
(2010) 04 MAD CK 0215

In the Madras High Court

Case No : W.P.Nos. 112, 627, 850 and 854 of 2010 and M.P. No"s. 1 of 2010 (10 MPs) and 2 of 2010 (7 MPs)

Tamil Nadu Nursery Matriculation and Higher Secondary
Schools Association (Regd.)

APPELLANT

Vs

The State of Tamil Nadu and Others
Private Schools
Correspondents Forum, Salem Vana Vani Vidyalaya, Salem Vs
The State of Tamil Nadu and The Director of Tamil Nadu
Matriculation Schools
Krishnagiri District Private
Schools Association Vs The State of Tamil Nadu and The
Director of Tamil Nadu Matriculation Schools
P.B.Prince
Gajendra Babu General Secretary State Platform for Common
School System Vs State of Tamilnadu

RESPONDENT

Date of Decision : 09-04-2010

Acts Referred:

Constitution of India, 1950 — Article 14, 142, 19(1), 19(6), 21A
Stamp Act, 1899 — Section 73
Tamil Nadu Recognised Private Schools (Regulation) Act, 1973 — Section 32, 32(2)
Tamil Nadu Schools (Regulation of Collection of Fee) Act, 2009 — Section 10, 11,
11(1), 11(2), 11(3)
Tamil Nadu Schools (Regulation of Collection of Fee) Rules, 2009 — Rule 172, 173,
174, 175, 177

Citation : AIR 2010 Mad 142

Hon'ble Judges : H.L. Gokhale, C.J;K.K. Sasidharan, J

Bench : Division Bench

Advocate : M. Venkatachalapathy for M. Sriram, in W.P. No. 627/2010, K. Doraisamy for Muthumani Doraisami, in W.P. Nos. 815 and 3620/2010, S. Silambannan, K. Sathish, for PROFEXS Associates in W.P. Nos. 850, 851 and 1105/2010, N.R. Chandran for Paramasiva Doss, in W.P. Nos. 852 and 2833/2010, R. Muthukumarasamy for V.P. Sengottuvel, in W.P. Nos. 854 and 855/2010, N.M. Ramalingam, in W.P. No. 1269/2010 and Senthil Nathan, in W.P. No. 112/2010, for the Appellant; P. Wilson, A.A.G. Assisted by G. Sankaran, Special Govt. Pleader (Education) and Dakshayni Reddy, Government Advocate, for the Respondent

Judgement

H.L. Gokhale, C.J.—All these writ petitions, except one (i.e., W.P. No. 112 of 2010), are filed by the unaided private school managements belonging either to the minorities or otherwise. They seek a declaration that the Tamil Nadu Schools (Regulation of Collection of Fee) Act, 2009 (Act 22 of 2009) (hereinafter referred to as 'the Act' in short) and the Tamil Nadu Schools (Regulation of Collection of Fee) Rules, 2009 (hereinafter referred to as 'the Rules' in short) are unconstitutional and violative of:

- i the right to establish and administer educational institutions, which right is guaranteed under Article 19(1)(g),
- ii the right to establish and maintain institutions for religious and charitable purposes, which is guaranteed under Article 26 of the Constitution of India, and
- iii the right of the minorities to establish and administer educational institutions guaranteed under Article 30 of the Constitution of India.

These petitions thereafter seek to challenge the consequential proceedings initiated by the Director of Education including the direction dated 26th November, 2009 to issue the applications for admissions only during 01-05-2010 to 15-05-2010 and not prior thereto. Writ Petition No. 112/2010 is, however, different. It also assails some of the provisions of this statute, but for an altogether different reason viz., for being against the concept of common school system and the principles of equality and justice.

2. As the preamble of the Act states, it is enacted with a view to regulate the collection of fees by the schools in the State of Tamil Nadu and matters connected thereunder. This Act consists of 16 sections. The first section as usual is about the short title, extent and commencement. The Act has come into force from 05th August 2009. Section 2 gives various definitions. Section 2(j) defines a "private school", which reads as follows:

"2 (j) "private school" means any pre-primary school, primary school, middle school, high school or higher secondary school, established and administered or maintained by any person or body of persons and recognized or approved by the competent authority under any law or code of regulation for the time being in force, but does not include,

- (i) an aided school;
- (ii) a school established and administered or maintained by the Central Government or the State Government or any local authority;
- (iii) a school giving, providing or imparting religious instruction alone but not any other instructions;

Explanation:- For the Purpose of this clause,-

1) "code of regulation" means the Code of Regulations for Approved Nursery and Primary Schools, Code of Regulations for Matriculation Schools and Code of

Regulations for Anglo-Indian Schools;

2) (i) pre-primary school shall consist of Pre-KG to UKG.

(ii) primary school shall consist of LKG to Standard V or Standards I to V;

(iii) middle school shall consist of LKG to Standard VIII, Standards I to VIII or Standards VI to VIII;

(iv) high school shall consist of LKG to Standard X, Standards VI to X or Standards IX and X;

(v) higher secondary school shall consist of LKG to Standard XII, Standards I to XII, Standards VI to XII or Standards XI and XII.

3) Aided schools conducting any classes or courses, for which no money is paid as aid out of the State funds, shall be construed as a private school in so far as such classes or courses are concerned.

3. Sections 3 to 8 are the most relevant sections from this Act. The petitioners principally attacked Section 3(2) read with Section 6 and later Section 11 of the Act. It is necessary to reproduce these sections:

3. Prohibition of Collection of excess fee.

(1) No Government school or aided school shall collect any fee in excess of the fee fixed by the Government for admission of pupils to any Standard or course of study in that school.

(2) No fee in excess of the fee determined by the committee under this Act shall be collected for admission of pupils to any Standard or course of study in a private school.

