

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 13th July, 2012

+ **CM No. 5202/2012 in W.P.(C) No. 7796/2011**

% **SOCIAL JURIST, A CIVIL RIGHTS GROUP Petitioner**

Through: Mr. Ashok Aggarwal, Adv.

Versus

GOVT. OF NCT OF DELHI & ANR. Respondents

Through: Mr. V.K. Tandon, Adv. for GNCTD
Mr. Ravinder Agarwal, CGSC
Mr. A.K. Singh, Adv. for DCPCR
Mr. Aagney Sail, Adv. for NCPCR

CORAM :-

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

JUDGMENT

RAJIV SAHAI ENDLAW, J.

1. The present proceedings are a classic example of a statute being given an effect, which perhaps the legislature never intended it to have. The controversy concerns the Right of Children to Free and Compulsory Education Act, 2009 (RTE Act) and the effect thereof on Rajkiya Pratibha Vikas Vidyalayas (RPVVs).

2. RPVVs were established as Pace Setting Government Schools vide Cabinet Note No.F.DE-15/Act/140/97 dated 27.03.1997 of the Government

of National Capital Territory of Delhi (GNCTD). To understand the intent and thought process which went into establishing the RPVVs, it is necessary to reproduce in *toto* the said Cabinet Note:-

“The schooling pattern in Delhi is clearly divided into two streams. On the one hand we have the so called public schools which charge high fees and on the other hand we have the Govt. and aided schools which provide free education. Those who are being deterred by the poor standard of education in Govt. schools, are forced to send their wards to high fee charging schools. The poor are also forced to send their wards to Govt. schools. In such a situation, very bright children are grouped with less than average children. Consequently, even bright children having potential suffer. This situation has to be corrected. Majority of the people are not bothered about status symbols and shall willingly prefer Govt. schools provided good education is available there. A Govt. school or a public school should be a matter of choice not of compulsion, as it is today.

Directorate of Education has given serious thought to this situation and has decided to make de-novo efforts to raise the standard of education in Govt. schools to a level acceptable to most of the parents. It has been proposed to select certain Government schools in different areas of the National Capital Territory of Delhi for upgrading to this level by making necessary addition to the school, making changes

in the staff, selection of good principals and giving them certain more powers within the existing framework. For giving good educational facilities, emphasis will be given on the selection of the teachers, the head of school, the students, the quantum of autonomy and system of achievement evaluation. These schools will also be provided extra facilities for co-curricular activities and for inculcation of values. It is because of the lack of these ingredients that the majority of the Government schools are not able to provide quality education.

In order to have at least some Govt. schools, to begin with, having standards comparable to those available in the so-called better public schools, we shall have to incorporate the following ingredients in our schools on the basis of current achievement but also taking into account his previous record and his ability to build up an institution.

2. Teachers: We shall have to choose teachers who have given a consistently good performance over the year and who are well versed in the language they are expected to teach in. All teachers shall be very carefully selected from among those available in the government schools. On being posted in the pace setting schools, they will not be transferred for at least 5 years, except on extreme administrative grounds. There will, however, be no transfer on request.

3. Resources: Education will be absolutely free. However, with the increased rates of the pupil's fund and the PTA fund,

the schools should have adequate funds to take care of incentive and minor facilities.

4. Management: Each such school shall be adopted by an officer to be decided by the D.E. The adoptive officer will be authorized to issue orders in respect of administrative matters connected with that school and no separate orders from the district Dy. Director will be necessary in this regard. He will also be responsible for inspection and supervision of the schools. The Principal of the school shall be directly accountable to the officer adopting the school.

The school shall have an advisory committee consisting of the following:-

- ‘A’ A renowned educationist of the area.
- ‘B’ Head of the school - Secretary
- ‘C’ Adoptive officer - Chairman
- ‘D’ Concerned DDE (district)
- ‘E’ Concerned E.O.
- ‘F’ The parents nominated form amongst the PTA by the Principal.
- ‘G’ Two teachers of the school nominated by the Principal.

The committee shall be authorized to decide school timings, co-curricular activities, school calendar and introduction and abolition of subjects.

