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

Judgment reserved on: 24.02.2026

Judgment delivered on: 22.05.2026

\+ W.P.(C) 7481/2017 & CM APPL. 30818/2017, CM APPL. 29247/2025

DELHI PUBLIC SCHOOL VASANT KUNJ AND ANR ..... Petitioners

Through:

versus

GOVT OF NCT OF DELHI AND ANR ..... Respondents

Through:

With

W.P.(C) Nos. 8071/2017, 8553/2017, 8970/2017, 10804/2017, 8231/2019, 11359/2017, 11445/2017, 14223/2021, 5786/2023, 8077/2018, 9586/2021, 10313/2018, 696/2019, 1144/2019, 1464/2019, 8073/2019, 1488/2019, 2745/2019, 3034/2019, 3041/2019, 3323/2019, 3847/2019, 3848/2019, 3853/2019, 3854/2019, 3855/2019, 3988/2019, 4010/2019, 4168/2019, 4178/2019, 4179/2019, 4576/2019, 4636/2019, 4659/2019, 4966/2019, 5309/2019, 5688/2019, 5820/2019, 5858/2019, 5868/2019, 5870/2019, 5873/2019, 5982/2019, 6358/2019, 5986/2019, 6000/2019, 6020/2019, 6156/2019, 6161/2019, 6225/2019, 6541/2019, 6543/2019, 6670/2019, 6673/2019, 6684/2019, 6707/2019, 7249/2019, 7724/2019, 8462/2019, 8559/2019, 9122/2019, 9444/2019, 9917/2019, 9923/2019, 10129/2019, 10130/2019, 10135/2019, 10136/2019, 11188/2019, 1311/2020, 11221/2019, 11275/2019, 11557/2019, 11595/2019, 11659/2019, 11973/2019, 12397/2019, 89/2020, 1104/2020, 1037/2020, 2013/2020, 5986/2020, 6053/2020, 6112/2020 12266/2021, 8243/2020, 10255/2020, 11570/2021, 13341/2021, 14916/2021, 14936/2021, 15086/2021, 1976/2022, 2095/2022, 2101/2022, 3219/2022, 3220/2022, 4605/2022, 6574/2022, 4606/2022, 6577/2022, 7506/2022, 7515/2022, 11095/2022, 11106/2022, 11110/2022, 11315/2022, 11653/2022, 11997/2022, 12003/2022, 12064/2022, 12232/2022, 12254/2022, 14284/2022, 15118/2022, 396/2023, 399/2023, 430/2023, 15119/2022, 15122/2022,

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15754/2022, 15868/2022, 15872/2022, 16220/2022, 17102/2022, 17421/2022, 17462/2022, 599/2023, 1289/2023, 2202/2023, 2203/2023, 4034/2023, 4061/2023, 4318/2023, 4397/2023, 5211/2023, 5267/2023, 7111/2023, 7121/2023, 7574/2023, 7956/2023, 8246/2023

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HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

ANUP JAIRAM BHAMBHANI, J.

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The present batch of cases illustrates with uncomfortable clarity, how a public authority can persist in a course of action that betrays studied indifference to both the letter of the law and binding precedent.

There are instances, when upon conclusion of a prolonged and full-dressed hearing, the court is left wondering whether there were at all any issues that *truly required adjudication,* and which had not already been decided earlier, in not one but several cases; and whether the entire exercise conducted by the court was merely to re-articulate and reiterate a settled legal position, since one of the parties had obstinately refused to acknowledge and comply with that position. This batch of cases presents one such instance.

2. At the end of an excruciatingly prolonged hearing, it turns-out that the issues canvassed on behalf of the petitioner schools, and vigorously contested by the Directorate of Education ('DoE') and certain parents' associations, have been fully adjudicated and long-settled; but the sheer recalcitrance on the part of the DoE to comply with the settled position has compelled the schools to approach the court, yet again, since the DoE has persisted in its follies, and has, in a sense, simply refused to accept the law laid-down, not just by Co-ordinate Benches and by a Division Bench of this court, but also more than once by Constitution Benches of the Supreme Court.

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3. In the present batch of cases, the DoE has precipitated a huge round of litigation only by reason of its plain refusal to obey the law as comprised in the statute, and as authoritatively interpreted by the constitutional courts.

I. OVERVIEW

4. The seed of the contention raised by the petitioner schools is that their proposals for increasing fee from time to time have been arbitrarily and unlawfully rejected by the DoE, thereby impinging on their right to run private, un-aided, recognised schools with requisite financial autonomy; and that the DoE's actions have resulted in serious deleterious consequences *inter-alia* leading to stagnation of development and growth of their institutions.

5. After understanding the essence of the contestation between the parties, this court had invited the parties to draw-up the points that, according to them, arise for determination in the present batch of cases; and based on the suggested points, *vidé* order dated 13.09.2023, this court had framed the following points for determination:

> "***POINTS FOR DETERMINATION***
>
> ***POINTS OF LAW :***
>
> *1. Whether the orders/circulars/directions issued by the Directorate of Education ('DoE') dealing with fee-hike proposals by private, un-aided schools are in violation of principles of natural justice, in that*
>
> *1.1. these have been issued without affording an opportunity of hearing to the schools;*
>
> *1.2. these have been issued without making available to the schools the recommendations for fee fixation made by chartered accountants appointed by the DoE, which have been relied upon by the DoE;*

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1.3. these have been passed without issuing any show cause notice to the schools in relation to the disallowances that were proposed to be made by the DoE.

2. Whether the orders/circulars/directions are in excess of the statutory powers of the DoE, in that

2.1. these are ultra vires the provisions of the Delhi School Education Act, 1973 and/or the Delhi School Education Rules, 1973;

2.2. these are in contravention of the law laid down by the Supreme Court inter-alia in T.M.A. Pai Foundation & Ors. vs. State of Karnataka & Ors.; P.A. Inamdar & Ors. vs. State of Maharashtra & Ors.; Islamic Academy of Education & Anr. vs. State of Karnataka & Ors.; Modern School vs. UoI& Ors.; and by a Division Bench of this court inter-alia in Delhi Abhivabhavak Maha Sangh & Ors. vs. Govt. of NCT of Delhi & Ors.[1];

2.3. these are beyond the DoE's mandated role which is to prevent profiteering or commercialisation by schools, that is to say that the DoE may reject a fee-hike proposal only after finding that the school is indulging in profiteering and/or commercialisation;

2.4. these are beyond the 'regulatory' functions of the DoE as envisaged in the law.

3. Whether the directions issued and the disallowances made by the DoE in relation to fee fixation are contrary to the provisions of the Income Tax Act, 1961 and other taxation statutes, settled accounting principles and guidance notes/practice directions issued by the Institute of Chartered Accountants of India. More specifically, whether school accounts are to be maintained on the accrual/mercantile system of accounting or the cash system of accounting.

4. Whether the DoE's regulatory powers are different in relation to schools that are not governed by a 'land-clause' or 'prior approval clause' compared to those schools that are governed by such clause.

<u>POINTS ON SCHEME FOR FEE FIXATION</u> :

5. Whether the orders/circulars/directions issued by the DoE do not put in place a 'fair scheme' for fee fixation, in that

[1] Citations appear later in this judgment

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5.1. they do not allow a school to have a 'reasonable surplus', to be applied for future growth, development and expansion of the school, including for construction of school buildings, or for addition or improvement of infrastructural facilities, or for development/establishment of another educational institution run by the same society/trust/body;

5.2. they do not allow a school to hike fee to meet revenue expenditure (e.g., payment of salaries and allowances etc.);

5.3. they direct that savings and income from previous years retained by way of Contingency Reserve Fund, Development Fund, Depreciation Reserve Funds, be applied towards revenue expenditure, instead of being retained for capital expenditure;

5.4. they do not allow a school to hike fee for repayment of loans (and interest thereon) taken for development of the school;

5.5. they do not allow a school to retain funds for meeting statutory liabilities and obligations e.g., for payment of gratuity, leave encashment, retiral benefits etc.; and treat those monies as funds available for meeting revenue expenditure;

5.6. they do not allow a school to charge 'earmarked' levies such as activities fee, smart-card fee, annual fee, admission fee etc., as part of the fee payable by a student;

5.7. they do not allow a school to retain funds for purchase of capital assets e.g., school buses, vehicles etc. for use of students, staff and management of the school;

5.8. they do not allow fee collected to be applied towards payment of salaries/remuneration of full-time Chairman/Director/ Manager/ Consultant/Managing Committee members;

5.9. they do not allow fee collected to be applied towards payment of remuneration to a school's employees at rates higher than Government employees or more than minimum wage;

5.10. they do not allow increase of more than 10% in proposed budgetary expenses above the previous year's expenses;

5.11. they do not approve projected fee for an Academic Session based on the statutorily audited balance sheet of the school;

5.12. they add monies deposited pursuant to court orders, lying under lien with the court, to the funds available with a school for meeting revenue expenditure;

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5.13. they do not allow award of scholarships from school funds, and direct that scholarships awarded be recovered from the society/trust/body running the school;

5.14. they treat un-refunded caution money as part of funds available with the school for meeting revenue expenditure.