(a) by any person who is in charge of, or is responsible for, the management of such private school; or

(b) by any other person either for himself or on behalf of such private school or on behalf of the management of such private school.

(3) The fee collected by any school affiliated to the Central Board of Secondary Education shall commensurate with the facilities provided by the school.

4. Fixation of fee by Government.

The Government shall fix the fee for admission of pupils to any Standard or course of study in Government schools and aided schools.

5. Constitution of Committee:

(1) The Government shall constitute a committee for the purpose of determination of the fee for admission to any Standard or course of study in private schools;

(2) The committee shall consist of the following members, namely,

(a) A retired High Court Judge, nominated

by the Government...Chairperson

(b) Director of School Education...Ex-officio Member

(c) Director of Matriculation Schools...Ex-officio Member

(d) Director of Elementary Education...Ex-officio Member

(e) Joint Chief Engineer (Buildings),

Public Works Department...Ex-officio Member

(f) Additional Secretary to Government,

School Education Department...Ex-officio Member-

Secretary

(3) The term of office of the Chairperson shall be for a period of three years from the date of his nomination and in the case of vacancy arising earlier, for any reason, such vacancy shall be filled for the remainder of the term.

(4) The Chairperson shall be eligible to draw such rate of sitting fee and travelling allowance as may be applicable to a First class Committee.

(5) No act or proceeding of the committee shall be invalid by reason only of the existence of any vacancy in, or any defect in, the constitution of the committee.

(6) The Chairperson shall preside over the meeting of the committee.

6. Factors for determination of fee.

(1) The Committee shall determine the fee leviable by a private school taking into account the following factors, namely:-

(a) The location of the private school;

(b) The available infrastructure;

(c) The expenditure on administration and maintenance;

(d) The reasonable surplus required for the growth and development of the private school.

(e) Any other factors as may be prescribed.

(2) The Committee shall, on determining the fee leviable by a private school, communicate its decision to the school concerned.

(3) Any private school aggrieved over the decision of the Committee shall file their objection before the committee within fifteen days from the date of receipt of the decision of the committee.

(4) The committee shall consider the objection of the private school and pass orders within thirty days from the date of receipt of such objection.

(5) The orders passed by the committee shall be final and binding on the private school for three academic years. At the end of the said period, the private school would be at liberty to apply for revision.

(6) The committee shall indicate the different heads under which the fee shall be levied.

7. Powers and functions of the committee:

(1) The powers and functions of the committee shall be,

(a) To determine the fee to be collected by private schools;

(b) To hear complaints with regard to collection of fee in excess of the fee determined by it or fixed by the Government, as the case may be. If the committee, after obtaining the evidence and explanation from the management of the private school or aided school concerned or from the Government school, comes to the conclusion that the private school or the Government school or aided school has collected fee in excess of the fee determined by the committee or fixed by the Government, as the case may be, it shall recommend to the appropriate competent authority for the cancellation of the recognition or approval, as the case may be, of the private school or aided school or for any other course of action as it deems fit in respect of the private school or Government school or aided school.

(2) The Committee shall have power to.-

(i) require each private school to place before the committee the proposed fee structure of such school with all relevant documents and books of accounts for scrutiny within such date as may be specified by the committee;

(ii) verify whether the fee proposed by the private school is justified and it does not amount to profiteering or charging of exorbitant fee;

(iii) approve the fee structure or determine some other fee which can be charged by the private school.

(3) The Committee shall have power to.-

(i) verify whether the fee collected by the School affiliated to the Central Board of Secondary Education commensurate with the facilities provided by the school;

(ii) to hear complaints with regard to collection of excess fee by a school affiliated to the Central Board of Secondary Education; and

(iii) to recommend to the Central Board of Secondary Education for disaffiliation of the school, if it comes to a conclusion that the school has collected excess fee.

(4) The committee shall have the power to regulate its own procedure in all

matters arising out of the discharge of its functions, and shall, for the purpose of making any inquiry under this Act, have all the powers of a civil court under the Code of Civil Procedure, 1908 while trying a suit, in respect of the following matters, namely, -

- (i) Summoning and enforcing the attendance of any witness and examining him on oath;
- (ii) The discovery and production of any document;
- (iii) The receipt of evidence on affidavits;
- (iv) The issuing of any commission for the examination of witness.

8. Regulation of accounts.-

The Government may regulate the maintenance of accounts by the private schools in such manner as may be prescribed.

4. Section 9 provides for penalties in the event of contravention of the provisions of the Act. Section 10 provides for offences by the Company. Section 11 lays down that there shall be a District Committee in every Revenue District for this purpose. Section 12 lays down that no Court shall take cognizance of any offence under this Act except with the sanction of the Government. u/s 13, the provisions of this Act are stated to be in addition to and not in derogation of any other law for the time being in force. Section 14 provides for protection of action taken in good faith. Section 15 lays down the power to remove difficulties and Section 16 lays down the power to make rules.

5. The principal submission of the learned Counsel for the petitioners is that the regulation of collection of fee by the unaided and minority schools is impermissible. It infringes the Fundamental Right of the unaided educational institutions whether belonging to minorities or otherwise to practice any profession or to carry on any occupation, trade or business, which is available under Article 19(1)(g) of the Constitution of India. This law imposing the restrictions thereunder cannot be said to be in the interest of general public and the restrictions cannot be considered to be reasonable.

6. The second limb of the submissions of the petitioners is concerning the minority unaided schools. It is submitted that they have the freedom to manage their religious affairs under Article 26 of the Constitution and the right to establish and administer their educational institutions under Article 30 of the Constitution is infringed by this Enactment.

7. The third limb of the argument is that the power u/s 11 of the Act given to the District Committee or any of its members to enter, search and seize the record or the documents of the school or its management is excessive and arbitrary, and therefore violative of Article 14 of the Constitution of India. This Section 11 reads as follows:

11. District Committee:

(1) There shall be a District Committee in every revenue district, which shall consist of the Chief Educational Officer of the district as Chairperson and such other members as may be prescribed.