5. Institutional Planning and Self Evaluation: Before the

beginning of each academic session, the school will prepare an institutional plan laying down the objectives, strategies and the resources available. After the session is over, a self evaluation exercise shall be undertaken and review of the work shall be done by the Advisory Committee. Accountability of the staff will be enforced and appropriate action taken.

6. Pupils Achievement Evaluation: In order that continuous and comprehensive evaluation of the pupils is done, it will be necessary to keep a proper record of the students' work and conduct during the year and to ensure that cumulative record cards are maintained for each student and shown to his guardian after every terminal test.

These schools shall also be given freedom to adopt more strict criteria of promotion of students and their admission to different streams in Class–XI.

7. Infrastructure & facilities: Every such school shall provide Computer Education as a compulsory subject of study for all students and also for those interested, as an elective subject. Complete modern technological hardware will be made available to these schools. This will include OHP, VCR Projector, latest PA system etc. The schools shall also be provided with a hall, playgrounds and all the three streams at the +2 level.

8. Admission: In the first year i.e. 1997-98, admission will be allowed only to class VIth to IXth and XIth. From the IInd year, admission will be open to all the classes for children who

have studied for at least last two years in the Govt. or aided schools. Children will be admitted strictly on the basis of performance in the admission test which will be of the level of class to which admission is desired and, for this purpose, these schools shall be excluded from the Admission Plan. All the aspirants for admission will be tested in English, Hindi, Maths and Gen. Science. The enrolment in each section shall not exceed 35 under any circumstances and each class shall not have more than three sections. The pace setting schools shall run in single shift.

To begin with, it is proposed to have one such pace-setting school at the rate of one school in 3-4 zones from the session 1997-98. No new school will be established but one such existing school preferably located in a cluster of schools will be selected for conversion into a pace setting school.

The proposal has no legal implications and does not involve any additional financial liability. As such the same is being placed before the Cabinet for consideration and approval on the following counts:

1. To allow 9 schools at the rate of one each in 3-4 zones to run on the above mentioned lines w.e.f. the academic session 1997-98;
2. To allow admission of students to classes VI to IX & XI during 1997-98 and to all classes from VI onward from 1998-99 onward, purely on merit to be determined through a suitable admission test.

3. To give additional facilities to these schools as mentioned in the above note.

This note has been seen and approved by the Minister of Education and the Chief Minister.”

3. It is the uncontroverted position that the intent and thought process that had gone into establishing RPVVs bore fruit and the examination results of the students of RPVVs vis-à-vis students of other Government schools have been far superior.

4. However when the RPVVs published the admission notice for Classes VI and IX for the Academic Session 2010-11, by holding entrance test consisting of objective type questions to test numerical ability, mental ability, general knowledge and language comprehension, the Member Secretary of the National Commission for Protection of Child Rights (NCPCR) [constituted under the Commissions for Protection of Child Rights Act, 2005 (CPCR Act)] protested, averring the said procedure, of admission by holding a selection test, to be violative of Section 13 of the RTE Act and demanded withdrawal of the said admission notice.

5. The Director of Education of the GNCTD responded as under:

“In the year, 1997, it was realized that in Government

Schools, there are many students who have potential to excel given right environment. It was also realized that such students from low economic strata but having potential cannot afford to attend public schools. It was proposed to shape their excellence and provide a platform to cater to their higher needs of academic excellence. Accordingly, Government proposed to establish pace setting Government Schools of special category to provide better conditions of teaching learning environment and better infrastructure and thus Rajkiya Pratibha Vikas Vidyalayas came into existence with the approval of the Cabinet.

The entry level of admission in RPVVs is Class-VI. The students are taken from the lot of students who are already getting education in any Government / Government Aided Schools as well as schools managed by Local Bodies to provide them further excellence in education. In this way, the selection of such students from above category of schools to the RPVVs by the way of test is not an infringement to their Right to Education. To admit them in RPVVs means to shape their potential as the RPVVs were established with the view to cater to those students who belong to low economic strata of the society but have potential and excellence.

Therefore, such test is not violative of the provisions of Section 13 of the Right of Children to Free and Compulsory Education Act, 2009 as the test is just an internal arrangement to select students who are already in Government / Government

Aided / MCD / NDMC / Cantonment Board Schools for admission into these RPVVs. The test has already been conducted on 09.04.2010.”