6. Whether the DoE is empowered to impose upon a school a decision in relation to fee-hike that is contrary to the decision of the school's Managing Committee, taken by majority, on which committee the DoE has its representatives.

7. Whether the DoE should be required to approve or reject the statement of proposed fee submitted by a school in a time-bound manner; and if so, within what time-line; and failing that, should the proposed fee be deemed to have been approved.

8. Whether the fee-hike permitted by the DoE for a particular Academic Session should be applicable from the first day of that Academic Session; and not from the date of the order permitting the increase. What should be the position in relation to fee-hike proposals filed several years ago, that are still pending with the DoE."

II. SUBMISSIONS ON BEHALF OF THE SCHOOLS

6. The matter has gone through prolonged hearings, during which learned counsel appearing for the various schools have articulated their submissions on the issues involved at great length. The submissions made on behalf of the petitioner schools may be summarised as follows:

6.1. The invariable refrain of all schools represented in the present batch of cases is that they are *private, un-aided, recognised* schools and have a fundamental right under Article 19(1)(g) of the Constitution of India to run their own institutions as part of the right "*to practise any profession, or to carry on any occupation, trade or business*", with significant autonomy, including autonomy relating to their fee structures.

6.2. It has been submitted that under the Delhi School Education Act, 1973 ('DSE Act'), the DoE's regulatory powers in relation to

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fixation of fee are restricted *only* for preventing '*commercialisation*' and '*profiteering*'; and unless there is a finding that a particular school was indulging in such practices, the DoE cannot interfere with a school's fee structure.

6.3. It has further been argued that as per the wording and scheme of Rule 177 of the Delhi School Education Rules, 1973 ('DSE Rules') the income derived by an un-aided, recognised school through the fee collected from students must *first* be applied towards payment of salaries and other allowances to its employees; and the *remaining funds* are to be allocated for pension, gratuity and the school's expansion and development plans; and thereafter, the *savings, if any*, are permitted to be spent for establishing other recognised schools under the umbrella of the same society or trust, as detailed in the various sub-rules of Rule 177.

6.4. It has also been argued that a school is permitted to maintain a *reasonable surplus of upto 15%* for the growth and development of the institution; and retention of a reasonable surplus does not constitute *profiteering* by the school.

6.5. It has also been the submission of the schools that the DoE has made no effort, in any of the cases, to calculate whether the surplus funds held by a school amounted to a *reasonable surplus*, which is permissible in light of various judgments of the Supreme Court; and without doing so, the DoE has proceeded to infer that the schools were indulging in profiteering and commercialisation and has thereby arbitrarily disallowed schools from raising their fee.

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7. In support of the foregoing submissions, the petitioner schools have placed reliance on the following judicial precedents: ***T.M.A. Pai Foundation & Ors. vs. State of Karnataka & Ors.***;[2] ***P.A. Inamdar & Ors. vs. State of Maharashtra & Ors.***; [3] ***Islamic Academy of Education & Anr. vs. State of Karnataka & Ors.***; [4] ***Modern School vs. Union of India & Ors.***;[5] ***Cochin University of Science and Technology & Anr. vs. Thomas P. John***;[6] ***Indian School, Jodhpur & Anr. vs. State of Rajasthan & Ors.***;[7] ***Delhi Abhivabhavak Maha Sangh & Ors. vs. Union of India***[8] ('DAM-I'); ***Delhi Abhivabhavak Maha Sangh & Ors. vs. Govt. of NCT of Delhi & Ors.***[9] ('DAM-II'); ***Action Committee vs. Directorate of Education & Ors.***;[10] ***Ramjas School vs. Directorate of Education***;[11] ***Mahavir Sr. Model School & Anr. vs. Directorate of Education;*** [12] and ***Bluebells School International Kailash vs. Directorate of Education***.[13]

8. Insofar as maintenance of their accounts is concerned, learned counsel for the petitioner schools have argued, that their schools have been set-up and are run either by a 'society' or a 'trust' working for a 'charitable purpose', as per the relevant statutes; and have been granted

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[2] (2002) 8 SCC 481
[3] (2005) 6 SCC 537
[4] (2003) 6 SCC 697
[5] (2004) 5 SCC 583
[6] (2008) 8 SCC 82
[7] (2021) 10 SCC 517
[8] 1998 SCC OnLine Del 809
[9] 2011 SCC OnLine Del 3394
[10] 2019 SCC OnLine Del 7591
[11] 2020 SCC OnLine Del 1776
[12] 2023 SCC OnLine Del 1587
[13] 2024 SCC OnLine Del 1017

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'recognition' in terms of Rule 50 of the DSE Rules; and that none of the schools is being run as a 'for-profit institution'.

9. It has been argued that since under section 2(15) of the Income-tax Act, 1961 ('IT Act') 'charitable purpose' is defined to include 'education', the societies and trusts that run the schools are entitled to certain exemptions under sections 11 and 12 of the IT Act. For this purpose, the *books of accounts* of the society or trust are prepared in-line with what is prescribed in section 12A(1)(b) of the IT Act read with Rule 17AA of the Income-tax Rules, 1962 ('IT Rules').

10. It has been pointed-out furthermore, that schools are required to submit returns to the DoE in terms of Rule 180 of the DSE Rules, and the *books of accounts of a school* are prepared and audited on behalf of the Director of Education in terms of Rule 50(xviii) read with Rule 180 of the DSE Rules. This is done to enable the DoE to monitor the functioning of a school *for purposes of continuing the 'recognition'* of the school under the DSE Act. It has been submitted that this is different from the *books of accounts of the society or trust* (that has set-up the school) which are prepared under the IT Act, with the purpose of assessing the income of the society or trust for taxation. It has been submitted that though there is no conflict between the preparation of accounts under the DSE Act and under the IT Act, the purpose of submission of the *school's* returns to the DoE is different from the purpose of submission of the *society's* or *trust's* returns to the Income Tax Department.

11. In the above backdrop, learned counsel appearing for the petitioner schools have explained that the procedure adopted by the DoE in

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scrutinising the fee-hike proposals submitted by private, un-aided, recognised schools is the following:

11.1. As a practice which is contrary to the law, the DoE compels schools to file their proposals seeking permission for increasing their fee for an ensuing academic session, even though there is no requirement in law for a school to seek *prior approval* for fee increase *at the commencement of an academic session*;

11.2. The DoE then engages a team of chartered accountants, who asks for documents and other relevant information from schools to justify the fee-hike;

11.3. Thereafter the DoE's chartered accountants schedule meetings with the schools for discussions of their fee-hike proposals and prepare a report containing the chartered accountants' recommendations, which report is submitted to the DoE; and

11.4. Invariably, the DoE adopts such report and rejects the fee-hike proposals made by the schools.

12. It has been argued that the foregoing procedure adopted by the DoE is completely illegal, since it is contrary to the provisions of the DSE Act and the DSE Rules, apart from being violative of the principles of natural justice for the following reasons:

12.1. No show-cause notice or other written communication is issued to the schools before an order is passed by the DoE rejecting fee-hike proposals submitted by the schools;

12.2. No hearing is granted *by the Director of Education*, who passes the rejection order, at any stage; it being emphasised that the *discussion* held by the DoE's chartered accountants with a school

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while scrutinising the fee-hike proposal is not a substitute for a hearing by the Director who passes the rejection order; and

12.3. The rejection orders passed by the DoE are one-sided and unreasoned, so much so that typically they do not even record the submissions made by a school during the meetings with the DoE's chartered accountants; and if at all any submissions are partly recorded, they are summarily rejected.

13. In support of their submissions, learned counsel for the petitioner schools have placed reliance on the following judicial precedents: ***Kothari Filaments & Anr. vs. Commissioner of Customs (Port), Kolkata & Ors.***;[14] ***Reliance Industries Limited vs. Securities and Exchange Board of India & Ors.***;[15] ***Automotive Tyre Manufacturers Association vs. Designated Authority & Ors.***; [16] ***Bal Bharati Public School vs. Directorate of Education***;[17] *Ramjas School*; and *Mahavir Sr. Model School*.

14. It has also been pointed-out that though the judgment of the Supreme Court in *Modern School* and connected matters imposes a duty on the DoE to ensure that schools comply with the terms of allotment of land to them by the government, that ruling does not purport to confer on the DoE any additional powers beyond the powers vested in them under the DSE Act. The argument is that the powers of statutory bodies are derived, controlled and restricted by the statute which create them, and by the rules and regulations framed thereunder. In support of this

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[14] (2009) 2 SCC 192 at paras 13-18
[15] 2022 SCC OnLine SC 979 at paras 47 & 51
[16] (2011) 2 SCC 258
[17] 2019 SCC OnLine Del 6940 at paras 31-32 & 35-41

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submission, reliance has been placed by the schools on ***Sukhdev Singh & Ors. vs. Bhagatram Sardar Singh Raghuvanshi & Anr.***[18]

15. More specifically, to illustrate the manner in which the DoE goes about assessing the financials of a school, resulting in rejection of their fee-hike proposals, learned counsel have explained the DoE's view on certain major heads of accounting, arguing that the DoE's perspective is wholly misconceived, baseless, and illegal. In particular, attention has been drawn to the following heads of accounting and the manner in which they are assessed by the DoE.

