
(2017) 04 KAR CK 0069

In the Karnataka High Court

Case No : 14241 of 2017 connected with writ petition Nos 15631 and 14240 of 2017 (EDN-RES)

Soujanya Patel Trust, Vijayanagar, Bangalore

APPELLANT

Vs

State of Karnataka and others

RESPONDENT

Date of Decision : 17-04-2017

Acts Referred:

Constitution of India, Article 162 -
Right to Education Act, 2009, Section 35, Section 11, Section 35(2), Section 12(1)(a),
Section 12(1)(c)

Citation : (2017) 04 KAR CK 0069

Hon'ble Judges : S. Sujatha

Bench : SINGLE BENCH

Advocate : S. Basavaraj, ?A.S. Ponnanna,?H.T. Narendra Prasad

Final Decision : Dismissed

Judgement

1. Since the common issues are involved in these matters, the same are heard and disposed of by this common order. 2. The action of the respondents in announcing the admissions of the students under the Right of Children to Free and Compulsory Education Act, 2009 ("RTE" Act, for short) both at the LKG and 1st Standard level in the petitioners-Educational Institutions is challenged in these petitions. 3. The petitioners' schools were affiliated to Central Board of Secondary Education and were granted permanent recognition without any grant, by the Commissioner of Public Instructions, Bangalore. These institutions are imparting pre-primary and elementary education. Respondents have allotted the students to the petitioners-Educational Institutions under RTE quota both to LKG and 1st Standard levels. The Government of Karnataka has issued the Government order dated 6-3-2017 (Annexure-Q) under Section 35(2) of the RTE Act prescribing the mode for the determination of the seats in a private school for admission of children belonging to disadvantaged group and weaker section under Section 12(1)(c) and the proviso thereof to the RTE Act. In W.P. No. 15631 of 2017, the petitioner has challenged the said Government order amongst other

reliefs. The learned Counsel Sri Basavaraju S, appearing for the petitioners submitted that the proviso to Section 12(1)(a) to 12(1)(c) of the RTE Act carves out an exception from the main provision, as such where a school specified in clause (n) of Section 2 imparts pre-school education, the provisions of clauses (a) to (c) shall apply for admissions to such pre-school education. A proviso to a section cannot be used to import into the enacting part something which is not there, the impugned action of the respondents in declaring both pre-primary and 1st Standard as entry level of RTE quota for that of Educational Institutions run by the petitioners is prima facie illegal, contrary to RTE Act in its entirety including Section 12 thereof. The learned Counsel submits that an entry level to educational institutions mentioned in Section 12(1)(c) i.e. Standard is modified by the proviso to the extent of replacing the entry level to pre-primary instead of Standard-I. The respondents failed to appreciate the same and have indulged in twisting the very language of Section 12, which amounts to sheer abuse of statutory power. The legislative intentment is clear and unambiguous. It is to provide education at the earliest level in an educational institution. The hybrid procedure adopted by the respondents has absolutely no rationale behind it and adversely affects the children since the educational institutions are asked to divide admission between LKG and 1st Standard. The RTE Act, and Article 21-A of the Constitution of India provides free and compulsory education to the children between the age group of 6 to 14. The petitioners and other educational institutions which admit the students at pre-primary level provide free education from the age of 4 itself. Further allegations are made as regards the Government order dated 6-3-2017 being anti-dated. Thus, the arguments of the learned Counsel are two fold. Firstly, proviso appended to Section 12(1) destroys the main enactment i.e., 12(1)(c). Secondly, in giving effect to both, the main enactment and the proviso, the State Government cannot interpret in a hybrid manner other than the enacted provisions. Hence, the Government order dated 6-3-2017 is illegal. In other words, there is only one entry level at pre-primary, if the schools are imparting education both at pre-primary and elementary levels, i.e, bound by the proviso, not the main enactment. Assuming if both entry levels are applicable, the State Government has no power to scramble the same in a hybrid manner giving a go by to the legislative intent. The learned Counsel in support of his contentions placed reliance on the following judgments: (i) *Binani Industries Limited, Kerala v. The Assistant Commissioner of Commercial Taxes, VI Circle, Bangalore and Others* 2007 (62) Kar. L.J. 426 (SC) : VI (2007) SLT 209 : 2007 (5) SCJ 142 : (2007)15 SCC 435; (ii) *Union of India v. Sanjay Kumar Jain* AIR 2004 SC 4139 : V (2004) SLT 98 : (2004) 21 AIC 948 (SC) : 2004-III-LLJ-753 (SC) : (2004)6 SCC 708; (iii) *Dashrath Rupsingh Rathod v. State of Maharashtra and Another* 2014 (5) Kar. L.J. 499 (SC) : AIR 2014 SC 3519 : 2014 Cri L.J. 4350 (SC) : 2014 (7) SCJ 273 : VI (2014) SLT 466 : (2014) 141 AIC 1 (SC) : (2014)9 SCC 129. 4. The learned Additional Advocate General Sri A.S. Ponnanna, appearing for the respondents would contend that based on the experience of implementation of admission under Section 12 (1)(c) of the RTE Act, it was found necessary to prescribe additional guidelines in the instances as