6. NCPCR was however not satisfied with the response aforesaid and exercising its powers under Section 13(1)(j) of the CPCR Act initiated proceedings and issued notice to show cause to the GNCTD to show as to how the process of holding of selection test for admission to RPVVs was not in violation of the rights of children and the policies under the RTE Act framed for their benefit. Ultimately the NCPCR being of the view that the thrust of RTE Act was on free, compulsory and quality education for all children and the selection process for admission to RPVVs was resulting in discrimination and was violative of Section 13 of the RTE Act, vide order dated 17.06.2010 directed cancellation of all admissions made to RPVVs in the year 2010-11 and further directed RPVVs to follow only permissible method of selection of children under Section 2(o) of the RTE Act, i.e. the random method for admission.

7. In the meanwhile, upon the enactment of the RTE Act, the RPVVs were vide Notification No. F.Addl.DE(Sch)609-623 dated 16.06.2010 notified as schools belonging to specified category within the meaning of

Section 2 (p) of the RTE Act. Even the said Notification records as under:-

“Whereas there are 932 Government Schools in jurisdiction of Directorate of Education which include 19 Rajkiya Pratibha Vikas Vidyalayas.

And Whereas, in the year, 1997 it was realized that in Government Schools, there are many students who have potential to excel, given right environment. It was also realized that such students from low economic strata but having potential cannot afford to attend public schools. It was proposed to shape their excellence and provide a platform to cater to their higher needs of academic excellence. Accordingly, it was proposed to allow to establish pace setting Government Schools of special category having distinct character to provide better conditions of teaching learning environment and better infrastructure and the same, was approved by Government and thus, Rajkiya Pratibha Vikas Vidyalayas came into existence.

And Whereas, THE RIGHT OF CHILDREN TO FREE AND COMPULSORY EDUCATION ACT, 2009 has been notified to take effect from 01.04.2010. The provisions of the Act are to provide for free and compulsory education to all children of the age of 6-14 years. The Rajkiya Pratibha Vikas Vidyalayas, are the schools like Kendriya Vidyalayas,

Navodaya Vidyalayas, Sainik Schools or any other school having a distinct character which may be specified by notification by the appropriate Government under Clause (p) of Section 2 of the aforesaid Act.

And Whereas, students of Rajkiya Pratibha Vikas Vidyalayas are admitted from amongst those studying in Government / Government Aided / MCD / NDMC/ Cantonment Board schools, in order to cater to the needs of their higher potential. They are selected from such students, after a test at the entry level of Class – VI and thereafter to Class-IX and XI subject to the condition of availability of seats in the respective Rajkiya Pratibha Vikas Vidyalayas.

And Whereas, the Rajkiya Pratibha Vikas Vidyalayas, have a distinct character, in terms of the objectives and mission stated above.

Now, therefore, in pursuance of Clause (p) of Section 2 of the Right of Children to Free and Compulsory Education Act, 2009, the Lt. Governor, NCT of Delhi is pleased to declare Rajkiya Pratibha Vikas Vidyalayas as Specified Category Schools like Kendriya Vidyalayas, Navodaya Vidyalayas, Sainik Schools.”

8. GNCTD filed W.P.(C) No. 4973/2010 in this Court impugning the aforesaid order of NCPCR. Notice of the said petition was issued and vide

interim order dated 27.07.2010, the order of the NCPCR stayed. However, vide a subsequent order dated 05.05.2011 in the said writ petition, it was observed by a Single Judge of this Court that the RTE Act which was subsequent to the Scheme of RPVVs formulated in the year 1997 would prevail over the said Scheme and it was imperative for the GNCTD to comply with Section 13 of the RTE Act even in the matter of admission to RPVVs.