16. **CONTINGENCY RESERVE FUND**: Counsel have explained that in almost all the impugned orders, the DoE has treated the money retained by a school in its Contingency Reserve Fund as part of the 'funds available' to the school, and has thereby rejected the school's proposal for increasing its fee. It has been submitted that the rationalé for maintaining a Contingency Reserve Fund is to provide a buffer or reserve for unforeseen exigencies that the school may face; and such reserve provides financial stability to a school and ensures that there is no shortfall in the availability of funds if an exigency arises. It has been pointed-out that Rule 177(2)(e) of the DSE Rules mandates that a school must maintain a reasonable reserve fund of not less than 10% of its savings (referred-to by some schools as the Contingency Reserve Fund); however, the DoE ignores this provision and adds the money lying in the contingency reserve fund of a school to the 'funds available' with the school; and thereby rejects the school's fee-hike proposal. The schools

[18] (1975) 1 SCC 421

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have also referred to the reports of Justice Anil Dev Singh Committee, in which the committee has opined that schools must maintain a Contingency Reserve Fund equivalent to four months' salary and allowances of employees for any unforeseen contingencies.

17. It has been submitted that in certain other cases, the DoE has disallowed a school from maintaining a Contingency Reserve Fund, observing that since the fund was not maintained in the *joint names* of the Deputy Director of Education and the Manager of the school, as per Form-II appended to the Delhi Right of Children to Free and Compulsory Education Rules, 2011 ('Delhi RTE Rules'), the fund has not been maintained as per the requirements of the rules. It has been argued that the DoE's objection that the Contingency Reserve Fund must be maintained in the joint names of the Deputy Director of Education and the Manager of a school is misconceived, since Form-II appended to the Delhi RTE Rules is *not applicable* to a school established prior to the enactment of the Right of Children to Free and Compulsory Education Act, 2009 ('RTE Act'). It has been pointed-out, that as per Rule 14, a school established prior to the commencement of the RTE Act is deemed to be recognised under section 18 of the RTE Act; and such a school is only required to make a self-declaration in Form-1(A) appended to the Delhi RTE Rules, which does not contain any condition that the contingency reserve fund must be maintained in the joint names of the Deputy Director of Education and the Manager of the school. It has accordingly been argued that Form-II applies *only* to a school established *after* the commencement of the RTE Act or to an unrecognised school. Furthermore, it has been argued, that as per Rule 173 of the DSE Rules,

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every fund of the school is required to be kept "*in the name of the school*"; and no provision of the DSE Rules envisages that the DoE would have a lien on the funds collected by a private, un-aided, recognised school; which would effectively be the consequence if the Contingency Reserve Fund of a school is held jointly with the Deputy Director of Education.

18. **DEVELOPMENT FUND:** Counsel have submitted that furthermore, the DoE's stand is that if the Development Fund maintained by a school is not utilised, or *if in the DoE's opinion*, the Development Fund is more than what the DoE considers is the school's requirement, the money lying in the Development Fund is also to be treated as 'funds available ' with the school to meet its revenue expenditure like salaries, allowance, etc. Reference in this regard has been made to impugned order dated 30.11.2018 that is subject matter of W.P.(C) No. 1464/2019 concerning N.K. Bagrodia Public School, Ahinsa Marg, Sector-9, Rohini, New Delhi, where the DoE has taken this view.

19. Counsel have explained, that the Development Fund maintained by a school comprises the 'development fee' collected from students, which is an 'earmarked fee' collected for purchase, upgradation and replacement of fixed assets; and the fee so collected *cannot be diverted to* meet revenue expenditure. It has been contended that any such diversion would violate section 18(4)(b) of the DSE Act read with Rules 175 to 177 of the DSE Rules, as well as the verdict of the Supreme Court in *Modern School*.[19] Furthermore, it has been pointed-out, that by the

[19] cf. para 25

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very nature and purpose of the fund, money is to be accumulated in the Development Fund on a long-term basis, to be utilised by a school, as and when required, for major developmental work, which the DoE cannot object to.

20. It has been pointed-out, that an earlier proposal made by the DoE directing schools to divert earmarked/designated/restricted funds, such as Development Fund, towards the general fund for paying increased salaries due to implementation of the 7th Central Pay Commission did not receive the approval of the Hon'ble Lieutenant Governor of Delhi, and was never officially issued by the DoE, which points to the impermissibility of diversion of such funds.

21. **DEPRECIATION RESERVE FUND**: Furthermore, it has been pointed-out that the DoE also counts the money lying in the Depreciation Reserve Fund maintained by a school in the 'funds available' with the school, which is entirely impermissible and illegal. It has been submitted that maintaining a Depreciation Reserve Fund is a mandatory pre-condition for charging development fee; it is a real, actual, capital fund, which includes the depreciation charged by a school for multiple years; and under section 18(4)(b) of the DSE Act read with Rule 176 of the DSE Rules, it is impermissible to divert monies from the Depreciation Reserve Fund to meet any revenue expenditure. It has been argued that though the fund is maintained by schools in *actual* form, that is to say *backed by money in the bank*, the DoE disallows deduction of the money lying in the Depreciation Reserve Fund while calculating the 'funds available', taking the position that the Depreciation Reserve Fund

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represents only a *notional entry* and it is not required to be backed by actual money in the bank.

22. **GRATUITY, LEAVE ENCASHMENT & OTHER RETIREMENT BENEFITS & LIABILITIES**: It has been submitted that gratuity and leave encashment liabilities are statutory obligations, which a school must discharge as and when required, independent of their depiction in financial statements, in actuarial valuation reports, and irrespective of whether the money is kept in bank fixed deposit receipts or in Life Insurance Corporation of India ('LIC') policies. Counsel have pointed-out that even if such funds are not invested with the LIC, the DoE cannot treat these funds as part of the 'funds available' with a school for payment of salaries and allowances. It has been submitted that since schools do not have enough funds available for fulfilling their gratuity and leave encashment liabilities, they must be permitted to revise their fee structure from time-to-time commensurate with the requirements for maintaining such funds.

23. It has been clarified, that under Rule 177(2) of the DSE Rules there is no prescribed sequence or hierarchy amongst expenses and expenditures, and each head of expense/expenditure holds equal importance.

24. It has also been submitted, that all else apart, the orders passed by the DoE on fee-hike proposals are arbitrary and discriminatory, reflecting a 'pick-and-choose' approach, since in some cases the DoE has disallowed schools from maintaining gratuity and leave encashment funds, whereas in others the DoE has allowed a school to maintain gratuity and leave encashment funds without counting those funds towards 'funds available' with the school, but only with a condition that the school must deposit the gratuity and leave encashment funds with the

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LIC or in some other plan-assets. It has been pointed-out that in its reports, Justice Anil Dev Singh Committee had considered this aspect and allowed the entire retirement benefit liability of a school to be deducted from the 'funds available' with a school, without imposing any precondition whatsoever, whether of depositing such money with the LIC or otherwise, thereby acknowledging that the said liability is statutory in nature and a school cannot escape it in any circumstances.

25. The petitioner schools have submitted that the objections raised by the DoE and its chartered accountants are merely an attempt to artificially inflate and show availability of non-existent funds with the schools; and the fact is that salaries and allowances cannot be paid out of monies specifically earmarked for payment towards gratuity, leave encashment, and other retiral benefits and liabilities.

26. **EARMARKED LEVIES:** It has been submitted that section 18 of the DSE Act read with Rules 175 to 177 of the DSE Rules does not impose any restriction or condition on a school collecting 'earmarked levies' from *all* students enrolled in the school; and no provision in the DSE Rules mandates that earmarked levies can only be charged from *some* students. Furthermore, it has been the schools' submission that the provisions of DSE Rules envisage charging of earmarked levies based on the nature, purpose, and object of the levy and the service to be provided in return; and an earmarked levy is not based on the number of students who avail a service. Accordingly, it has been submitted that it is the *purpose* of a levy, and not its *nomenclature*, that determines its character as an earmarked levy. For instance, it has been argued, that 'development fee' is an earmarked levy intended specifically for the purpose of the future

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development of a school, which does not cease to be an earmarked levy merely because it is collected from *all* students. It has been submitted that the purpose or nature of earmarked levies is associated with the running of the school, whether related to its curricular or extra-curricular activities; and the nomenclature of a particular levy cannot be the determining factor for its permissibility.

27. The submission has been, that in several instances, the DoE has included the monies received towards earmarked levies in the 'funds available' with a school; while at the same time, the DoE has sought to prohibit collection of those very earmarked levies by a school.