that of petitioner-Educational Institutions. The said guidelines under Government order dated 6-3-2017 are issued under the provisions of Section 35(2) of the RTE Act. The main intendment of the Act, was to reserve 25% of the seats for the disadvantaged or weaker sections of students, so that there would be social equity. This was envisaged in the entry level, so that, there would be organic growth for such students, they could easily adjust to more competitive/advanced education in private schools without facing the pain of transition. The object of the Act was to integrate the children from different strata, so there is more empathy and understanding. But, the avowed object of enacting RTE Act was not fully achieved, due to many schools attempted to evade admission by deliberately starting the pre-primary classes in their schools, which is substantially lower in strength, than the strength in the 1st Standard. The Act when being formulated did not foresee, this misuse. This was because, logically the number of seats in a lower class, in any school would be equal to the next class, as the same students would be graduated to the next (senior) class. The Government order determines the number of entry levels and also the student strength mechanism for the academic year. It was further contended that it is the wrong perception of the petitioners that they are providing free education to the children, indeed the children are getting free education since the Government is reimbursing the institutions, the Government is bearing the cost of the education of such children. The only difference in the petitioners' pre and post RTE status would be, to an extent of 25% of the students whom the institutions cannot pick and choose. The Additional Advocate General placing reliance on the judgment of the " High Court of Judicature at Bombay in the case of Dr. Vikhe Patil Foundation's and Others v. Union of India and Others, W.P. No. 4457 of 2015, dated 14-8-2015, contended that while considering the similar set of facts, the Division Bench of Bombay High Court held that, compulsory admission of minimum 25% in Class I and/or pre-school at both entry level for the children belonging to specific class/group/section is within the framework of RTE Act/ Rules. Simultaneously two or both entry levels is also permissible. The circulars and other related communications in view of above reasons are held to be valid and within the framework of law. Learned Additional Advocate General further submitted that, harmonious construction of interpretation has to be given to the proviso and Section 12(1)(c). According to the learned Counsel, the proviso has to be interpreted in consonance with clause (c), where school specified in clause (n) of Section 2 imparts pre-school education and primary education, the strength of Class-1 envisaged in clause (c) has to be considered to reserve the seats under RTE quota. According to the learned Additional Advocate General, the entry level is at two points, i.e., pre-primary and Class I, clubbed together, the extent of at least 25% of the strength of Class I shall be treated as RTE quota. Thus, the proviso does not destroy the main provision. 5. Heard the learned Counsel appearing for the parties and perused the material on record. The fulcrum of dispute is relating to the interpretation of the proviso appended to Section 12(1) of the RTE Act i.e., whether the proviso appended to Section 12(1) of the RTE Act has to be read as an addendum substantive provision to the main

provision or as an exception? 6. It is apt to refer to the relevant provisions of the RTE Act. Section 12 of the RTE Act reads thus: "12. Extent of school's responsibility for free and compulsory education.-(1) For the purposes of this Act, a school.- (a) specified in sub-clause (i) of clause (n) of Section 2 shall provide free and compulsory elementary education to all children admitted therein; (b) specified in sub-clause (ii) of clause (n) of Section 2 shall provide free and compulsory elementary education to such proportion of children admitted therein as its annual recurring aid or grants so received bears to its annual recurring expenses, subject to a minimum of twenty-five per cent; (c) specified in sub-clauses (iii) and (iv) of clause (n) of Section 2 shall admit in Class I, to the extent of at least twenty-five per cent of the strength of that class, children belonging to weaker section and disadvantaged group in the neighbourhood and provide free and compulsory elementary education till its completion: Provided further that where a school specified in clause (n) of Section 2 imparts pre-school education, the provisions of clauses (a) to (c) shall apply for admission to such pre-school education. (2) The school specified in sub-clause (iv) of clause (n) of Section 2 providing free and compulsory elementary education as specified in clause (c) of sub-section (1) shall be reimbursed expenditure so incurred by it to the extent of per-child-expenditure incurred by the State, or the actual amount charged from the child, whichever is less, in such manner as may be prescribed: Provided that such reimbursement shall not exceed per-child-expenditure incurred by a school specified in sub-clause (i) of clause (n) of Section 2: Provided further that where such school is already under obligation to provide free education to a specified number of children on account of it having received any land, building, equipment or other facilities, either free of cost or at a concessional rate, such school shall not be entitled for reimbursement to the extent of such obligation. (3) Every school shall provide such information as may be required by the appropriate Government or the local authority, as the case may be." Section 2(n) of the Act reads thus: "2. (n) "School" means any recognised school imparting elementary education and includes.- (i) a school established, owned or controlled by the appropriate Government or a local authority; (ii) an aided school receiving aid or grants to meet whole or part of its expenses from the appropriate Government or the local authority; (iii) a school belonging to specified category; and (iv) an unaided school not receiving any kind of aid or grants to meet its expenses from the appropriate Government or the local authority." Section 35 of the Act reads as under: "35. Power to issue directions. -(1) The Central Government may issue such guidelines to the appropriate Government or as the case may be, the local authority, as it deems fit for the purposes of implementation of the provisions of this Act. (2) The appropriate Government may issue guidelines and given such directions, as it deems fit, to the local authority or the School Management Committee regarding implementation of the provisions of this Act. (3) The local authority may issue guidelines and give such directions, as it deems fit, to the School Management Committee regarding implementation of the provisions of this Act." 7. The relevant portion of the Government order dated 6-3-2017 reads thus: "4. Section