9. GNCTD filed a further affidavit in W.P.(C) No.4973/2010 stating as under:

“2. The petitioner respectfully submits that the matter has been considered by the Govt. of NCT of Delhi / petitioner, and it has decided to maintain ‘school of specified category’ status of Rajkiya Pratibha Vikas Vidyalayas (hereinafter referred to as ‘RPVV’) as notified in terms of clause (p) of Section 2 of the Right of Children to Free and Compulsory Education Act, 2009, and shall continue with its internal arrangement to select students from amongst those who are already studying in Govt. / Govt. aided / MCD/ NDMC / Cantonment Board Schools for

transfer / switchover in “RPVV”, considering the following:-

- i. Transfer / switchover being made in “RPVV” is an internal arrangement for selection of bright children from amongst children already studying in Government Schools mentioned *ibid*, belonging to poor strata of the society, and to provide them with facilities at par with Public Schools, free of cost, and to help them nurture their talent and achieve their career goals, for which they otherwise remain deprived while studying in Government Schools. Pertinent to add that the objective of the Government is to convert each and every Government School under its control in to ‘RPVV’, according to resources available.
- ii. Re-conversion of these RPVVs, in to ordinary schools, by switching to random selection method, shall mean switching off the ray of hope for brilliant children, who were earlier unable to access quality education owing to their weaker economic

condition and render the basic purpose of establishing “RPVVs” defunct.

- iii. RPVVs are having a distinct character and have been declared as specified category schools like Kendriya Vidyalayas, Navodaya Vidyalayas, Sainik Schools by appropriate government.
- iv. “RPVVs”, in spite of being “specified Category”, schools under sub section (p) of Section 2 of RTE Act, 2009, resort to transfer / switchover of students to the extent of 100% by way of selection from students of Government Schools demonstrating academic brilliance; pertinent to add that a large majority of students admitted in Government Schools and thereby in RPVVs, belong to weaker sections of the society.”

10. However, the learned Single Judge before whom W.P.(C) No.4973/2010 was pending, was not satisfied with the said affidavit and in the light of observations made during the hearing, the GNCTD on 30.09.2011 took a policy decision to start education, admissions / transfers

in RPVVs from IX standard only and to utilize the space so gained by curtailment of classes below that level to accommodate more students of poor and down trodden strata of the society at the level class IX onwards in the RPVVs. The said decision reads as under:

“We have to harmonize the objectives of setting up RPV Vidyalayas with the provisions in the Right to Education (RTE) Act. The RTE Act prohibits any selection of students through screening process where students’ intellectual skills are tested. This has been mandated with the objective of sending children to neighbourhood schools irrespective of their intellectual acumen. This, in turn, is based on the assumption that almost all children are endowed with intellectual potential which has been realized in the education set up of the schools. It also saves the children from going through the trauma involved in the process of selection.

The RPV Vidyalayas were set up with the objective of providing education to the gifted poor children studying in the government schools at par with the best private schools. The objective was to nurture and nourish the bright and gifted children, mainly poor, in a academic environment which cannot be provided in all the government schools.

There is no doubt that at some level, selection is necessary to encourage diligence and hard work and reward the deserving poor students a better academic environment.

The alternative would be to abolish the Pratibha schools and treat all children in government schools equally. Since the provision of Right to Education Act are applicable only for children between 1st to 8th Class, it would be appropriate to admit gifted children through a selection process in Class IX so that they are able to pursue their studies in an enriched environment from Class IX to Class XII. This will also have the benefit of admitting more children in RPV Vidyalayas as the space presently devoted to Class VI, VII and VIII would be available to students of Class IXth and XIIth. This will also enable us to harmonize the provisions of the Right to Education Act with the objective of setting up of RPV schools.”

11. In pursuance thereto an affidavit was filed in W.P.(C) No.4973/2010 that admission of students in RPVVs in elementary classes shall be in conformity with the RTE Act. In view of the said stand of the GNCTD, the learned Single Judge vide order dated 14.10.2011 disposed of W.P.(C) No.4973/2010 holding that nothing survived therein and directing that admission of students in elementary classes in RPVVs schools shall be in conformity with the RTE Act.