28. The petitioner schools have submitted that the DoE has faulted the collection of earmarked levies, putting it at par with collecting capitation fee, which is in the teeth of the definition of Capitation Fee under section 2(b) and section 13 of the RTE Act.[20]

29. The petitioner schools have further submitted that section 13 of the RTE Act is completely inapplicable and cannot be a basis to invalidate the charging of earmarked levies, since that provision bars *only* such heads of fee which have not been notified by a school in its fee structure. It has been submitted however, that all earmarked levies charged by a school

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[20] ***2. Definitions.***—*In this Act, unless the context otherwise requires,—*

(b) "capitation fee" means any kind of donation or contribution or payment <u>other than</u> the fee notified by the school;

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.

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are duly included by the schools in their statement of fee filed under section 17(3) of the DSE Act. It has further been pointed-out, that the revenue collected against earmarked levies is duly reflected and accounted-for as 'income' in the financial statements of a school and the expenses incurred therefrom are also duly reflected.

30. Lastly, it has been submitted, that the DoE has deliberately misinterpreted the phrase that schools must be run on a 'no-profit no-loss' basis, despite courts having repeatedly defined and explained that phrase in numerous decisions. It has been pointed-out that the phrase does not mean that schools may not generate a reasonable surplus or profit for the growth and expansion of the institution; and *mere existence of a surplus or profit does not in itself amount to 'profiteering'*.

31. **PAYMENT OF REMUNERATION TO CHAIRMAN ETC.:** In relation to schools paying remuneration for services rendered by a full-time chairman, or by directors, managers, consultants, professionals and managing committee members, learned counsel have submitted, that the DoE disallows any payments being made to persons holding such posts on the ground that since no such posts exist in government schools, such posts in private schools can only be 'honorary' and no payment can be made to persons holding such posts. Moreover, it is the DoE's stand that the only paid posts that can be created in a private school are those which exist in a government school.

32. Counsel have further submitted that on a conjoint reading of section 2(m) of the DSE Act and Rule 59(2)(n) and Rule 91(1) of the DSE Rules, only a 'manager' of an *aided school* is not entitled to any remuneration, honorarium or allowance; but a private, *un-aided* school is entitled to

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pay all its officers and employees, commensurate with their qualifications and merit, including its manager *provided* the manager is not also the head of the school.

33. It has been submitted that the DoE's disallowance of remuneration being paid to persons holding the afore-mentioned posts is illegal, arbitrary, mischievous and wholly without jurisdiction. Counsel have submitted that there is no provision either in the DSE Act or the DSE Rules which prohibits payments to well-qualified individuals employed by an *un-aided* private school. In support of this submission, counsel have drawn attention to report dated 14.06.2019 of Justice Anil Dev Singh Committee in relation to Tagore International School, which report says that there is no bar on payment of salary even to a trustee, if they are properly qualified and are rendering useful service to the school.[21] It has also been pointed-out, that while disallowing the salary paid to individuals holding the aforementioned posts in the impugned orders, the DoE has nowhere said that such persons are not competent, or qualified, or that they have not rendered useful services to the school commensurate with the remuneration paid to them. Furthermore, it has been argued that one possibly cannot compare the need for a private, un-aided school to engage persons to manage the school with that of a

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[21] "*In this case, there is no direct transfer of funds from the school to the parent trust. What has happened is that two of the Trustees have been paid salaries out of the school fund. The Ld. Counsel is right in contending that there is no bar under the law on employment of a member of the Managing Committee (Trustee) in the school. What has to be guarded is that the school funds may not go into the coffers of the persons who are running the trust or the society. If the trustees are properly qualified and are paid remuneration which is commensurate to their qualification and they are rendering useful services to the school, no objection can be taken to payment of salary to them merely for the reason that they happen to be the trustees of the parent trust. However, if it is found that the transfer of funds to the trust is being disguised as salary to the trustees who render no service to the school, such payments would be considered as disguised transfers.*" (page 19 of the report)

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government school, since typically government schools are managed by officers who are already on the rolls of the DoE, whereas private schools have to set-up their own managements.

34. **PAYMENT OF REMUNERATION HIGHER THAN GOVERNMENT SCHOOLS:** Learned counsel for the petitioner schools have also raised the grievance, that relying upon Rule 107 of the DSE Rules, the DoE objects if a private, un-aided, recognised school pays remuneration to its employees at a rate *higher* than what government schools are paying.

35. In this behalf, attention has been drawn to section 10(1) of the DSE Act, which reads as follows :

> ***10. Salaries of employees.***—*(1) The scales of pay and allowances, medical facilities, pension, gratuity, provident fund and other prescribed benefits of the employees of a* ***recognised private school shall not be less*** *than those of the employees of the corresponding status in schools run by the appropriate authority:*
>
> *Provided that where the scales of pay and allowances, medical facilities, pension, gratuity, provident fund and other prescribed benefits of the employees of any recognised private school are less than those of the employees of the corresponding status in the schools run by the appropriate authority, the appropriate authority shall direct, in writing, the managing committee of such school to bring the same up to the level of those of the employees of the corresponding status in schools run by the appropriate authority:*
>
> *Provided further that the failure to comply with such direction shall be deemed to be non-compliance with the conditions for continuing recognition of an existing school and the provisions of Section 4 shall apply accordingly.*

(emphasis supplied)

36. Attention has also been drawn to Rule 107 of the DSE Rules, which is also relevant for this issue, and reads as follows:

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> ***107. Fixation of pay.–***
>
> *(1) The **initial** pay of an employee, on first appointment, shall be fixed ordinarily at the minimum of the scale of pay:*
>
> ***Provided that a higher initial pay, in the specified scale of pay, may be given to a person by the appointing authority**:*
>
> *Provided further that no higher initial pay shall be granted in the case of an **aided school** except with the previous approval of the Director.*
>
> *(2) The pay of an employee on promotion to a higher grade or post shall be determined by the same rules as are applicable to the employee of Government school.*

(emphasis supplied)

37. Counsel have submitted, that on a plain reading of section 10(1) of the DSE Act, it is clear that an employee of a recognised, private school cannot be paid salary that is *less* than what an employee of a corresponding status receives in a government school; but there is no bar if a recognised, private school pays its employees *more* than what is being paid in a government school. Furthermore, it has been argued that Rule 107 of the DSE Rule cannot be read so as to supersede section 10; and all that Rule 107 says is that the *initial pay* of an employee must *ordinarily* be fixed at the *minimum* scale of pay.

38. Relying on the observations of the Supreme Court in *T.M.A Pai,*[22] counsel have argued that private schools are to be granted *maximum autonomy* in the administration and management of their day-to-day affairs, without any interference by the DoE. If private schools are prohibited from paying their teachers and staff salaries higher than those received by similarly placed employees in a government school, that

[22] cf. paras 56 & 61

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may disincentivise excellence and reduce private schools to a level of mediocrity and stagnation.

39. **INORDINATE DELAY IN DOE PASSING ORDERS ON FEE-HIKE PROPOSALS:** Another grievance raised by the petitioner schools is that in several cases the DoE passes orders, whether rejecting or accepting fee-hike proposals, after inordinate delay of the schools having submitted their statement of fee, which causes serious prejudice to the functioning of the institutions.

40. Relying on the decision of the Supreme Court in *Action Committee*, the petitioner schools have contended that schools cannot be expected to wait *ad-infinitum* before the statement of fee submitted by them is examined by the DoE, especially when there is *no legal obligation* upon them to obtain *prior approval* from the DoE for increasing their fee at the commencement of an academic session. It has been argued that the inordinate delay on the DoE's part to either accept or reject a fee-hike proposal, in itself creates huge complications in the financial management of the school, since it is nearly impossible for a school to either levy or collect increased fee retrospectively.

41. **TREATMENT OF 'LAND-CLAUSE' SCHOOLS:** Coming next to the case of private, un-aided, recognised that have a 'land-clause' in the allotment letters by which they were allotted land, the petitioner schools have explained, that a 'land-clause' is merely a contractual condition inserted by the land-owning/land-administering agency while allotting land to a school; and is therefore, at best, a *contractual* requirement imposed by a third party saying that the school must take *prior approval* of the DoE before increasing its fee. It has been argued however, that such

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requirement is not a *statutory* mandate imposed upon the school. It has been submitted that the 'land-clause 'must be read in harmony with the statutory scheme of section 17(3) of the DSE Act and the mandate of Article 19(l)(g) of the Constitution. It has been pointed-out, that in fact, the typical 'land-clause' itself stipulates compliance with the DSE Act and the DSE Rules.

