case of minority institutions when it comes to imposition of regulations by the State, such regulations have to be followed by the institution so long as they do not invade into the constitutional protection conferred upon the minority institutions under the Constitution of India. In the case on hand, the child and its parents are seeking implementation of provisions of Right to Education Act which provides not to expel, not to withhold a child from its school once admitted till it completes elementary education. On the other hand, we are dealing with the rights conferred upon the minority institution to establish and administer the school. In the judgments referred to above, it is clearly explained that the word "establish" refers to the right to bring into existence and the word "right to administer an institution" means the right to effectively manage and conduct its day-to-day affairs. This definitely would mean management of the affairs of the institution. The minorities definitely have the privilege of Right and freedom to establish and administer their educational institution as they choose. It is also well settled that right to administer does not include right to maladminister. The right to administer refers always to positive and good administration. The regulations imposed in the true interest of efficiency of instruction, discipline, health, sanitation, morality, public order and the like, can always be imposed.

61. In the present situation, having regard to the fact that the institution in question is a minority institution, whether one could impose the terms of Right to Education Act, compelling the respondent institution to readmit the minor girl Ms. Durva to the respondent institution recognizing the right of Ms. Durva under the Right to Education Act that she cannot be expelled or withheld in terms of section 15 and 16 of the Act. Right to Education Act is a statute in terms of Article 21A which again is in terms of directive principles of State policy as an obligation of the State. Articles 29 and 30 of the Constitution protect the interest of minorities and give them unfettered rights to establish and manage the day-to-day affairs of the administration in their institution. Reading the judgment of the

constitutional bench in the case of *Pramati Educational and Cultural Trust v. Union of India* (supra), especially the paragraphs referred to above, we are of the opinion that the rights of the parties including the child Ms. Durva must yield to the right of the minority institution protected under the constitution. The constitutional protection given to a minority institution recognizing their right to establish and administer educational institutions stand on a higher pedestal than the rights conferred upon Ms. Durva under Right to Education Act, a statute in terms of Article 21A of the Constitution. It is not a situation where Ms. Durva is totally denied of a right under Education Act in terms of Section 15 and 16 of the Act since State, in the present case, is coming forward to provide Ms. Durva admission in any other neighborhood school upon which the State can impose such obligation.

62. Accordingly, Petition is disposed of denying the relief sought by the petitioner seeking readmission to the respondent institution in question in terms of Sections 15 and 16 of the Act. However, we direct the State Government to provide admission to Ms. Durva to any of the neighborhood school to a class which is appropriate to her age and further, allow her to take examination, if any, for this academic year of 2016 and 2017.