12. In view of the aforesaid developments, no admissions were made to Class VI in RPVVs in the year 2011-12. That is when the present writ

petition being W.P.(C) No. 7796/2011 was filed as a Public Interest Litigation contending that 1400 seats in Class VI in RPVVs were being allowed to go waste by not making admissions thereto. Notice of this writ petition was issued. The respondent GNCTD in its counter affidavit pleaded that owing to the dispute aforesaid which was resolved only on 14.10.2011, admissions could not be made in the academic year 2011-12. Satisfied with the said explanation, the writ petition was disposed of on 14.12.2011 with the direction to the GNCTD to consider the suggestion of the petitioner that to ease out the over crowding in the other government schools students therefrom be transferred to the RPVVs so that the 1400 seats therein in Class VI are not wasted. After the disposal of this writ petition, CM No. 5202/2012 has been filed for directions contending that the process for admission to RPVVs had not been started for the year 2012-13 also. Notice of the said application was issued and GNCTD in reply thereto has disclosed the full history aforesaid to this Bench, particularly the decision of the NCPCR and the proceedings in W.P.(C) No. 4973/2010 preferred by the GNCTD thereagainst, and the decision dated 30.09.2011 to do away with the Classes VI to VIII earlier existing in the RPVVs and to make admissions to the RPVVs in Class IX only. It is thus stated that the

occasion for the admission to RPVVs in Class VI does not arise.

13. After going through the facts aforesaid and being *prima facie* of the view that the process of admission/transfer to RPVVs by selection was not violative of Section 13 of the RTE Act and that the decision to do away with Class VI to VIII in RPVVs is not in public interest, we called for the file of W.P.(C) No.4973/2010 and also issued notice of these proceedings to Union of India, NCPCR as well as Delhi Commission for Protection of Child Rights (DPCR). NCPCR has filed its reply along with a report and DCPCR has adopted the same. We have heard the counsels including on the aspect of restoration of RPVVs from Class VI with the same admission procedure as prevalent earlier.

14. Section 13 of the RTE Act, of which the procedure for selection to RPVVs has been held to be in violation of, is as under:

“13. No capitation fee and screening procedure for admission

- (1) No school or person shall, while admitting a child, collect any capitation fee and subject the child or his or her parents or guardian to any screening procedure.*
- (2) Any school or person, if in contravention of the provisions of sub-section (1), -*

- (a) *receives capitation fee, shall be punishable with fine which may extend to ten times the capitation fee charged;*
- (b) *subjects a child to screening procedure, shall be punishable with fine which may extend to twenty-five thousand rupees for the first contravention and fifty thousand rupees for each subsequent contraventions.*

‘Screening procedure’ has been defined in Section 2 (o) of the Act which is as under:

“2. *Definition*

In this Act, unless the context otherwise requires, -

- (o) *“screening procedure” means the method of selection for admission of a child, in preference over another, other than a random method.”*

Though the language of Section 13 is wide enough to include admission to any class but since the RTE Act is concerned with elementary education which is defined in Section 2(f) as education from first class to eighth class only, the prohibition contained in Section 13 of the RTE Act has to be read till Class VIII only. That is the basis on which the decision dated 30.09.2011 of GNCTD has proceeded i.e. of confining RPVVs from Class IX onwards, to obviate violation of Section 13 (supra). None of the

other counsels also have contended that the bar of Section 13 would apply to admission beyond Class VIII also.

15. The argument which was raised by GNCTD before NCPCR as well as before the learned Single Judge in W.P.(C) No.4973/2010 but which did not find favour was:-

- (i) that in tune with the decision/policy of establishing RPVVs only bright children with 60% and above marks, studying in government schools were allowed admission in RPVVs;
- (ii) in order to select bright students studying in Government/ Government aided / MCD / NDMC / Cantonment Board Schools without any bias and discrimination, procedure for selection from amongst students studying in the said category of schools for the previous two years and having scored at least 60% marks in previous class, via admission test was adopted;
- (iii) that education imparted to the selected students in RPVVs is totally free;
- (iv) that on the basis of performance and maintenance, 14 out of 19 RPVVs had been provided ISO certification;
- (v) that on the basis of performance of RPVVs, the poor

impression of government schools in the minds of people had begun to change and even economically well to do parents were coming forward to get their children admitted in government schools in order to gain admission to RPVVs;