12(1)(c) of the RTE Act stipulates that a private unaided school shall admit in Class 1, to the extent of at least 25 per cent of the strength of that class, children belonging to disadvantaged group and weaker section in the neighbourhood and provide free and compulsory education till its completion. The Act provides further that where such school imparts pre-school education, the above mentioned provision shall apply to such pre-school education. The pre-school education is generally referred as pro-primary education in Karnataka in classes LKG and UKG. 5. There are a number of standalone pre-primary schools imparting education in classes LKG and UKG only. Those schools have not been covered under the provision of the Act as the parents admitting their children in such standalone schools under the RTE Act would have to look for admitting their children again in Class 1 in another school providing primary education after two years of pre-primary education. It will not be practical to arrange admission of such children in another school, besides the selection itself being based on random selection by the IT system. 6. There are number of primary schools imparting pre-primary education also. In those schools the classes start from LKG. It is noted that several of such schools have two entry levels, i.e., they admit children at start of the pre-primary education in class LKG, and also admit children at start of the primary education in Class 1. The admissions in Class 1 in several cases is over and above the children promoted from class UKG in the same school to Class 1, i.e., fresh admission are done in Class 1 for the children who have not studied in the same school at pre-primary level. As a result, several, of such schools have much higher strength in Class 1 as compared to the strength in class LKG." "Determination of number of entry levels: 1. A primary school imparting pre-primary education also but having nearly same student strengths in class LKG and Class 1 shall be treated as a school with one entry level. 2. A primary schools imparting pre-primary education also but having higher student strengths in Class 1 as compared to the strength in class LKG shall be treated as a school with two entry levels, with the first level being class LKG and the second level being Class 1. 3. A school having higher student in Class 1 as compared to the strength in class LKG shall be treated as the school with two entry levels. A minor variation of less than 4 in the student strength of the two classes shall be ignored. 4. A school having near similar student strengths in class LKG and Class 1, but admitting students in Class 1 in lieu of the students taking a transfer to other schools on promotion from class UKG shall not be treated as a school with two entry levels. Determination of student strength for academic year 2017-18: 5. For purpose of determination of total student strengths in class LKG and Class 1 for admission under the RTE Act during academic year 2017-18 to the extent of 25 per cent of the total strength in the relevant class in the school having pre-primary and primary classes or in a standalone primary school as the case may be, the following benchmarks will be followed: i. Total admission in class LKG declared by such school for claiming the reimbursement for academic year 2016-17. ii. Total admissions in Class 1 declared by such for academic year 2016-17 in the IT based Student Achievement Tracking System established by the Government of Karnataka. iii.