(2) The District Committee or any member of the said Committee authorized by it in this behalf may, at any time, during the normal working hours of any private school, enter such private school or any premises thereof or any premises belonging to the management of such private school if it or he has to believe that there is or has been any contravention of the provisions of this Act or the Rules made thereunder and search and inspect any record, accounts, register or other document belonging to such private school or of the management, in so far any such record, accounts, register or other document relates to such private school and seize any such record, accounts, register or other document for the purpose of ascertaining whether there is or has been any such contravention.

(3) The provisions of the Code of Criminal Procedure, 1973 (Central Act 2 of 1974) relating to search and seizure shall apply, so far as may be, to search and seizure under Sub-section (2).

8. Mr. Muthukumarasamy, learned senior counsel led the counsel appearing for various petitioners. The arguments of most of the counsel for the petitioners (except W.P. No. 112/2010) were similar. Mr. N.R. Chandran, learned senior counsel appearing for the petitioner in W.P.Nos.852 & 2833 of 2010 criticized Section 11 of the Act for being violative of Article 14 of the Constitution of India. Mr. Senthil Nathan, learned Counsel appearing for the petitioner in W.P. No. 112/2010, on the other hand, criticized the Act for being against the concept of common school system and the principles of equality and justice. Mr. Wilson, learned Additional Advocate General, and Mr. Sankaran, learned Special Government Pleader defended the legislation as valid, legal and constitutional. A number of affidavits and documents were placed on record. We have gone through the same.

9 Mr. Muthukumaraswamy, learned Senior Counsel appearing for the petitioners in Writ Petition Nos.854 and 855 of 2010 took us through the three leading judgments rendered by the Apex Court and the relevant paragraphs therefrom concerning admissions to the professional medical and engineering institutions. The first one is in the case of T.M.A. Pai Foundation and Others Vs. State of Karnataka and Others, . The second is in the case of Islamic Academy of Education and Another Vs. State of Karnataka and Others, and the third one is in the case of P.A. Inamdar and Ors. v. State of Maharashtra and Ors. reported in (2005) 6 SCC 537.

10. The question of regulation of fees and admissions to the professional engineering and medical colleges came up before the Apex Court in TMA Pai Foundation case (supra). In that matter the Apex Court had framed five issues for its consideration. In the present matter, the observations of the Apex Court

on the third issue before it were pressed into service. The issue was whether in case of private institutions (unaided and aided), can there be a Government Regulation and if so, to what extent?

In paragraph 50 of the said judgment, the Apex Court laid down that the right to establish and administer broadly comprises the following rights:

- (a) To admit students;
- (b) To set up a reasonable fee structure;
- (c) To constitute a governing body;
- (d) To appoint staff (teaching and non-teaching); and
- (e) To take action if there is dereliction of duty on the part of any employee.

11. Paragraph 54 of the judgment was specifically pressed into service.

For the sake of convenience, we can place it in two clauses, since it contains two statements, which read as follows:-

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

Based on those statements in paragraph 54, it was submitted that there can be a regulation of the right to establish an educational institution but it will have to be to ensure the maintenance of proper academic standards, atmosphere and infrastructure (including qualified staff) and the prevention of maladministration. Fixing of a rigid fee structure would be an unacceptable restriction. The statements in paragraph 56 were pressed into service to the effect that one cannot lose sight of the fact that providing good amenities to the students in the form of competent teaching faculty and other infrastructure costs money. It has, therefore, to be left to the institution, if it chooses not to seek any aid from the Government to determine the scale of fee that it can charge from the students. It was considered as stated in paragraph 57 of the judgment that profiteering is not permitted, though there can be a reasonable revenue surplus, which is permissible to an educational institution.

12. Paragraph 61 of the judgment was very much pressed into service, which states that in the case of unaided private schools, maximum autonomy has to be with the management with regard to administration including the right of appointment, disciplinary power, admission of students and the fee to be charged. At the school level, the admissions are not on the basis of merit. The Court has observed that the State run schools do not provide the same standard

of education as the private schools. The State should use its resources for the state educational institutions and subsidize the fees payable by the students there. It is, however, in the interest of the general public that more good quality schools are established. The Court observed at the end of the paragraph as follows:

61. ...It is in the interest of the general public that more good quality schools are established; autonomy and non-regulation of the school administration in the right of appointment, admission of the students and the fee to be charged will ensure that more such institutions are established. The fear that if a private school is allowed to charge fees commensurate with the fees affordable, the degrees would be "purchasable" is an unfounded one since the standards of education can be and are controllable through the regulations relating to recognition, affiliation and common final examinations.

13. Mr. Wilson, learned Additional Advocate General, on the other hand, pointed out that the judgment in Islamic Academy case (supra) brought in a Committee to regulate the fee structure. In paragraph 6 of that judgment, the Court framed the very first question, which was whether the educational institutions are entitled to fix their own fee structure. In paragraph 7, the Court referred to paragraph 56 of the judgment in TMA Pai's case (supra) and then laid down that the respective Governments and the authorities will set up, in each State, a Committee headed by a retired High Court Judge to be nominated by the Chief Justice, which will oversee the fee structure available or to propose some other fees, which can be charged by the institute concerned. The fee fixed by the Committee shall be binding for a period of three years at the end of which period, the institute would be at liberty to apply for review. As far as the fixing of fees is concerned, the Court laid down as follows:-

7. ...Each educational institute must place before this Committee, well in advance of the academic year, its proposed fee structure. Along with the proposed fee structure all relevant documents and books of accounts must also be produced before the Committee for their scrutiny. The Committee shall then decide whether the fees proposed by that institute are justified and are not profiteering or charging capitation fee. The Committee will be at liberty to approve the fee structure or to propose some other fee which can be charged by the institute. The fee fixed by the Committee shall be binding for a period of three years, at the end of which period the institute would be at liberty to apply for revision. Once the fees are fixed by the Committee, the institute cannot charge either directly or indirectly any other amount over and above the amount fixed as fees. If any other amount is charged, under any other head or guise, e.g. donations, the same would amount to charging of capitation fee. The Governments/appropriate authorities should consider framing appropriate regulations, if not already framed, whereunder if it is found that an institution is charging capitation fees or profiteering that institution can be appropriately penalized and also face the prospect of losing its recognition/affiliation.