- (vi) that to meet the increasing demand, the RPVVs had been increased from the initial 3 to 19;
- (vii) that the provisions of the RTE Act are applicable for initial admission of children in schools; on the contrary, admission made in RPVVs are not of the students who have to be admitted at the initial stage but is of selection of bright children from amongst children already studying in government schools; there is thus no violation of Section 13 of the RTE Act;
- (viii) that RPVVs are a ray of hope for brilliant children who were earlier unable to have quality education owing to their weak economic condition;
- (ix) that though RTE Act mandates admission of only 25% of students from weaker strata of society and disadvantaged group, 100% admission to RPVVs were of students from

government schools (who belong to weaker sections of the society) showing academic brilliance;

- (x) Transfer / switchover from other Government, Government aided, Municipal, Cantonment Board schools to RPVVs is an internal arrangement for selection of bright children belonging to poor strata of the society to provide them the facilities at par with public schools free of cost and to help them nurture their talent and to achieve their career goals of which they would otherwise remain deprived while studying in government schools;
- (xi) that the ultimate objective was to slowly bring other government schools also to the level of RPVVs but which could not be immediately done;
- (xii) that re-conversion of RPVVs to ordinary school by switching to random selection method would render the basic purpose of establishing RPVVs defunct;
- (xiii) RPVVs were admitting students from Class VI only and not from Class I as being done in other Government, Government Aided, Municipal, Cantonment Board schools.

16. The contention of the counsel for the petitioner is two fold. Firstly, it is contended that about 1400 seats which earlier existed in RPVVs in Class VI to VIII should be restored as the same would ease the over crowding in the other government schools. Secondly, it is contended that the admission process to RPVVs in Class VI has to be random as under the RTE Act and cannot be by way of selection. It is argued that the government should strive for upholding the standards of all the Government, Government Aided, Municipal, Cantonment Board schools and not of one category of schools only.

17. NCPCR in its counter affidavit / report has harped upon Section 13 of the RTE Act. The counsel for the GNCTD has raised the same arguments as already noted above; on instructions it is further stated that the Government is willing to restore RPVVs from Class VI if the admission procedure as prevalent earlier is permitted.

18. The government as aforesaid has now restricted the RPVVs from Class IX onwards. We can however safely assume that the decision taken in the year 1997 to make the selection in Class VI was on the premise that talent should be nurtured from that early age. The decision to shift the same to Class IX is under the compulsion in the judicial proceedings.

19. We are unable to accept the argument that the 1400 odd seats in Classes VI to VIII (which are a part of elementary education) need to be restored with admission thereto on random basis. If any and all, as distinct from only bright and talented students were to be admitted to RPVVs, RPVVs will cease to have the cutting edge environment and the advantage they enjoy; also no purpose will be so served by transferring students, in Class VI, from one school to another. The students admitted on random selection in Class VI will necessarily have to be promoted to Class IX in RPVVs thereby not leaving any vacant seats for admission by selection, as proposed, in Class IX even. We are further of the view that confining RPVVs from Class IX to XII, as proposed will also adversely affect the functioning and result of RPVVs. As aforesaid, there must have been a rationale in, while establishing RPVVs, providing for admission on selection basis in Class VI and not in Class IX. A child by the time reaches Class IX is generally found to have become set in his ways and difficult to mould; the spark / talent in a child in Class V can be extinguished by the time reaches Class IX, if not provided the right environment and may not be capable of rekindling. Once the experts in the field of education had decided to make admission on selection basis in Class VI, we are of the view that the

same should not be interfered with.

20. Though the petitioner and the petitioner's counsels have done humungous service in the field of education, at least in the city of Delhi but we are unable to accept their contention that the best, as RPVVs represent should either be made available to all or to none. The Courts cannot shut their eyes to the dependency, of providing the best education, on the availability of resources financial as well as manpower. From the material placed before us, it is apparent that the teachers and the principals appointed to the RPVVs are the best from their respective stocks. The Supreme Court, in *State of Punjab v. Ram Lubhaya Bagga* (1998) 4 SCC 117, *Delhi Development Horticulture Employees' Union v. Delhi Administration* (1992) 4 SCC 99 and in *Viklad Coal Merchant, Patiala v. Union of India* (1984) 1 SCC 619 has taken notice of the limited resources available with the government and of the justifiability of optimum use thereof and the need for distribution of the scarce resources to achieve and accomplish desired results including by prioritization. What we have wondered is, whether a wait for a utopian state of affairs (when all schools can be raised to the level of RPVVs) should be allowed to come in the way of the small steps which can be taken in the interregnum. Though the 19 RPVVs form a drop in the