42. In this context, attention has also been drawn to the decision of the Division Bench of this court in *DAM-II*[23] and of a Co-ordinate Bench in *Action Committee*, where it has been held that section 17(3) of the DSE Act strikes a balance between the right of a private, un-aided, recognised school to collect fee and the statutory duty of the DoE to regulate the same. It has been held, that while a school does have the right to fix a reasonable fee structure and increase its fee, it can do so *without prior approval* of the DoE *only* if the school files its full statement of fees with the DoE before the commencement of an academic session. However, the school must take *prior approval* from the DoE if it proposes to increase its fee, *during an ongoing* academic session, beyond what is declared in the statement of fees filed with the DoE. It has been observed that the filing of the statement of fees by a school enables the DoE to regulate the fees; and it is this 'balance' that renders the restriction contained in section 17(3) on un-aided schools reasonable and constitutionally valid under Article 19(l)(g). Thus, it has been argued that a school as well as the DoE must comply with the 'land-clause' within

[23] cf. paras 61-65

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the framework and discipline of the 'balancing' provision of section 17(3) and not *de-hors* that provision.

43. **RECOVERY OF ARREARS OF FEE FOR COVID-19 PERIOD:** Specifically in relation to the period of the COVID-19 pandemic, the petitioner schools have contested the DoE's claim that recovering arrears of fee for that period would be improper, submitting that this stand taken by the DoE is baseless, and curtails a school's right to receive fee for education imparted, during the COVID-19 period, especially since *simultaneously* the DoE also insists that a school must pay full arrears of salary to its teachers for that period; and that a school must also implement the pay commission recommendations for increased salaries; and manage inflation, all of which is impossible without timely increase of fee.

44. **CONTROLLING SCHOOLS THROUGH CIRCULARS & COMMITTEE REPORTS:** On a broader argument, the schools have submitted that their functioning must be governed by the provisions of DSE Act and DSE Rules, and the law as laid down by the courts, and *not* by circulars or committee reports issued from time-to-time by the DoE, which are inconsistent with such statutory provisions and judicial pronouncements. It has further been submitted that the DoE cannot interfere with the schools' fundamental right to maximum autonomy in managing and administering their day-to-day affairs.

III. SUBMISSIONS ON BEHALF OF THE DOE & PARENTS' ASSOCIATIONS

45. On the other hand, the DoE has vigorously challenged the contentions raised by the petitioner schools. Learned counsel who have appeared on behalf of the parents' association have adopted and supplemented the

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submissions made by the DoE. For sake of brevity and convenience, the submissions made on behalf of the parents' association have been subsumed in the DoE's submissions. The summary of the submissions made by the learned ASG on behalf of the DoE is the following:

45.1. The DoE has argued that as per the extant position of law, schools are required to seek prior permission of the DoE before increasing their fee at any point in time. Furthermore, it has been submitted that in its judgment dated 19.01.2016 passed in ***Justice for All vs. Govt. of NCT of Delhi & Ors.***[24] a Division Bench of this court had directed the DoE to ensure strict compliance with the terms of allotment signed by private, un-aided, recognised schools under which land was allotted to them by the Delhi Development Authority ('DDA') or other land-owning/land-administering agencies. The DoE has submitted that the court has also emphasized the need for regulatory oversight by the DoE in matters relating to fee-hike, pointing-out that this issue is intrinsically linked to the public-interest obligation of schools arising from concessional allotment of land to them.

45.2. It has been submitted that in compliance of the aforesaid judgment, *vidé* order dated 16.04.2016, the DoE had issued directions to all private, un-aided, recognised schools situate on government land with a condition in their allotment letters to seek prior approval of the DoE before increasing their fee, to mandatorily submit their proposals for any intended fee-hike for

[24] 2016 SCC OnLine Del 355

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the academic session 2016-2017, through online module latest by 31.05.2016. Thereafter, *vidé* order dated 03.06.2016, the DoE constituted a panel of chartered accountants for a period of 01 year, to scrutinize the financial records and conduct inspections of private, un-aided, recognised schools, particularly those which were allotted land by the DDA, to verify the justifiability and transparency of the proposals submitted for fee enhancement. Subsequently, *vidé* order dated 20.07.2016, the DoE reaffirmed and operationalized the authority of the empaneled chartered accountants to carry-out special inspections of private, un-aided, recognised schools on the terms enclosed with order dated 20.07.2016.

45.3. Also, *vidé* order dated 22.07.2016, the DoE directed special inspections of 82 private, un-aided, recognised schools, which had submitted proposals for fee increase for the academic session 2016-2017, with a further categorical direction that inspections shall be conducted by qualified, independent chartered accountancy firms duly empaneled by the DoE, to ensure expertise, objectivity and neutrality during the scrutiny process.

45.4. It has also been submitted that a decision was taken by the DoE that the inspection reports submitted by the chartered accountants would be subject to review by the Project Management Unit ('PMU') set-up by the DoE; thereby putting in place a layered review mechanism, as part of a robust regulatory framework to prevent any unjustified or arbitrary fee-hike by private, un-aided, recognised schools. *Vidé* letter dated 31.08.2016, the DoE

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conveyed its intention to operationalize the PMU through M/s. Ernst & Young LLP ('E&Y LLP'); and on 31.08.2016 E&Y LLP accepted the work-order and confirmed its engagement to provide skilled manpower to the DoE on a hired basis for the said purpose.

45.5. It has been submitted by the DoE that the PMU mechanism was set-up by the DoE to ensure financial transparency and for safeguarding the interests of students and parents. By that mechanism the recommendations of the chartered accountancy firms' as well as the school's financial submissions (including their audited financial statements and proposed budget for 2016-2017) were subject to a second-level expert scrutiny by the PMU comprising financial experts from E&Y LLP.

45.6. It has been argued that upon detailed examination and financial review of the Inspection-cum-Audit Reports, the PMU rejected the fee-hike proposals of several petitioner schools; and recommended that no increase in fees should be allowed for the session 2016-2017, since the total funds available with those schools for Financial Year 2016-2017 were sufficient for their purposes, even after accounting for all projected expenses.

45.7. The DoE has submitted, that additionally, *vidé* order 04.10.2016 the DoE also constituted a committee comprising senior officers of the DoE and experienced accounts personnel from their department, to provide for a third-level scrutiny, which committee conducted a comprehensive assessment of the schools' financial documents and records. Upon meticulous evaluation, this committee *prima-facie* found financial irregularities and

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deficiencies in the records of the petitioner schools, and also observed that the schools possessed sufficient surplus funds to meet their operational expenses for the academic session 2016-2017 without necessitating any hike in tuition fee.

45.8. Accordingly, the proposals submitted by the schools for enhancement of fee for the academic session 2016-2017 were formally rejected by the Director (Education) after considering the inspection-cum-audit reports submitted by the chartered accountancy firms, the PMU review reports, and the findings given by the internal committee constituted *vidé* order dated 04.10.2016.

45.9. Lastly it has been submitted by the DoE that the impugned orders clearly show that principles of natural justice have been followed; and ample opportunity of hearing was provided by the DoE to the schools.

46. The specific response of the DoE to the individual points for determination framed by this court is summarised in the following paras.

46.1. **Response to Point for Determination Nos. 1 and 2:** The DoE has argued, that as per section 17(3) of the DSE Act read in conjunction with Rule 180(3) and 190 of the DSE Rules, the DoE has the authority to regulate fees and charges levied by private, un-aided, recognised schools. Furthermore, it has been submitted that this authority of the DoE has been reinforced by mandate provided by the Supreme Court in *Modern School* in order to prevent commercialisation of education.

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46.2. It has been submitted by the DoE that the team of chartered accountants appointed by them plays a crucial role in evaluating the financial aspects of the proposals for fee-hike submitted by private, un-aided, recognised schools in terms of sections 18(3) and 18(4) of the DSE Act read with Rules 172, 173, 174, 175, 176, 177, and 178 of the DSE Rules. The chartered accountants assess the fee-hike proposals based on the principles of charging fee under various heads as per earmarked levies as settled by Justice Santosh Duggal Committee appointed by a Co-ordinate Bench of this court, and by various notifications, circulars, and orders issued by the DoE, and in light of the Generally Accepted Accounting Principles (GAAP) as directed by the Supreme Court in *Modern School*.

46.3. It has been submitted by the DoE, that as part of the process set-up by them, all private, un-aided, recognised schools are provided an opportunity to present their justifications and clarifications regarding their fee-hike proposals before the DoE officers and the PMU team. The communication issued by the Deputy Director (Education) to the private, un-aided, recognised schools serves as a notice to attend the hearing; and schools are obligated to demonstrate the necessity for a fee-hike, complying with all statutory and judicially laid-down requirements.

46.4. It has been argued by the DoE that in the event an order is made rejecting a fee-hike proposal, a school is provided a one-month window to rectify the defects and deficiencies outlined in the order and to ensure compliance with the directives contained therein;

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and that therefore, there is a layered review mechanism in place, as part of a robust regulatory framework to prevent any unjustified or arbitrary fee-hike by private, un-aided, recognised schools.

46.5. It has been submitted by the DoE, that the law as clarified in *Modern School* balances institutional autonomy with financial discipline, by permitting reasonable surplus, while prohibiting profiteering, by incorporating accepted accounting principles to distinguish revenue expenses and capital expenditure; and mandating prudent financial management. The DoE has also argued that in the case of 'land-clause' schools, as per lease conditions the development and expansion costs must be borne by the society; thus, any fee-derived surplus cannot be diverted for such purposes and must only be applied towards legitimate educational needs.