14. Mr. Wilson, learned Additional Advocate General, submitted that far more students attended the schools as against the professional courses about which the above mentioned three judgments were rendered. Regulation of fees of the schools was the felt necessity of the society. In the State of Tamil Nadu, there were about 5500 Nursery/Primary Schools, 4100 Matriculation Schools, 38 Anglo Indian Schools and 500 State Board Schools of Tamil Medium totalling to 10,138 schools which were unaided. There was no uniformity in their fee structure and on the face of it large numbers of them were charging very high fees, which could not be justified. It was, therefore, felt necessary to regulate their fees. He placed before us documents and charts to show how excessive fees were charged. He submitted that the State Government was already regulating (1) starting of the schools (2) staffing pattern, strength of teachers (3) facilities/infrastructure and (4) examination. Mr. Wilson, therefore, contended that if that was not objected, why should regulation of fees be objected if that was sought to be done by objective standards as laid down in Section 6(1) of the Act. The State was not against reasonable revenue surplus, but against profiteering.

15. Having noted the submissions advanced by the learned Counsel appearing for the respective petitioners, and of the learned Additional Advocate General, we must note that the Apex Court was concerned with the fees in the Medical and Engineering colleges in the above referred to three matters, and the fees collected by the private schools were not the subject matter of those proceedings. Yet, the counsel for both the parties accept that the principles laid down in the above referred to three judgments will be useful for deciding the question of validity of the legislation in this matter.

Guidelines for examining the validity of the legislation

Now, as can be seen in T.M.A. Pai's case itself, the Apex Court has observed that the Government can provide regulations to control the charging of capitation fee and profiteering. Question No. 3 before the Court was as to whether there can be Government regulations, and if so, to what extent in case of private institutions? What the Apex Court has observed in paragraph-57 of the judgment is instructive for our purpose.

57. We, however, wish to emphasize one point, and that is that inasmuch as the occupation of education is, in a sense, regarded as charitable, the Government can provide regulations that will ensure excellence in education, while forbidding the charging of capitation fee and profiteering by the institution. Since the object of setting up an educational institution is by definition "charitable", it is clear that an educational institution cannot charge such a fee as is not required for the purpose of fulfilling that object. To put it differently, in the establishment of an educational institution, the object should not be to make a profit, inasmuch as education is essentially charitable in nature. There can, however, be a reasonable revenue surplus, which may be generated by the educational institution for the purpose of development of education and expansion of the institution.

16 Again in paragraph-69 of the judgment, while dealing with this issue, the Apex Court observed that an appropriate machinery can be devised by the State or University to ensure that no capitation fee is charged and that there is no profiteering, though a reasonable surplus for the furtherance of education is permissible. Although the Apex Court overruled the earlier judgment in Unni Krishnan, J.P. and others Vs. State of Andhra Pradesh and others etc. etc., , which was to the extent of the scheme framed therein and the directions to impose the same, part of the judgment holding that primary education is a fundamental right was held to be valid. Similarly, the principle that there should not be capitation fee or profiteering was also held to be correct.

17. Thereafter, when we come to the judgment in Islamic Academy case, the first question framed by the Apex Court was whether the educational institutions are entitled to fix their own fee structure? It is pertinent to note that this judgment very much brought in a committee to regulate the fees structure, which was to operate until the Government/Appropriate Authorities consider framing of appropriate regulations. It is also material to note that in paragraph-20, the Apex Court has held that the direction to set up Committee in the States was passed under Article 142 of the Constitution and was to remain in force till appropriate legislation was enacted by Parliament.

18. The judgment in P.A. Inamdar's case, though sought to review the one in Islamic Academy case, it left the mechanism of having the committees undisturbed. In paragraph-129 of the judgment, the Apex Court observed that the State regulation, though minimal, should be to maintain fairness in admission procedure and to check exploitation by charging exorbitant money or capitation fees. In paragraph-140 of the judgment, the Apex Court has held that the charge of capitation fee by unaided minority and non-minority institutions for professional courses is just not permissible. Similarly, profiteering is also not permissible. The Apex Court observed that it cannot shut its eyes to the hard realities of commercialization of education and evil practices being adopted by many institutions to earn large amounts for their private or selfish ends. On question No. 3, which was with respect to Government regulation in the case of private institutions, the Apex Court clearly answered in paragraph-141 that every institution is free to devise its own fee structure, but the same can be regulated in the interest of preventing profiteering. No capitation fee can be charged. In paragraph-145 of the judgment, the Apex Court rejected the suggestion for post-audit or checks if the institutions adopt their own admission procedure and fee structure, since the Apex Court was of the view that admission procedure and fixation of fees should be regulated and controlled at the initial stage itself.