The school will have an option to inform the Block Education Officer in case it plans to vary the strength significantly during 2017-18 as compared to the strength in 2016-17. Primary schools imparting pre-primary education also but having one entry level only in class LKG: 6. In primary schools imparting pre-primary education also but having one entry level only in class LKG, i.e., their student strength in class LKG and Class 1 being nearly same as per para 5, the admission under Section 12(1)(c) shall be made in class LKG only. Primary schools imparting pre-primary education also and having two entry levels, one in class LKG and second Class 1: 7. In primary schools imparting pre-primary education also but having two entry levels, i.e., their student strength in Class 1 being higher than that in class LKG, the admission under Section 12(1)(c) shall be made in class LKG and Class 1 both. 8. The number of seats for admission under the RTE Act in class LKG and Class 1 shall be determined in the following manner: i. Total number of RTE seats for academic year 2017-18 in the school shall be equal to 25 per cent of strength in Class 1 as per para 5 above. ii. Number of RTE seats for academic year 2017-18 in class LKG shall be equal to 25 per cent of the strength of class LKG as per para 5. iii. Number of RTE seats for academic year 2017-18 in Class 1 shall be equal to difference between the Total Number of RTE seats as per (i) above and number of RTE seats for class LKG as per (ii) above. iv. A school having more strength in class LKG than in Class 1 shall not be asked to admit students in Class 1." 8. The Hon'ble Apex Court in *Binani Industries Limited's* case (supra), while considering the scope of proviso, observed thus: "15. The normal function of a proviso is to except something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. As was stated in *Mullins v. Treasurer of Survey* (referred to in *Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subhash Chandra Yograj Sinha and Calcutta Tramways Company Limited v. Corporation of Calcutta*) when one finds a proviso to a section the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject-matter of the proviso. The proper function of a proviso is to except and to deal with a case which would otherwise fall within the general language of the main enactment and its effect is confined to that case. It is a qualification of the preceding enactment which is expressed in terms too general to be quite accurate. As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment and ordinarily, a proviso is not interpreted as stating a general rule: "If the language of the enacting part of the statute does not contain the provisions which are said to occur in it you cannot derive these provisions by implication from a proviso." Said Lord Watson in *West Derby Union v. Metropolitan Life Assurance Company*. Normally, a proviso does not travel beyond the provision to which it is a proviso. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other. (See *A.N. Sehgal and Others v. Raje Ram Sheoram and Others*, *Tribhovandas Haribhai Tamboli v. Gujarat Revenue Tribunal and Others* and *Kerala State Housing Board and Others v. Ramapriya Hotels (Private) Limited and Others*): "This word (proviso) hath divers operations. Sometime it

worketh a qualification or limitation; sometime a condition; and sometime a covenant" (Coke upon Littleton 18th Edition, 146): "If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant, and the earlier clause prevails.... But if the later clause does not destroy but only qualifies the earlier, then the two are to be read together and effect is to be given to the intention of the parties as disclosed by the deed as a whole (Per Lord Wrenbury in *Forbes v. Git*)."

..... 17. Maxwell states in his work on Interpretation of Statutes (12th Edition) that the rule against retrospective operation is a presumption only, and as such it "may be overcome, not only by express words in the Act but also by circumstances sufficiently strong to displace it" (p. 225), if the dominant intention of the Legislature can be clearly and doubtlessly spelt out, the inhibition contained in the rule against perpetuity becomes of doubtful applicability as the "inhibition of the rule" is a matter of degree which would "vary secundum materiam" (p. 226). Sometimes, where the sense of the statute demands it or where there has been an obvious mistake in drafting, a Court will be prepared to substitute another word or phrase for that which actually appears in the text of the Act (p. 231)/" (emphasis supplied)

9. In *Dashrath Roopsingh Rathod's case* (supra), the Hon'ble Apex Court held thus: "40. Harman in that view correctly held that "what would constitute an offence is stated in the main provision. The proviso appended thereto however imposes certain further conditions which are required to be fulfilled before cognizance of the offence can be taken". If the Parliament intended to make the conditions stipulated in the proviso, also as ingredients of the offence, the provision would have read differently. It would then have specifically added the words "and the drawer has despite receipt of a notice demanding the payment of the amount, failed to pay the same within a period of fifteen days from the date of such demand made in writing by a notice". That, however, is not how the enacting provision of Section 138 reads. The Legislature has, it is obvious, made a clear distinction between what would constitute an offence and what would give to the complainant the cause of action to file a complaint for the Court competent to take cognizance. That a proviso is an exception to the general rule is well-settled. A proviso is added to an enactment to qualify or create an exception to what is contained in the enactment. It does not by itself state a general rule. It simply qualifies the generality of the main enactment, a portion which but for the proviso would fall within the main enactment. 41. The P. Ramanatha Aiyer, Law Lexicon, 2nd Edition, Wadhwa and Company at page 1552 defines proviso as follows: "The word "proviso" is used frequently to denote the clause the first words of which are "provided that" inserted in deeds and instruments generally. And containing a condition or stipulation on the performance or non-performance of which, as the case may be. The effect of a proceeding clause or of the deed depends. A clause inserted in a legal or formal document, making some condition, stipulation, exception or limitation or upon the observance of which the operation or validity of the instrument depends (Section 105, Indian Evidence Act, 1872). A proviso is generally intended to restrain the enacting clause and to except something which