46.6. **Response to Point for Determination No. 3:** It has been submitted by the DoE that there are no criteria laid-down in the IT Act, or in any other taxation statute, for determination of school fee. Therefore, fee fixation by a school is to be carried-out on the basis of Justice Santosh Duggal Committee Report, which was duly accepted by the Supreme Court in *Modern School*, whereby the Supreme Court held that the accounts of private, un-aided, recognised schools should be prepared and maintained on the principles contained in GAAP; and *vidé* its order dated 10.02.2005, the DoE has directed schools to follow the same. It has further been submitted, that on 16.04.2016, the DoE had also directed private, un-aided, recognised schools to follow

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'Guidance Note dated 21.07.2005 on Accounting by Schools' [GN(A) 21 (Issued 2005)] issued by the Institute of Chartered Accountants of India ('ICAI Guidance Note') for preparation and maintenance of their accounts, which note mandates that the accounts of private, un-aided, recognised schools should be maintained on 'accrual' basis.

46.7. **Response to Point for Determination No. 4:** It has been argued by the DoE, that as per the provisions of the DSE Act and DSE Rules, the regulatory powers of the DoE may vary depending on whether or not a private, un-aided, recognised school is governed by a 'land-clause' also known as 'prior approval clause'. According to the DoE, since private, un-aided, recognised schools governed by a 'land- clause' are established on land allotted by a governmental authority, they are subject to stricter regulatory oversight, since land is allotted to these schools often at concessional rates or with certain conditions attached to such allotment, such as reserving a percentage of sets for economically weaker section of students. It has been submitted, that the DoE has the power to monitor these schools more rigorously, to ensure that they comply with the conditions of land allotment, seat reservation, and other statutory obligations. Insofar as private, un-aided, recognised schools *not* governed by a 'land-clause' are concerned, since such schools are not established on land allotted under specific governmental conditions, these schools may have more autonomy in certain respects; and the regulatory powers of the DoE over these schools may still exist but in less stringent

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form in comparison to schools governed by a 'land-clause'. It has been argued on behalf of the DoE that they still have powers to ensure that even private, un-aided, recognised schools not governed by a 'land-clause' comply with statutory obligations under the DSE Act and DSE Rules.

46.8. **Response to Point of Determination No. 5 (including points 5.1 to 5.14):** It has been argued on behalf of the DoE, that the DoE ensures a fair and transparent fee fixation process by scrutinizing fee statements and audited accounts based on uniform accounting principles. While schools are permitted a reasonable surplus for educational development, the DoE is empowered to prevent profiteering and commercialisation. It has been argued by the DoE, that insofar as expenditure towards expansion, infrastructure, or building new institutions is concerned, as held by the Supreme Court in *Modern School*, that cost must be borne by the society and such cost cannot be factored into the 'reasonable surplus' held by a school.

46.9. It has been submitted by the DoE that the Supreme Court ruling in *Islamic Academy* underscores the autonomy of private educational institutions in determining their fee structure; but in that case, the Supreme Court also highlights that 'surplus' must be used solely for the benefit and improvement of the educational institution, and it is imperative to avoid profiteering and charging capitation fee.

46.10. It has been submitted that in *T.M.A. Pai Foundation* the Supreme Court has reaffirmed the principle that there should be no charging

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of capitation fee or profiteering. However, it has been clarified by the DoE that a 'reasonable surplus', intended to cover the cost of expansion and facility enhancement does not tantamount to profiteering.

46.11. It has been further submitted by the DoE that charging of 'earmarked levies' must comply with Justice Santosh Duggal Committee framework *i.e.*, these must be user-based, purpose-specific, and non-profiteering.

46.12. It has been further submitted, that Depreciation Reserve Fund is a 'notice account' and there is no requirement to maintain any 'fixed deposit account' for that purpose. In view of the same, the DoE has said that both revenue expenses and capital expenditures are allowed from that account, on case-to-case basis.

46.13. The DoE has also argued, that private, un-aided, recognised schools have failed to adhere to the principles governing earmarked levies as laid down by Justice Santosh Duggal Committee; and that earmarked levies must be collected only from students availing a specific service. It has been submitted, that earmarked levies are charges collected by educational institutions for specific purposes and are expected to be utilized exclusively for the purpose for which they are collected. It is the DoE's contention that charging fees outside of prescribed heads, or generating surplus therefrom, amounts to profiteering and commercialisation of education, and to indirect charging of capitation fee.

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46.14. It has been submitted that as per *Modern School* and DoE's order dated 15.12.1999, development and expansion costs of a school must be borne by the society; and school funds cannot be diverted to repay society loans, nor can such liability be shifted to students. Thus, fee-hike for loan repayment is impermissible.

46.15. The DoE submits, that it is a well-established legal principle that statutory obligations take precedence over other financial commitments. Therefore, it is the widely recognised understanding, that funds designated for statutory liabilities should not be considered part of the funds available for other purposes, including for staff salaries and allowances. As per the provisions of the DSE Rules, school funds allocated for statutorily mandated gratuity and leave encashment liabilities should *not be excluded* by the schools from funds available for any reason.

46.16. It has been argued by the DoE that the Supreme Court judgment in *Modern School* emphasises that schools should not charge separate fees for services that are part of their core educational responsibilities. The DoE has contended that though the acquisition and maintenance of school buses and vehicles may be necessary for education, they should not be used as a means to generate unreasonable surplus beyond what is necessary for providing transportation services.

46.17. It has been submitted that the DSE Act and the DSE Rules provide a clear definition of the Manager's role in private, un-aided, recognised schools. The DoE's contention is that the Manager is *not* considered an employee of the school; and is primarily

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responsible for managing the affairs of the school on behalf of the Managing Committee. Therefore, the DSE Act and the DSE Rules *do not permit* payment of any salary to the Manager; hence the Chairman/Director/Manager/Consultant/ Managing Committee members of a private, un-aided, recognised school cannot be considered as employees of the school and cannot be paid salary/remuneration from the school fund.

46.18. It has been submitted on behalf of the DoE, that the recruitment to vacant posts in private, un-aided, recognised schools are to be made in accordance with the recruitment rules notified by the Administrator of the Government of NCT of Delhi, and in the recruitment rules the scale of pay and the grade pay *cannot exceed* the scale of pay and allowances paid to their counterparts in government schools, as per section 10(1) of the DSE Act. Therefore, according to the DoE, fee collected towards payment of remuneration to employees of a school at rates *higher* than government employees or more than minimum wage *cannot be* permitted.

46.19. It has been argued, that there is no concept of 10% increase of development fee every year if there is no need. It has been contended that since imparting education is a charitable activity, a school cannot be run for profit-making; hence, there cannot be a mandatory 10% increase in development fee every year. That being said, the DoE has submitted that there are cases in which they have allowed increase of more than 10% in proposed budgetary expenses above the previous year's expenses.

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46.20. It has been argued, that every fee-hike proposal submitted by a private, un-aided, recognised school under section 17(3) of the DSE Act along with audited balance sheet has to undergo scrutiny, examination, and evaluation to determine whether the fee proposed by the school qualifies for enhancement in light of the provisions of the DSE Act and the DSE Rules.

46.21. It has been submitted, that in *usual circumstances*, the DoE does not add monies lying under lien pursuant to court orders to the funds available with a school for meeting revenue expenses.

46.22. It has also been submitted on behalf of the DoE, that as per the provisions of the DSE Act and the DSE Rules, and the guidance provided by Supreme Court in *Modern School*, scholarships paid to students in accordance with Rule 177 of the DSE Rules are considered legitimate use of the school funds for educational purposes; and there is no requirement for the scholarship payments to be recovered from the society that has established the school. However, it has been clarified by the DoE that where there is non-compliance with the provisions of the DSE Act and the DSE Rules, the DoE enforces corrective measures, including by issuing orders for recovery from the society of the school funds used to pay scholarships, as per the Supreme Court's mandate.

46.23. The DoE has submitted that as per the provisions of Clause 18 of Order No. F.DE/15(56)Act/2009/778 dated 11.02.2009, un-refunded caution money is to be considered as part of the funds available only to the extent of the non-refunded portion of caution money as of the relevant financial year.

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46.24. **Response to Point for Determination No. 6:** It has been argued on behalf of the DoE, that the mere presence of a nominee of the Director of Education on a school's Managing Committee does not take away the authority of the DoE under section 17(3) of the DSE Act for taking a decision with respect to a fee-hike proposal. It has been further argued by the DoE, that the nominee of the Director of Education is not an expert in accountancy; and the financial affairs of a private, un-aided, recognised school need to be scrutinized as per settled principles of accounting and in accordance with section 17(3) of the DSE Act and Rule 177 of the DSE Rules.