19. Thus, in P.A. Inamdar's case (supra), the Apex Court left the mechanism laid down in Islamic Academy's case (supra) undisturbed with respect to the fees. On question No. 3, viz., as to whether in the private institutions there can be a Government Regulation, the Court held that every institution was free to devise its own fee structure but the same can be regulated in the interest of preventing

profiteering. What the Court held in paragraphs 144 and 147 is relevant for our purpose and, therefore, we quote those two paragraphs hereunder:-

144. The two Committees for monitoring admission procedure and determining fee structure in the judgment of Islamic Academy are in our view, permissible as regulatory measures aimed at protecting the interest of the student community as a whole as also the minorities themselves, in maintaining required standards of professional education on non-exploitative terms in their institutions. Legal provisions made by the State Legislatures or the scheme evolved by the Court for monitoring admission procedure and fee fixation do not violate the right of minorities under Article 30(1) or the right of minorities and non-minorities under Article 19(1)(g). They are reasonable restrictions in the interest of minority institutions permissible under Article 30(1) and in the interest of general public under Article 19(6) of the Constitution.

147. In our considered view, on the basis of the judgment in Pai Foundation and various previous judgments of this Court which have been taken into consideration in that case, the scheme evolved out of setting up the two Committees for regulating admissions and determining fee structure by the judgment in Islamic Academy cannot be faulted either on the ground of alleged infringement of Article 19(1)(g) in case of unaided professional educational institutions of both categories and Article 19(1)(g) read with Article 30 in case of unaided professional institutions of minorities.

Again in paragraph-146, the Apex Court observed that even non-minority institutions can be subjected to similar restrictions which are found reasonable and in the interest of the student community. The same view is again reiterated in Paragraphs 148 & 155 of the judgment.

Analysis of the present Act

20. On this background, when we look to the committee constituted u/s 5(1) of this Act, it shows that the initial function of the committee is to approve the fees structure formulated by the concerned institution. It is only when the committee finds the fee structure to be objectionable and cannot be approved, then it will determine some other fee, and the private schools will be asked to charge the same. Sections 6(1) and 7(1) of the Act lays down the procedure which will be followed by the committee:

a The Committee has to call upon the private institutions to place before it the proposed fee structure of the institution with all relevant documents and books of accounts for scrutiny within the period to be indicated by the Committee in the given notice. (The Committee has already circulated the questionnaire to the institutions which contains details) about the fee component.

b After the receipt of the proposal from the concerned institution, the Committee has to verify as to whether the fee proposed by the Private School is justified and it does not amount to profiteering or charging of exorbitant fee.

c In case the Committee is of the view that the fee structure proposed by the institution appears to be correct, taking note of the various facilities provided and that there was no profiteering or collection of exorbitant fee under the guise of capitation fee, it has to approve the fee structure.

d In case the Committee is of the view that the fee structure forwarded by the institution is exorbitant and that there is an element of profiteering, the Committee has to determine some other fee.

e While fixing some other fee, the Committee has to follow certain procedures taking into consideration the factors as found mentioned u/s 6(1) as well as Rule 3 of the Rules.

f The determination of the fee as made by the Committee should be intimated to the concerned institution and there upon the institution has got a right to submit their objections within fifteen days.

g The objections so submitted by the institution shall be examined by the Committee. The Committee has to consider it objectively. The Committee was not expected to reject the objection summarily. As per Section 7(4) of the Act, the Committee shall have the powers to regulate its own procedure in all matters and it shall have all the powers of a Civil Court under the Code of Civil Procedure, 1908 regarding summoning and attendance of witness and related matters. Therefore, the Committee would be within their powers to get the factors verified in respect of the claim made by the institution, to approve their fee structure, as against the fee determined by the Committee.

h The fee so prescribed would be in operation for a period of three years and at the end of such period, it would be open to the institution to make an application for revision of fees.

21. The observation of the Supreme Court was against the Government fixing the rigid fee in respect of private institutions. The impugned Act, in no way fixes the rigid fee. It only calls upon the management to forward their fee structure with details as to how they arrive at such a fee structure. The main idea is to see as to whether under the guise of collection of fees they are indirectly collecting the capitation fee or indulging in profiteering. That is why the Act initially uses the term "Approval of the fee structure" and only in such cases where the committee is of the view that the fee structure proposed is exorbitant and is in the nature of capitation fee or profiteering, it intervenes in the matter and for the purpose of fixing the correct fee, the private institution is given liberty to specify their fee structure, taking into account the expenditure necessary for running the institution as well as its future needs. Thus, it proceeds to determine the fee structure thereafter. In that process, it considers the objections given by the management to the fees proposed by the Committee. The consideration of objections by the Committee cannot be treated as an empty formality. The Committee has to consider the objections made by the institution in an objective manner and if necessary, by inspecting the institution and calling upon the

management to produce the records in their possession in respect of various facets and to arrive at a decision as to whether the fee determined by the Committee was the correct one or it requires modification. It cannot be ignored that the committee is a high powered committee headed by a retired High Court Judge.

22. It is material to note that the private schools with respect to whom the Act is concerned are all recognized institutions. They are all governed under the Tamil Nadu Recognised Private Schools (Regulation) Act, 1973 and the Rules made there under. The Act is a self-contained Code dealing with recognized private schools and withdrawal of recognition also. That will be so done where it is found that the institutions contravenes any of the provisions of the Act or the terms and conditions of granting such recognition.

Section 32 of the Private Schools Regulation Act provides for fees and other charges. It reads thus:

32. Fees and other charges:

1. Subject to the provisions of Sub-section (2), no private school shall levy any fee or collect any other charge or receive any other payment except a fee, charge or payment specified by the competent authority.

2. Every private school in existence on the date of the commencement of this Act and levying different rates of fees or other charges or receiving any other amount on such date, shall obtain the prior approval of the competent authority before continuing to levy such fees or charges or receive such payment.