would have otherwise been within it or in some measure to modify the enacting clause..." 44. Also pertinent is a four-judges Bench decision of this Court in *Dwarka Prasad v. Dwarka Das Saraf*, (1976) 1 SCC 128 where this Court was examining whether a cinema theatre equipped with projectors and other fittings ready to be launched as entertainment house was covered under the definition of "accommodation" as defined in Section 2(1)(d) of Uttar Pradesh (Temporary) Control of Rent and Eviction Act, 1947. The proviso provided for some exception for factories and business carried in a building. It was held that sometimes draftsmen include proviso by way of over caution to remove any doubts and accommodation would include this cinema hall: "18. A proviso must be limited to the subject-matter of the enacting clause. It is a settled rule of construction that a proviso must prima facie be read and considered in relation to the principal matter to which it is a proviso. It is not a separate or independent enactment. "Words are dependent on the principal enacting words, to which they are tacked as a proviso. They cannot be read as divorced from their context" 1912 A.C. 544. If the rule of construction is that prima facie a proviso should be limited in its operation to the subject-matter of the enacting clause, the stand we have taken is sound. To expand the enacting clause, inflated by the proviso, sins against the fundamental rule of construction that a proviso must be considered in relation to the principal matter to which it stands as a proviso. A proviso ordinarily is but a proviso, although the golden rule is to read the whole section, inclusive of the proviso, in such manner that they mutually throw light on each other and result in a harmonious construction. The proper course is to apply the broad general rule of construction which is that a section or enactment must be construed as a whole, each portion throwing light if need be on the rest. The true principle undoubtedly is, that the sound interpretation and meaning of the statute, on a view of the enacting clause, saving clause, and proviso, taken and construed together is to prevail. (Maxwell on Interpretation of Statutes, 10th Edn. p. 162)" (emphasis supplied) 10. The Hon'ble Apex Court in *Sanjay Kumar Jain's* case (supra) held thus: "11. The normal function of a proviso is to except something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. As was stated in *Mullins v. Treasurer of Survey*, 1880(5) QBD 170, referred to in *Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subhash Chandra Yograj Sinha*, AIR 1961 SC 1596 and *Calcutta Tramways Company Limited v. Corporation of Calcutta*, AIR 1965 SC 1728; when one finds a proviso to a section the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject-matter of the proviso. The proper function of a proviso is to except and to deal with a case which would otherwise fall within the general language of the main enactment and its effect is confined to that case. It is a qualification of the preceding enactment which is expressed in terms too general to be quite accurate. As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment and ordinarily, a proviso is not interpreted as stating a general rule. "If the language of the enacting part of the statute does not contain the provisions which are said to occur in it you cannot

derive these provisions by implication from a proviso". Said Lord Watson in *West Derby Union v. Metropolitan Life Assurance Company*, 1897 AC 647 (HL). Normally, a proviso does not travel beyond the provision to which it is a proviso. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other. (See *A.N. Sehgal and Others v. Raje Ram Sheoram and Others*, AIR 1991 SC 1406, *Tribhovandas Haribhai Tamboli v. Gujarat Revenue Tribunal and Others*, AIR 1991 SC 1538 and *Kerala State Housing Board and Others v. Ramapriya Hotels (Private) Limited and Others*, (1994) 5 SCC 672)."

11. A statutory proviso "is something engrafted on a preceding enactment *R. v. Taunton St. James*, (1829)9 B and C 831). 12. In *Allied Motors (Private) Limited v. Commissioner of Income Tax* AIR 1997 SC 1361 : (1997) 224 ITR 677 (SC) : (1997) 3 SCC 472, in order to cure the defect, a proviso was sought to be introduced through an amendment. The Court held thus: "A proviso which is inserted to remedy unintended consequences and to make the provision workable, a proviso which supplies an obvious omission in the section and is required to be read into the section to give the section a reasonable interpretation, requires to be treated as retrospective in operation so that a reasonable interpretation can be given to the section as a whole."

13. The High Court of Judicature of Bombay in the case of *Dr. Vikhe Patil Foundation's* (supra) held thus: "47. The purpose and object and specifically of Section 12(1)(c) with proviso is crystal clear, positive affirmation for the "school" to admit children of 25% of the schools strength of every class of entry level. Therefore, the "schools" in question and/or which runs both classes of pre-primary school and elementary school, they are under obligation to have reservations of 25%, based upon the strength of the respective first entry classes. There is no specific intention expressed and/or no such choice and/or option is provided to such schools to select one out of these two entry classes, for providing admission and reservation in question. The mandate is to provide reservation irrespective of the classes i.e. pre-primary, at both levels. 48. The expression "25% of the strength of that class" (Section 12(1)(c)) means and includes pre-primary school (3 to 6 year), first entry level and also of first standard of elementary (primary school), both the entry level classes to select one out of two levels is impermissible. At every entry level, it is obligation of the school to admit the fixed percentage of children, belonging to the described class. The schools, therefore, who are imparting the education at two levels pre-primary and primary, at both the entry level, they have to admit prescribed percentage of children/students to achieve the purpose and object of the RTE Act. 49. The plain reading of Section 12(1)(c) including proviso of RTE Act and RTE Rules made thereunder, made it mandatory to admit the reserved children at both the entry levels. Such reservation, at both entry levels, is within the framework of law. There is no specific provision of any option either of these two. There is no bar and/or prohibition for the school, not to admit such children in the respective entry level classes. Both the entries are available for the respective schools, irrespective of nature of the schools. There is no exemption and/or concession contemplated and/or provided. Therefore, the circular dated 21st January, 2015 and related communications providing two