sea of over 1000 Government, Government Aided, Municipal, Cantonment Board schools in the city of Delhi but we at the same time cannot shut our eyes to the difference which they have made. Though the Courts are unable to issue general directions for raising the level of education in all the Government, Government Aided, Municipal, Cantonment Board schools to the best possible or as in RPVVs but the same would not prevent this Court from, in the exercise of wide jurisdiction under Article 226 of the Constitution of India, to come to the rescue of an illustrious institution as the RPVVs represent, from being shut down.

21. The argument of discrimination also is not available. Though right to elementary education cannot be denied by adopting a screening procedure but providing better opportunities and education to those amongst the elementary level students who show the potential and the spark cannot be said to be discriminatory. Discrimination can be only amongst those equally placed. However, when institutions of learning of superior quality are few and the admission seekers thereto far in excess, nothing wrong can be found in allowing those few only who are found capable of utilization thereof, to avail of the best. Every march in the direction of excellence has its own martyrs and such martyrdom cannot be allowed to thwart or scuttle a step

taken in public interest. The policy of effecting change in a phased manner is a well accepted one. The Supreme Court as far back as in *State of Jammu & Kashmir v. Shri Triloki Nath Khosa* (1974) 1 SCC 19 observed that in this unequal world the proposition that all men are equal has working limitations, since absolute equality leads to Procrustean cruelty or sanctions indolent inefficiency and therefore an imaginative and constructive *modus vivendi* between commonness and excellence must be forged to make the equality clauses viable. It was further held that the social meaning of Articles 14 to 16 is neither dull uniformity nor specious 'talentism'; it is a process of producing quality out of larger areas of equality. Shortlisting of candidates on some rational and reasonable basis, though in the context of employment was upheld in *Union of India v. T. Sundararaman* (1997) 4 SCC 664. The State is permitted to treat unequals differently with the objective of creating a level-playing field in the social, economic and political spheres.

22. We will however still have to deal with the question whether the procedure aforesaid, earlier prevalent of admission to RPVVs can be said to be in violation of Section 13 of the RTE Act inasmuch as, howsoever laudatory the concept of RPVV may be, if it is found to be in violation of

Section 13 of the RTE Act (as held by NCPCR), it is not in the domain of this Court to allow the same.

23. The preamble to the RTE Act describes the same as an Act to provide for free and compulsory education to all children of the age of six to fourteen years. The same is not in conflict with RPVVs. Section 3 of the Act vests in a child of the age of 6 to 14 years, a right to free and compulsory education in a neighbourhood school till completion of elementary education. Transfer by selection from a Government, Government Aided, Municipal, Cantonment Board school to RPVVs does not affect that right. Section 5 of the RTE Act is relevant and the relevant part thereof is as under:

“5. Right of transfer to other school. – (1) Where in a school, there is no provision for completion of elementary education, a child shall have a right to seek transfer to any other school, excluding the school specified in sub-clauses (iii) and (iv) of clause (n) of section 2, for completing his or her elementary education.

RPVVs as aforesaid are specified category schools within the meaning of Section 2(p) and falling in sub-clause (iii) of Section 2(n) of the Act. The right of a child already admitted to a school, under Section 5 (supra) to be

transferred to any other school for completing elementary education is only where there is no provision for completion of elementary education in the school to which the child stands admitted. Even where such right exists, Section 5 excludes therefrom the right to be transferred *inter alia* to a specified category school. The selection as aforesaid for admission to Class VI in RPVVs was from Government, Government Aided, Municipal, Cantonment Board schools, all of which have a provision for completion of elementary education. The RTE Act has thus not vested any right in a child already admitted to a school, to be transferred to RPVVs and that being the position, transfer by way of selection to RPVVs cannot be said to be prohibited by RTE Act.