23. Therefore, even as per the Private Schools Regulation Act, 1973, the private institution was expected to collect only the fees as prescribed by the competent authority. The provisions of this impugned Act have to be read along with the Private Schools Regulation Act, 1973 and the said position is clearly stated in Section 13 of the Act which clearly states that it is to be read in addition to existing laws. So long as Section 32 is in the Statute Book, it is always open to the State to regulate the fee. However there is no mechanism in the Tamil Nadu Private Schools Regulation Act for approval of the fee structure formulated by the private institution and to have determination of another fee. The impugned Act has to be considered only in the said context as it provides for the first time the machinery for approval of the fee structure proposed by the private institutions and the determination of a different fee, in case the Committee was of the view that the fee structure was exorbitant or that there is an element of capitation fee or profiteering.

24. The judgment of the Apex Court rendered in the case of Modern School Vs. Union of India (UOI) and Others, is quite instructive for our purpose. The Delhi School Education Act, 1973 was under challenge in that matter. That Act also contained provisions for fixing fees by the Director of Education. The judgment of the Apex Court was rendered after the judgment in T.M.A. Pai's case and Islamic

Academy case, but before one in P.A. Inamdar's case.

25. The following observations in Modern School case are reproduced herein below for ready reference:

(A) In paragraph- 14 of the judgment the Supreme Court observed thus:

14. At the outset, before analysing the provisions of the 1973 Act, we may state that it is now well settled by a catena of decisions of this Court that in the matter of determination of the fee structure unaided educational institutions exercise a great autonomy as they, like any other citizen carrying on an occupation, are entitled to a reasonable surplus for development of education and expansion of the institution. Such institutions, it has been held, have to plan their investment and expenditure so as to generate profit. What is, however, prohibited is commercialisation of education. Hence, we have to strike a balance between autonomy of such institutions and measures to be taken to prevent commercialisation of education. However, in none of the earlier cases, this Court has defined the concept of reasonable surplus, profit, income and yield, which are the terms used in the various provisions of the 1973 Act.

(underlining supplied)

(B) Again in paragraph-15, the Supreme Court indicated that there should be no capitation fee as well as profiteering. The observation reads thus:

15. ...The institutions should be permitted to make reasonable profits after providing for investment and expenditure. However, capitation fee and profiteering were held to be forbidden. Subject to the above two prohibitory parameters, this Court in T.M.A. Pai Foundation case held that fees to be charged by the unaided educational institutions cannot be regulated. Therefore, the issue before us is as to what constitutes reasonable surplus in the context of the provisions of the 1973 Act. This issue was not there before this Court in T.M.A. Pai Foundation case..

(C) In para 16 of the judgment, the Supreme Court formulated the question as to whether the educational institutions are entitled to fix their own fee structure. While confirming the position that each institute must have freedom to fix its own fee structure, the Supreme Court observed that there should be no attempt for profiteering or collection of capitation fee. The observation reads thus: -

16. ...In view of rival submissions, four questions were formulated. We are concerned with the first question, namely, whether the educational institutions are entitled to fix their own fee structure. It was held that there could be no rigid fee structure. Each institute must have freedom to fix its own fee structure, after taking into account the need to generate funds to run the institution and to provide facilities necessary for the benefit of the students. They must be able to generate surplus which must be used for betterment and growth of that educational institution. The fee structure must be fixed keeping in mind the infrastructure and facilities available, investment made, salaries paid to teachers

and staff, future plans for expansion and/or betterment of institution subject to two restrictions, namely, non-profiteering and non-charging of capitation fees. It was held that surplus/profit can be generated but they shall be used for the benefit of that educational institution. It was held that profits/surplus cannot be diverted for any other use or purposes and cannot be used for personal gains or for other business or enterprise. The Court noticed that there were various statutes/regulations which governed the fixation of fee and, therefore, this Court directed the respective State Governments to set up a committee headed by a retired High Court Judge to be nominated by the Chief Justice of that State to approve the fee structure or to propose some other fee which could be charged by the institute.

(D) While considering Section 17(3) of the Delhi School Education Act, the Supreme Court observed that the Director has authority to regulate the fees u/s 17(3) of the Act. The paragraph reads thus:

17. ...Therefore, reading Section 18(4) with Rules 172, 173, 174, 175 and 177 on one hand and Section 17(3) on the other hand, it is clear that under the Act, the Director is authorised to regulate the fees and other charges to prevent commercialisation of education. u/s 17(3), the school has to furnish a full statement of fees in advance before the commencement of the academic session. Reading Section 17(3) with Sections 18(3) and (4) of the Act and the Rules quoted above, it is clear that the Director has the authority to regulate the fees u/s 17(3) of the Act.

(E) While concluding the judgment, the Supreme Court observed that the Delhi School Education Act was interpreted to bring in transparency, etc., as well as to prevent commercialization of education to the extent possible. The relevant paragraph reads thus:

26. To sum up, the interpretation we have placed on the provisions of the said 1973 Act is only to bring in transparency, accountability, expenditure management and utilisation of savings for capital expenditure/investment without infringement of the autonomy of the institute in the matter of fee fixation. It is also to prevent commercialisation of education to the extent possible.

26. It is material to note that this view was subsequently sought to be challenged and reviewed, but the Apex Court declined to review it, as can be seen in *Unaided Private Schools of Delhi v. Director of Education* reported in *Action Committee, Un-Aided Pvt. Schools and Others Vs. Director of Education, Delhi and Others*, .