levels and clarification of certain area cannot be stated to be contrary to the RTE Act and/or any other provisions. It is legal and valid." 14. The Hon"ble Apex Court in *Society for Un-Aided Private Schools of Rajasthan v. Union of India and Another*, 2012 (3) Kar. L.J. 177 (SC) : 2012 AIR SCW 3400 : 2012 (4) SCJ 318 : AIR 2012 SC 3445 has upheld the validity of the RTE Act except the applicability to the unaided minority Educational Institution. The relevant para reads thus: "169. Learned Attorney General for India has favoured the setting up of an Adjudicatory/Regulatory Authority to determine the question whether compliance with Section 12(1)(b) and 12(1)(c) will have an adverse impact on the financial viability of the school, and if so, to suggest remedies and to deal with issues like expulsion etc. Learned Attorney General indicated the necessity of a statutory amendment if the Regulatory/Adjudicatory body has to be set up under the Act. Proper adjudication mechanism may also pave the way for a successful and effective public-private partnership for setting up educational institutions of best quality so that our children will get quality education. I am sure that the Government will give serious attention to the above aspect of the matter which are of prime importance since we are dealing with the future of the children of this country. Part VI Conclusions: 1. Article 21-A casts an obligation on the State to provide free and compulsory education to children of the age of 6 to 14 years and not on unaided non-minority and minority educational institutions. 2. Rights of children to free and compulsory education guaranteed under Article 21-A and RTE Act can be enforced against the schools defined under Section 2(n) of the Act, except unaided minority and non-minority schools not receiving any kind of aid or grants to meet their expenses from the appropriate Governments or local authorities. 3. Section 12(1)(c) is read down so far as unaided non-minority and minority educational institutions are concerned, holding that it can be given effect to only on the principles of voluntariness, autonomy and consensus and not on compulsion or threat of nonrecognition or non-affiliation. 4. No distinction or difference can be drawn between unaided minority and non-minority schools with regard to appropriation of quota by the State or its reservation policy under Section 12(1)(c) of the Act. Such an appropriation of seats can also not be held to be a regulator measure in the interest of the minority within the meaning of Article 30(1) or a reasonable restriction within the meaning of Article 19(6) of the Constitution. 5. The appropriate Government and local authority have to establish neighbourhood schools as provided in Section 6 read with Sections 8 and 9, within the time-limit prescribed in the Statute. 6. Duty imposed on parents or guardians under Section 10 is directory in nature and it is open to them to admit their children in the schools of their choice, not invariably in the neighbourhood schools, subject to availability of seats and meeting their own expenses. 7. Sections 4, 10, 14, 15 and 16 are held to be directory in their content and application. The concerned authorities shall exercise such powers in consonance with the directions/guidelines laid down by the Central Government in that behalf. 8. The provisions of Section 21 of the Act, as provided, would not be applicable to the schools covered under sub-section (iv) of clause (n) of Section 2. They shall also not be applicable to minority institutions, whether