46.25. **Response to Point for Determination No. 7:** The DoE has submitted that the scrutiny of fee-hike proposals along with audited financial statements under section 17(3) of the DSE Act is a structured and time-intensive process. Upon submission of a fee-hike proposal, the DoE undertakes a detailed verification of the documents through its PMU, followed by multiple rounds of meetings, clarifications and a personal hearing being granted to the school management, thereby ensuring a comprehensive evaluation of the proposal in accordance with prescribed legal and accounting principles.

46.26. It has been submitted, that the DoE takes a final decision to approve or reject a proposed fee-hike based on the PMU's assessment, requiring a minimum period of about 06 months.

46.27. **Response to Point for Determination No. 8:** The DoE has argued that the decision to permit fee-hike for a specific academic

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session from a particular month of the year is justified. For instance, the DoE's order dated 29.06.2022 allowing the proposal for fee increase for one of the petitioner schools for the academic session 2019-2020 was made effective from 01.07.2022, rather than from 01.04.2019, since there was delay in issuing the order due to the Covid-19 pandemic, which resulted in the closure of schools and of the offices of the DoE during the academic sessions 2020-2021 and 2021-2022. It has been submitted, that the decision regarding fee enhancement for the academic session 2019-2020 could be finalized only in June 2020, after following the principles of natural justice and affording the school an opportunity to be heard.

47. Lastly, it has been submitted by the DoE that the regulatory framework adopted by the DoE is fully consistent with the provisions of the DSE Act and DSE Rules; and the law laid-down by the Supreme Court and by this court. It is the DoE's contention that the impugned orders neither violate the principles of natural justice, nor transgress the statutory limits of the DoE's powers; and in fact the orders ensure transparency, accountability and prevention of commercialisation of education. Accordingly, it is the DoE's contention that the challenges raised by the petitioners are devoid of merit and are liable to be rejected.

IV. RE-HEARING AS A CONSEQUENCE OF PROMULGATION OF THE DELHI SCHOOL EDUCATION (TRANSPARENCY IN FIXATION AND REGULATION OF FEES) ACT, 2025

48. After all parties had been heard in the batch of matters, and while the matter was reserved for judgment, the Legislative Assembly of the

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National Capital Territory of Delhi enacted and notified the Delhi School Education (Transparency in Fixation and Regulation of Fees) Act 2025, purporting to put in place a comprehensive regime on the subject.

49. By reason thereof, the matters were re-listed for hearing confined only to the new law that had been promulgated. In the course of that hearing however, in essence and substance, learned counsel appearing for *all parties* submitted that the enactment of the new law would have no bearing on the challenge to the various impugned orders that was pending in the present batch of matters, since the new law, as framed, was to apply prospectively whereas the DoE orders under challenge related to the Academic Years 2016-17 to 2022–23.

50. Furthermore, this court was informed, that the new law was challenged before the Supreme Court in SLP (C) No. 2602/2026; and, as recorded in orders dated 02.02.2026 and 04.02.2026 passed in those proceedings, the DoE has represented to the Supreme Court that the " …… new law will *not* be implemented at this stage for the Academic Year 2025–2026 …… ".

V. ANALYSIS, DISCUSSION & CONCLUSIONS

51. After hearing learned counsel for the parties at *inordinate* length, this court is of the view that almost all the contentions raised by the contesting parties have already been substantially, if not completely, answered by the Supreme Court and by various benches of this court in their several judgments, as discussed below.

52. The law is abundantly clear. The judgments on the issue *are consistent*, except for one *apparently* discordant note by a Division Bench in its judgment in *Justice for All*, which discordance also, in the opinion of this

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court, arises from a mis-interpretation by the DoE of what the Division Bench has actually said, as is clarified below. Yet, when tested on the touchstone of the clearly enunciated law, the actions of the DoE that are under challenge in the present batch of petitions, *are clearly flawed*; and hopefully, a result only of *bona-fidé* misunderstanding of the law and of *all the court rulings*.

53. As a sequitur to the above, and notwithstanding that several judicial pronouncements have already addressed the issues raised by the parties, this court deems it appropriate to *further elucidate* certain aspects of the matter. The intent of this exercise is to provide a degree of specificity, so as to facilitate the DoE in implementing the law in accordance with the existing judicial precedents. The endeavour of this court is to resolve any *residual ambiguities* that may have arisen in the course of applying the relevant statutory provisions.

54. With the above preface, this court would proceed to address the points for determination set-out in order dated 13.09.2023. It is however not considered advisable to delve into every submission made by every individual party, but to decide issues that are germane to all schools in relation to their common grievances.

55. The first and most significant submission made on behalf of all the petitioner schools, is that they are entitled to function freely as private, un-aided, recognised schools in exercise of their fundamental right guaranteed under Article 19(1)(g) of the Constitution, namely the right "to practice any profession, or to carry on any occupation, trade or business"; and that they are entitled to run their educational institutions

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with significant autonomy, in particular with the freedom to fix their own fee structures.

56. The schools have contended that the DoE's regulatory powers under the DSE Act are restricted *only* to preventing '*profiteering* 'and '*commercialisation* 'by schools; and absent any evidence of those malpractices, the DoE cannot interfere with a school's fee structure or fee increase.

57. The schools have further contended that Rule 177 of the DSE Rules lays-out in detail the manner in which the fee realized by a private, un-aided, recognised school is to be utilized. It has been argued that as per the scheme of Rule 177, the income generated by a school from fee collected from students must *first* be applied towards payment of salaries and other allowances to employees; and *then* the remaining funds must be allocated for payment of pension, gratuity and towards the school's expansion and development plans, as well as for establishing other recognised schools, as detailed in the various provisions of Rule 177.

58. It has been argued, that in *Islamic Academy* it has been held that a school is permitted to have a *reasonable surplus which may ordinarily vary from 6% to 15%* [25] for the growth and development of the institution; and that retention of a reasonable surplus does not constitute profiteering by a school. It is the submission of the schools that before rejecting their fee-hike proposals the DoE has made no effort, in any of the cases, to calculate the reasonable surplus which the schools are entitled to hold; and without doing so, the DoE has proceeded to infer that schools are

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indulging in profiteering and commercialisation, which is a factually incorrect and baseless conclusion. It has been argued, that if the DoE had conducted the exercise of objectively and rationally examining whether a school was holding only a reasonable surplus, it would have found that no part of the school fee collected has been accumulated in any manner that is not permissible in law; and that the reasonable surplus held by the schools has been applied only for permissible purposes.

59. It has been argued on behalf of the schools, that the DoE has been calculating the 'funds available' with a school in a manner which is violative of settled accounting principles and practices, in addition to being in breach of the ICAI Guidance Note; apart from also being otherwise incorrect and unlawful.

60. To evaluate the arguments made on behalf of the petitioner schools, it is necessary to first notice the provisions of section 17 of the DSE Act, which deals with the fee and other charges that a school may demand and collect from students, and which reads as follows:

> ***17. Fees and other charges.***—*(1) No aided school shall levy any fee or collect any other charge or receive any other payment except those specified by the Director.*
>
> *(2) Every **aided school** having different rates of fees or other charges or different funds **shall obtain prior approval** of the prescribed authority before levying such fees or collecting such charges or creating such funds.*
>
> *(3) The manager of every recognised school shall, **before the commencement of each academic session**, **file** with the Director **a full statement of the fees to be levied by such school during the ensuing academic session**, and **except with the prior approval** of the Director, no such school shall charge, **during that academic session**, any fee **in excess of the fee specified by its manager in the said statement**.*

(emphasis supplied)

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61. Also relevant for purposes of the present discussion is section 18 of the DSE Act, which establishes and defines the 'School Fund' and the 'Recognised Unaided School Fund', specifying the types of monies that may be credited to these funds. Section 18 reads as under:

> ***18. School Fund.—****(1) In every aided school, there shall be a fund, to be called the "School Fund", and there shall be credited thereto—*
>
> *(a) any aid granted by the Administrator,*
>
> *(b) income accruing to the school by way of fees, charges or other payments, and*
>
> *(c) any other contributions, endowments and the like.*
>
> *(2) The School Fund and all other funds, including the Pupils' Fund, established with the approval of the Administrator, shall be accounted for and operated in accordance with the rules made under this Act.*
>
> *(3) In every* ***recognised unaided school****, there shall be a fund, to be called the "****Recognised Unaided School Fund****", and* ***there shall be credited thereto income accruing to the school by way of****—*
>
> *(a) fees,*
>
> *(b) any charges and payments which may be realised by the school for other specific purposes, and*
>
> *(c) any other contributions, endowments, gifts and the like,*
>
> *(4) (a)* ***Income derived by unaided schools by way of fees shall be utilised only for such educational purposes as may be prescribed****; and*
>
> *(b) charges and payments realised and all other contributions, endowments and gifts received by the school shall be utilised only for the specific purpose for which they were realised or received.*
>
> *(5)* ***The managing committee of every recognised private school shall file every year with the Director such duly audited financial and other returns as may be prescribed, and every such return shall be audited by such authority as may be prescribed****.*