27. Mr. Wilson, learned Additional Advocate General, relied upon a judgment of a single Judge of the Karnataka High Court in the case of *Bapuji Educational Association v. State* reported in AIR 1986 Karnataka 119. In that matter, similar provisions of Karnataka Educational Institutions (Prohibition of Capitation Fee) Act were under challenge. Section 3 of the Act prohibited collection of capitation

fee. The concept of educational institutions was defined u/s 2(c) of the Act to mean any institution by whatever name called whether Government, private body, local authority, trust or university carrying on activity of imparting education in medicine or engineering leading to a degree conferred by the University under the Karnataka State Universities Act and also in other educational institutions or class or classes of such institution as the Government may, by notification specify. The capitation fee was defined u/s 2(b) of the Act to mean any amount by whatever name called, paid or collected directly or indirectly in excess of the fee prescribed u/s 5 of the Act, but did not include the deposit specified under the proviso to Section 3 of the Act. Section 3 of the Act prohibited collection of capitation fee. Section 5 of the Act empowered the State by notification to regulate the tuition or any other fee or deposit or other amount that may be received or collected by any educational institution. Section 5(2) of the Act directed that no educational institution shall collect any fees or amount or accept deposits in excess of the amounts notified u/s 3(1) of the Act. The learned single Judge analysed the various provisions of the Act and also the prevalent judgments, and in terms held in paragraph 78(A) that the provisions of Section 3 read with Section 5(2) of the Act were not violative of Articles 14 & 19(1)(g) of the Constitution of India. Mr. Wilson pointed out that a similar Act is existing in the State of Maharashtra viz., Maharashtra Educational Institution (Prohibition of Capitation Fees) Act, 1987 and the authorities thereunder were functioning appropriately.

28. In view of what is stated above, it can be said that the scheme of the present Act is in consonance with the law laid down by the Apex Court, and it by and large strikes a balance between the autonomy of the institutions and measures to be taken to prevent commercialization of education. There are sufficient guidelines in the statute for either approving or fixing the fees. The procedure prescribed provides for appropriate opportunity to the managements. The Committee is headed by a retired High Court Judge. The minority educational institutions have also to maintain non-exploitative terms as held in P.A. Inamdar's case. The impugned Act, therefore, cannot be said to be in any way in violation of Articles 19(1)(g) and 26 or 30 of the Constitution of India. However, having said this, when it comes to Section 11 of the Act, we have to examine the procedure little more carefully.

Constitutionality of Section 11 of the Act.

29. Section 11(1) provides for constitution of a District Committee. Section 11(2) permits the District Committee or any member of the said Committee authorized by it to enter and inspect the private institution or any premises belonging to the management of such School, if it or he has reason to believe that there is or has been any contravention of the provisions of the Act. As per Section 11(3), the provisions of the Code of Criminal Procedure relating to search or seizure would be applicable in case of a search u/s 11(2).

30. The Supreme Court in paragraph-55 of T.M.A. Pai Foundation case has clearly

stated that in the case of private unaided institutions, maximum autonomy in the day-to-day administration has to be with the private institution. It was further held that bureaucratic or Governmental interference in the administration of such an institution will undermine its independence.

31. By way of search as per Section 11(2), wide powers are given to the District Committee or any of its members duly authorized for conducting search. The said provision taken along with the relevant rule as per Rule 4(4) clearly shows that the Committee or its members are given free access at all reasonable time to enter the institution and to seize books, registers, accounts, records, documents, securities, cash or any other property belonging to or in the custody of any private school or its management. This is an unreasonable restriction in the matter of conducting educational institution by the private management. These Schools are not depending upon the Government for funds or their administration. No grant is paid to them. Therefore such wide powers as granted u/s 11(2), would undermine the autonomy and it will create a perennial apprehension to the institution. The provision confers unguided power which can be used arbitrarily and misused.

32. The power to conduct search, as provided u/s 11(2), is only in respect of unaided private institutions. The other private institutions getting aid from the Government are excluded from the definition of a private school and therefore, would not come under the purview of Section 11 of the Act, as the provision clearly says that Schools to be inspected would be only "Private Schools." There is no object sought to be achieved by this classification which is prima facie unreasonable. Arbitrariness is writ large. The provision is clearly violative of the equality provision of the Constitution. Therefore Section 11 is liable to be struck off as "unconstitutional" as it is violative of Article 14 of the Constitution of India. The Government is not powerless in the matter of implementation of the Act. Even without Section 11 it would be possible for the Government and the Committee to implement the provisions of the Act and the Rules made thereunder. The Committee was given powers to recommend to the appropriate authority for the purpose of canceling the recognition or approval to the institution, in case, the institution was found to collect fee other than the one prescribed by the Government. Similarly, Section 9(i) attracts criminal prosecution in the event of violating the provisions of the Act. Therefore there are sufficient statutory provisions to punish the private schools in case of collecting fees more than the prescribed fee. The District Committee can send a reasonable notice and seek the necessary information.

33. In this connection, we may profitably refer to the judgment of the Apex Court in the case of Distt. Registrar and Collector, Hyderabad and Another Vs. Canara Bank Etc., . By Andhra Pradesh Act No. 17 of 1986 the State Government had amended Section 73 of the Indian Stamps Act, 1899 as applicable in the State. The amended provisions empowered any person authorized by the Collector of Stamps to have access to the documents in private custody or

custody of a public officer where the inspection thereof may attend to secure any duty or to prove or lead to the discovery of any fraud or omission in relation to any duty. The provision permitted the exercise of power at all reasonable times and was not preceded by any requirement of reasons being recorded by the Collector or person authorized by him. The person authorized was vested with the authority to impound a document. On analyzing the various provisions of the amended Act, the Apex Court held that the power to impound a document had to be construed strictly and would be sustained only when falling within the four corners and letters of law. The Apex Court relied upon its earlier judgments including the one in AIR India Vs. Nergesh Meerza and Others, where in it was held that where a statute conferred a power on an authority to decide the matters without laying down any guidelines or principles or norms, that power had to be struck down as violative of Article 14 of the Constitution of India. In the present matter, we are constrained to take a similar view.