aided or unaided. 9. In exercise of the powers conferred upon the appropriate Government under Section 38 of the RTE Act, the Government shall frame rules for carrying out the purposes of this Act and in particular, the matters stated under sub-section (2) of Section 38 of the RTE Act. 10. The directions, guidelines and rules shall be framed by the Central Government, appropriate Government and/or such other Competent Authority under the provisions of the RTE Act, as expeditiously as possible and, in any case, not later than six months from the date of pronouncement of this judgment. 11. All the State Governments which have not constituted the State Advisory Council in terms of Section 34 of the RTE Act shall so constitute the Council within three months from today. The Council so constituted shall undertake its requisite functions in accordance with the provisions of Section 34 of the Act and advise the Government in terms of clauses (6), (7) and (8) of this order immediately thereafter. 12. Central Government and State Governments may set up a proper Regulatory Authority for supervision and effective functioning of the Act and its implementation. 13. Madrasas, Vedic Pathshalas etc. which predominantly provide religious instructions and do not provide for secular education stand outside the purview of the Act." 15. The Hon'ble Apex Court in the case of Commissioner of Commercial Taxes v. Ramkishan Shrikishan Jhaver and Others (1950-2004) 6 SCST 6625 : (1967) 20 STC 453 (SC) : (1968) 1 SCR 148 : (1968) 66 ITR 664 (SC) : AIR 1968 SC 59, has observed that in exceptional circumstances a proviso may not be really a proviso in the accepted sense but may be a substantive provision itself. 16. Thus, from a conspectus reading of the authorities referred to above, it is manifest that the function of the proviso ordinarily is to qualify the preceding enactment which is expressed in a quite accurate manner. The proper function of a proviso is to accept and deal with the case which would otherwise fall within the main enactment but this is not an inflexible Rule. It is settled legal position that language employed in the proviso depicts whether the Legislature intended to exercise its enacting power. Where the language of the main enactment is explicit and unambiguous, the proviso has to be read along with the main enactment. It can be held that Section 12(1)(c) of the RTE Act, envisages a specified extent of school's responsibility for free and compulsory education, inasmuch as, admission of students in Clause P and by way of proviso, it widens the scope of Section 12(1)(c), supplementing, pre-school education. 17. As per P. Ramanath Iyer's Law Lexicon "further" means. - (i) at a greater distance in time; (ii) additional; more (iii) going beyond; (iv) to promote or advance. The use of the word "further" in the proviso makes it different from the general interpretation of the proviso. It is an addition to clause (c). The usage of the word "further" indicates the legislative intent of the parliament to read the provision in addition to clause (c), not as an exception. The arguments advanced at the hands of the learned Counsel appearing for the petitioners would have been accepted if the pre-school education, but for the proviso would otherwise had fallen within the general language of the main enactment. The interpretation of the proviso depends on the text and context. The phrase "further" employed in the proviso indicates the legislative intent that it is a substantive provision.

Hence, the arguments of the learned Counsel for the petitioners that the proviso destroys the main enactments, clause (c) of Section 12(1) is wholly inconceivable. As per Lord Wrenbury in *Forbes v. Git*, (1922)1 AC 256, as aforesaid, "if in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant, and the earlier clause prevails. But if the later clause does not destroy but only qualifies the earlier, then the two are to be read together and effect is to be given to the intention of the parties as disclosed by the deed as a whole". Applying the golden Rule of reading together, the clauses enumerated in Section 12(1) with the proviso makes it manifestly clear that the proviso supplements to clause (c) of Section 12(1). Hence, it can be held that there are two entry levels, one at the: 1st Standard and the other, at pre-school.

18. The Government order dated 6-3-2017 is similar to that of the circular considered by the High Court of Judicature at Bombay in the case of *Dr. Vikhe Patil Foundation's case* (supra), wherein similar circulars are upheld holding that the compulsory admission of minimum 25% in Class-I or pre-school at both entry levels to the children belonging to disadvantaged or weaker section is within the framework of law and the simultaneous entry to both levels is permissible. Though the judgment may not strictly be binding on this Court, it has the persuasive effect.

19. In the statement of objections filed by the Government, it is stated that many schools were trying to evade admission under the RTE quota deliberately starting pre-primary in their schools, substantially lower in strength than that of the 1st Standard. For example, if a school has 20 students in LKG, it has to reserve 5 seats for disadvantaged children, the same school may have 80 seats in Class-I, if the entry level is construed only at LKG, they can admit only 5 and continue them later on in 1st Standard instead of giving admissions to 20 students i.e. 25% of 80 in Class I. The statistical analysis of the admission data of the academic year 2016-17 pertaining to schools imparting both primary and pre-primary education furnished by the respondents disclose that about 2,281 schools having two entry levels with different strength in LKG and 1st Standard, were not declaring all the seats in the 1st Standard, by showing lower strength in LKG. An adequate number of seats would be lost to the disadvantaged students and weaker sections (about 12,555). It is noticed that in W.P. No. 14240 of 2017, the school started LKG Section during 2016-17 with strength of 60. The petitioner-Educational Institution has been running Class 1 with the strength of 228. In terms of the RTE Act, 25% of the available seats as per Section 12(c) is 57, with 1st Standard strength of 228. If the same school starts LKG with the strength of 60 seats, RTE seats comes to 15 seats. If the arguments of the learned Counsel for the petitioners to be accepted, loss of seats under RTE Act would be $57-15=42$. Hence determination of number of students as per the Government order to Class 1 at 42 is justifiable. The total RTE seats allotted to the school is 37 which is to the extent of 25% of the available seats under Class I. If the student strength in LKG is equal to that of Class-I, the entry level is treated as one. A primary school imparting pre-primary education along with student strength in 1st standard on a higher side, the entry level is treated

as two with the first level being LKG and second level being class-I. A minor variation of less than four in the student strength of two classes is ignored. This is the mode prescribed by the Government order to determine the number of entry levels. Similarly determination of student strength for the academic year 2017-18 with different entry levels are prescribed. Therefore the petitioners who run both classes of pre-primary and elementary school are under an obligation to have reservations of 25% based upon the strength of respective entry classes. No option is provided to the schools to select any of the two entry classes viz., 1st Standard or LKG for providing admission and reservation to the children belonging to weaker Section/disadvantaged group. The two entry" levels cannot be considered to be disjunctive, it is conjunctive. The Government order dated 6-3-2017 determines the number of entry" levels vis-a-vis the student strength.