24. The aforesaid position including that the bar under Section 13 supra to admission by selection does not apply to admission by transfer from one school to another at the level of Class VI becomes further clear from the Delhi School Education (Free Seats for Students belonging to Economically Weaker Sections and Disadvantaged Group) Order, 2011 issued under the provisions of the RTE Act. While Clause 3 thereof mandates all schools to admit children belonging to weaker sections and disadvantaged groups in Class I or at preschool level if available in the school to the extent of 25% of

the strength of that class, Clause 4(b) thereof prescribes the total number of seats at the entry level i.e. Nursery or Class I to be not less than the total number of seats in any other class of the school. The transfer by selection at the level of Class VI to RPVVs thus does not affect the right created under the RTE Act. The Supreme Court in *Indian Drugs & Pharmaceuticals Ltd. v. Punjab Drugs Manufacturers Association* (1999) 6 SCC 247 negated the challenge to the policy on the ground that the same did not affect the right of others. It is thus clear that the prohibition in Section 13 of subjecting a child to screening procedure during admission is applicable only to admission at the entry level which is Nursery or Class I. Mention may be made of Section 4 of the RTE Act providing for admission in a class appropriate to the age of a child who has not been admitted in any school or though admitted could not have completed elementary education. However, RPVVs do not admit such children. Thus, the admission procedure by selection in RPVVs is not in violation of Section 13 of the RTE Act and the decision aforesaid of the NCPCR in this regard cannot be sustained and is set aside.

25. Though, we are conscious that in the present proceedings, we are not directly concerned with the challenge to the decision of NCPCR, the

government itself having given up the said challenge in W.P.(C) No.4973/2010 but it will be a pity if inspite of the matter having been brought before us and finding RPVVs to have become a victim of circumstances aforesaid, we, on technicalities fail to interfere and allow the RPVVs, unarguably established for public purpose, for good of the society, to die. Even otherwise, the thrust of the establishment of RPVVs is affirmative and reformatory and, therefore, should be scrutinized under judicial principles sensitive to the nature of the State's efforts. The Supreme Court in *Union of India v. Rakesh Kumar* (2010) 4 SCC 50 held that the enquiry while examining the validity of affirmative action measures should be governed by the standard of proportionality though ofcourse such affirmative action measures should be periodically reviewed. The establishment as aforesaid of RPVVs is one such affirmative action measure. This Court is also empowered to *suo moto* take notice of the situation which has arisen and to take remedial steps. We are emboldened in our said endeavour by the recent dicta of the Apex Court in *Dev Sharan v. State of Uttar Pradesh* (2011) 4 SCC 769. It was held that the courts, especially the higher courts, cannot afford to act as mere umpires while examining these questions of public importance; the Judges as

Constitutional invigilators and statutory interpreters are also one of the trinity of the nation's appointed instrumentalities in the transformation of the socio-economic order. It was yet further held that the judiciary in its sphere, shares the revolutionary purpose of the Constitutional order, and when called upon to decode social legislation must be animated by a goal-oriented approach. Moreover, the present is not an inter-party dispute and has been raised by way of PIL. The Apex Court in ***Rural Litigation and Entitlement Kendra v. State of U. P.*** 1989 Supp (1) SCC 504 had approved a relook by the Court of the matter not directly before it.

26. We therefore in exercise of our extraordinary jurisdiction:

- (i) strike down the order dated 17.06.2010 (supra) of the NCPCR;
- (ii) hold that RPVVs cannot be compelled to make admissions on random basis in Class VI by transfer of children already studying in Government, Government Aided, Municipal, Cantonment Board schools to RPVVs;
- (iii) hold that the procedure for admission to RPVVs in Class VI as earlier existing is not violative of Section 13 of the RTE Act;
- (iv) direct the GNCTD to restore the admission in Class VI through selection to RPVVs from the next academic year onwards;

- (v) as far as the present academic year is concerned, GNCTD to within 15 days take a decision whether any admissions to the current year can be made by holding of selection process and if possible to hold the same, to avail of the existing infrastructure in RPVVs and to prevent a gap year.

No costs.

RAJIV SAHAI ENDLAW, J

ACTING CHIEF JUSTICE

JULY 13, 2012

‘gsr’