34. Though Rule 4(1) to Rule 4(4) dealing with maintenance of accounts has got a nexus to the object sought to be achieved, Sub-clause (4) and (5) of Rule 4 were inserted to carry out the search and seizure as provided u/s 11 of the Act. Rule 4(4) gives police power to the Authorized Officers and District Committee Members with free access to the books, registers, accounts, documents and even cash, securities and other property belonging to or in the custody of the private school. This rule gives unbridled, un-channeled and unregulated powers to the officers and as such, poses a perennial threat to the very functioning of private schools. Both Section 11 of the Act and Rule 4(4) leave the matter in entirety to the unregulated discretion of the authorized officers and District Committee Members. In view of our finding that Section 11 is ultra vires of Article 14 of the Constitution, the corresponding rule as contained in Rule 4(4) and 4(5) are also liable to be struck off as unconstitutional, and violative of Article 14 of the Constitution of India. However, it is open to the District Committee to call for particulars from the schools, as indicated in paragraph 32 above.

35. Mr. Senthil Nathan, learned Counsel appearing for the petitioner in W.P. No. 112 of 2010 submitted that the petition runs counter to the scheme of neighbourhood school and principles of equality and justice which are sought to be achieved under the Right to Education Act. As far as the submission on this aspect by the learned Counsel is concerned, it is difficult for us to accept the same. As can be seen from the judgment in T.M.A. Pai's case and other cases, the Apex Court has taken cognizance of the fact that private contribution in the field of education is necessary, and Government is not in a position to have sufficient resources for providing education to all. If that is so, it is difficult to bring about a common school system. The Right to Education Act does not prevent private schools. The only thing, which is possible to be realized, is to bring in legislation for regulation of fees structure and to check exploitation in private schools, which is sought to be brought about and that being so, the Act cannot be criticized on that score.

36. The Constitution (86th Amendment) Act, 2002 has made Elementary Education a fundamental right under Article 21A of the Constitution of India. The right to Free and Compulsory Elementary Education was a long felt need, which has now been given the status of a fundamental right. The Right of Children to Free and Compulsory Education Act, 2009 (hereinafter referred to as, "The RTE Act"), which came into force from 1st April 2010 was a consequential legislation to translate the constitutional intent into action. The RTE Act, 2009 provides for 25 percent seats in private schools for children from poor families and prohibits donation or capitation fee. Though the RTE Act is Central Legislation, its effective implementation lies in the hands of the State Governments. While implementing the RTE Act from 1 April 2010, the Government of India announced that 25 Per cent reservation for children from economically weaker sections of the society would be operational from Class 1 with effect from the academic year 2011. The present impugned legislation if examined in the context of Article 21A of the Constitution of India and the RTE Act is also valid.

37. The petitioner in W.P. No. 112/2010 in addition to the challenge to certain provisions of the Act, also challenges the legality and correctness of Rule 3 of the Tamil Nadu Schools (Regulation of Collection of Fee) Rules, 2009 (hereinafter referred to as Rules) primarily on the ground that it would result in inequality. According to the petitioner, there would be attempt on the part of the Management to impose corporal punishment and other methods to achieve 100% results, with a view to justify their fee structure.

38. Section 6(1) of the Act and Rule 3 indicates the factors to be considered by the Committee in the matter of determination of fee leviable by private schools. The location of school plays a prominent role in determining the fee structure inasmuch as the land value in Municipalities and Corporations would be substantial when compared to the value prevailing in rural areas. Therefore, schools in urban areas necessarily had to incur considerable expenditure for providing the required infrastructural facilities. Similarly on account of the advancement in science and technology and keeping in view the expectation of students, the schools had to provide modern facilities. The term, "School fully equipped", denotes such modern facilities involving the latest technology. The consideration regarding 100% of results appears to be one among the many factors and in fact, it was not given the status of a vital factor, in the matter of determination of fee. Therefore, Rule 3 indicates one of the factors to be taken note of by the Committee in the course of determination of proper fee and as such, challenge to the said Rule is liable to be rejected.

39. We may add at this stage that on behalf of the Government considerable material has been placed on record showing that private schools are charging exorbitant fees. Mr. Wilson pointed out that number of commissions including the Kothari Commission on education had emphasized appropriate measures long back. He has brought to our notice the large number of representations made by Parents' Associations all throughout the State against charging of high fees by

particular schools and the news reports of agitation by parents at different places. We may also note that an affidavit has been filed on behalf of the State stating that when it comes to the appointment of High Court Judge to be the Chairperson of the Committee u/s 5(2)(a) of the Act, the Government intends to bring about an amendment to provide that the nomination of a retired High Court Judge shall be by the Chief Justice of the High Court and not by the Government. We hope and expect that the Government will bring that amendment at the earliest.

40. In the light of the discussion as above, we do not find any merit in the petitions, except to the extent that Section 11 of the Act is held as ultra vires Article 14 of the Constitution of India. The power of the Committee or its members u/s 11(2) of the Act and Rules 4(4) and 4(5) of the Rules thereunder to enter the private schools or its premises or those of the management at any time for the purposes of search, inspection and seizure are held to be arbitrary and violative of Article 14 of the Constitution of India. Subject to this limited intervention, the challenge to the other provisions of the Act is repelled.

41. The petitioners (except one in W.P. No. 112/2010) have challenged the direction not to grant admissions before 01.05.2010. Mr. Wilson has explained it by pointing out that the same was necessary to first get the school fees either approved and fixed and thereafter the admissions may proceed. This problem will be only this year. Once the fees are laid down, they will operate for three years which is also in consonance with paragraph-7 of the Apex Court judgment in Islamic Academy case (supra). In fact, the Committee has started its work in right earnest and barring a few petitioners almost all schools are cooperating in this behalf. The Committee has sought the information in a prescribed format and we find the same to be quite exhaustive. Those schools which have a reasonable fee structure need not worry. In view of this we see no reason to interfere with the direction.

42. All the petitions stand disposed of accordingly. No costs. Consequently, the miscellaneous petitions are closed.