20. Clause 3 of the Statement of Objects and Reasons reads thus: "3. Consequently, the Right of Children to Free and Compulsory Education Bill, 2008, is proposed to be enacted which seeks to provide.- (a) that every child has a right to be provided full time elementary education of satisfactory and equitable quality in a formal school which satisfies certain essential norms and standards; (b) "compulsory education" casts an obligation on the appropriate Government to provide and ensure admission, attendance and completion of elementary education; (c) "free education" means that no child, other than a child who has been admitted by his or her parents to a school which is not supported by the appropriate Government, shall be liable to pay any kind of fee or charges or expenses which may prevent him or her from pursuing and completing elementary education; (d) the duties and responsibilities of the appropriate Governments, local authorities, parents, schools and teachers in providing free and compulsory education; and (e) a system for protection of the right of children and a decentralised grievance redressal mechanism." 21. Section 11 of the Act reads thus: "11. Appropriate Government to provide for pre-school education.-With a view to prepare children above the age of three year for elementary education and to provide early childhood care and education for all children until they complete the age of six years, the appropriate Government may make necessary arrangement for providing free pre-school education for such children." Thus, it is the obligation of the appropriate Government to make necessary arrangements for providing pre-school education for the children above the age of three years until they complete the age of six years in terms of Section 11 of the RTE Act. 22. In the case of Society for Un-Aided Private Schools of Rajasthan, supra, the Hon"ble Apex Court upholding the Constitutional validity of the RTE Act has observed thus: "Chapter IV of the 2009 Act deals with responsibilities of schools and teachers. Section 12(1)(c) read with Section 2(n) (iii) and 2(n)(iv) mandates that every recognised school imparting elementary education, even if it is an unaided school, not receiving any kind of aid or grant to meet its expenses from the appropriate Government or the local authority, is obliged to admit in Class I, to the extent of at least 25% of the strength of that class, children belonging to weaker section and disadvantaged group in the neighbourhood and provide free and compulsory elementary education till its

completion. As per the proviso, if the school is imparting pre-school education, the same regime would apply." 23. It is in furtherance of achieving the objects of the RTE Act, the State Government exercising the power under Section 35(2) of the Act issued guidelines specifying the manner in which the obligation of reserving the RTE quota has to be discharged. 24. As aforesaid, proviso gets integrated to Section 12(1)(c) in terms of the language employed therein. That means "to the extent of at least 25% of the strength of that Class-I" applies to both the entry levels if the school is imparting education at both the entry levels, no option is left to the schools to pick and choose anyone entry level. Reservation at 25% of the strength of the class separately cannot be fixed, if the school is imparting education at both the levels. The proviso if read together with 12(1)(c) at least 25% of strength of Class I has to be maintained at both the entry levels i.e., Class-I + pre-school or at one level either Class I or pre-school depending upon the school imparting the education. In other word s, if the school is imparting education in both the levels, reservation under Section 12(1) (c) read with proviso has to be maintained simultaneously at both the levels; if the school is imparting only elementary education from Class-I as the entry level, the reservation to be maintained only at one entry level Class I; if the school is imparting education only in pre-school not with any elementary education, reservation to be maintained at pre-school level. 25. It is by experience, State Government found it necessary to prescribe guidelines for the effective implementation of the object of the Act. The rationale for issuing such guidelines is well-founded and is intra vires of the RTE Act. The State is empowered to issue guidelines under Section 35(2) of the RTE Act and also to invoke Article 162 of the Constitution of India to fill in the gap to remove the doubts or to bring clarity, if any. 26. Thus, the Government order dated 6-3-2017 is legal and cannot be found fault with. Conclusions: 1. Action of the respondents in allotting the students to the petitioner-Educational Institutions both at the pre-school and 1st Standard is legal and intra vires of the RTE Act. 2. Reservation of 25% in Class I and/or pre-school at both the entry levels/simultaneously for the children belonging to weaker sections and disadvantaged group is justifiable. 3. Government order dated 6-3-2017 issued by the Government of Karnataka is valid and in accordance with law". 4. Writ petitions are dismissed.