(emphasis supplied)

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62. Furthermore, it is also necessary to notice certain Rules contained in Chapter XIV (titled 'School Fund') of the DSE Rules, which relate to the collection, maintenance, withdrawal and utilization of the monies collected by a school, including maintenance of accounts. The relevant rules read as follows:

> ***173. School fund how to be maintained—*** *(1) Every School Fund shall be kept deposited in a nationalised bank or a scheduled bank or any post office* ***in the name of the school****.*
>
> *(2) Such part of the School Fund as may be approved by the Administrator, or any officer authorised by him in this behalf, may be kept in the form the Government securities.*
>
> *(3) The Administrator may allow such part of the School Fund as he may specify in the case of each school, (depending upon the size and needs of the school) to be kept as cash in hand.*
>
> *(4) Every Recognised Unaided School Fund shall be kept deposited in a nationalised bank or a scheduled bank or in a post office* ***in the name of the school****, and such part of the said Fund as may be specified by the Administrator or any officer authorised by him in this behalf shall be kept in the form of Government securities and as cash in hand respectively:*
>
> *Provided that in the case of an unaided minority school, the proportion of such Fund which may be kept in the form of Government securities or as cash in hand shall be determined by the managing committee of such school.*
>
> ***174. Withdrawal from School Fund—****Withdrawals from the School Fund or Recognised Unaided School Fund, as the case may be, shall be made jointly by the head of school and the manager of such school, or jointly by the head of the school and by any duly authorised member of the managing committee, where the head of the school is also the manager of the school.*
>
> *****
>
> ***176. Collections for specific purposes to be spent for that purpose—Income derived from collections for specific purposes shall be spent only for such purpose.***

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177. Fees realised by unaided recognised schools how to be utilized— *(1) Income derived by an unaided recognised schools by way of* ***fees*** *shall be utilised in the* ***first instance****, for meeting the* ***pay, allowances and other benefits admissible to the employees of the school****:*

Provided that ***savings****, if any* ***from the fees****collected by such school* ***may be utilised*** *by its managing committee* ***for meeting capital or contingent expenditure*** *of the school, or for one or more of the following educational purposes, namely:—*

(a) award of scholarships to students;

(b) establishment of any other recognised school, or

(c) assisting any other school or educational institution, not being a college, under the management of the same society or trust by which the first mentioned school is run.

(2) The ***savings*** *referred to in sub-rule (1)* ***shall be arrived at after providing for the following****, namely :—*

(a) ***pension, gratuity and other specified retirement and other benefits admissible to the employees*** *of the school;*

(b) the ***needed expansion of the school or any expenditure of a developmental nature****;*

(c) the ***expansion of the school building or for the expansion or construction of any building*** *or establishment of hostel or expansion of hostel accommodation;*

(d) co-curricular activities of the students;

(e) ***reasonable reserve fund, not being less than ten per cent, of such savings****.*

(3) ***Funds collected for specific purposes, like sports, co-curricular activities, subscriptions for excursions or subscriptions for magazines, and annual charges, by whatever name called, shall be spent solely for the exclusive benefit of the students*** *of the concerned school and* ***shall not be included in the savings*** *referred to in sub-rule (2).*

(4) The collections referred to in sub-rule (3) shall be administered in the same manner as the monies standing to the credit of the Pupils Fund as administered.

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> ***179. Aided schools to keep accounts of all income—*** *(1) Every aided school shall keep accounts of income from all sources and of all expenditure in the form in which such accounts are maintained immediately before the commencement of these rules.*
>
> *(2) The accounts of the school shall be open to inspection by the auditors and inspecting officers authorised by the Director, and also by any officer authorised by the Comptroller and Auditor General of India.*
>
> ***180. Unaided recognised schools to submit returns—*** *(1)* ***Every unaided recognised private school shall submit returns and documents in accordance with Appendix II****.*
>
> *(2) Every return or documents referred to in sub-rule (1), shall be submitted to the Director by the 31st day of July of each year.*
>
> *(3)* ***The account and other records maintained by an unaided private school shall be subject to examination by the auditors and inspecting officers authorised by the Director*** *in this behalf and also by any officers authorised by the Comptroller and Auditor General of India.*

(emphasis supplied)

63. The foregoing statutory provisions have been subject of detailed interpretation by the Supreme Court in several decisions, *repeatedly*. Of those judgments, the ones that are most relevant for the issues at hand, have been discussed hereinafter.

ANSWERS TO THE POINTS FOR DETERMINATION

64. Based on the aforesaid statutory landscape, this court would now proceed to answer the points for determination that were framed *vidé* order dated 13.09.2023. The points are being answered, *not* chronologically, but in their logical sequence.

VI. ANSWER TO POINT FOR DETERMINATION NO. 2

> *2. Whether the orders/circulars/directions are in excess of the statutory powers of the DoE, in that*

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2.1. these are ultra vires the provisions of the Delhi School Education Act, 1973 and/or the Delhi School Education Rules, 1973;

2.2. these are in contravention of the law laid down by the Supreme Court inter-alia in T.M.A. Pai Foundation & Ors. vs. State of Karnataka & Ors.; P.A. Inamdar & Ors. vs. State of Maharashtra & Ors.; Islamic Academy of Education & Anr. vs. State of Karnataka & Ors.; Modern School vs. UoI & Ors.; and by a Division Bench of this court inter-alia in Delhi Abhivabhavak Maha Sangh & Ors. vs. Govt. of NCT of Delhi & Ors.;

2.3. these are beyond the DoE's mandated role which is to prevent profiteering or commercialisation by schools, that is to say that the DoE may reject a fee-hike proposal only after finding that the school is indulging in profiteering and/or commercialisation;

2.4. these are beyond the 'regulatory 'functions of the DoE as envisaged in the law.

65. Point for Determination No. 2 has been conclusively dealt with by multiple Benches of the Supreme Court, including by at least 02 Constitution Benches, in the verdicts discussed below.

66. In *T.M.A. Pai Foundation* an 11-Judge Constitution Bench of the Supreme Court has dealt, at great length, with the issue of autonomy of private educational institutions and the extent of permissible regulation of such institutions. The relevant observations of the Supreme Court in the case are as follows:

"***3. In case of private institutions, can there be government regulations and, if so, to what extent ?***

"46. We will now examine the nature and extent of the regulations that can be framed by the State, university or any affiliating body, while granting recognition or affiliation to a private educational institution.

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"47. Private educational institutions, both aided and unaided, are established and administered by religious and linguistic minorities, as well as by non-minorities. Such private educational institutions provide education at three levels viz. ***school****, college and professional level. It is appropriate to first deal with the case of private unaided institutions and private aided institutions that are not administered by linguistic or religious minorities. Regulations that can be framed relating to minority institutions will be considered while examining the merit and effect of Article 30 of the Constitution.*

* * * * *

Private unaided non-minority educational institutions

"50. 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 employees.

* * * * *

"53. With regard to the core components of the rights under Articles 19 and 26(a), it must be held that while the State has the right to prescribe qualifications necessary for admission, private unaided colleges have the right to admit students of their choice, subject to an objective and rational procedure of selection and the compliance with conditions, if any, requiring admission of a small percentage of students belonging to weaker sections of the society by granting them freeships or scholarships, if not granted by the Government. ***Furthermore, in setting up a reasonable fee structure, the element of profiteering is not as yet accepted in Indian conditions. The fee structure must take into consideration the need to generate funds to be utilized for the betterment and growth of the educational institution, the betterment of education in that institution and to provide facilities necessary for the benefit of the students****. ……*

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"54. 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. ***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****.*

"55. ..... There can be no doubt that in seeking affiliation or recognition, the Board or the university or the affiliating or recognizing authority can lay down conditions consistent with the requirement to ensure the excellence of education. It can, for instance, indicate the quality of the teachers by prescribing the minimum qualifications that they must possess, and the courses of study and curricula. It can, for the same reasons, also stipulate the existence of infrastructure sufficient for its growth, as a prerequisite. ***But the essence of a private educational institution is the autonomy that the institution must have in its management and administration****. There, necessarily, has to be a difference in the administration of* ***private unaided*** *institutions and the* ***government-aided*** *institutions.* ***Whereas in the latter case, the Government will have greater say in the administration, including admissions and fixing of fees, in the case of private unaided institutions, maximum autonomy in the day-to-day administration has to be with the private unaided institutions****. Bureaucratic or governmental interference in the administration of such an institution will undermine its independence. While an educational institution is not a business, in order to examine the degree of independence that can be given to a recognized educational institution, like any private entity that does not seek aid or assistance from the Government, and that exists by virtue of the funds generated by it, including its loans or borrowings,* ***it is important to note that the essential ingredients of the management of the private institution include the recruiting students and staff, and the quantum of fee that is to be charged****.*

"56. An educational institution is established for the purpose of imparting education of the type made available by the institution.

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Different courses of study are usually taught by teachers who have to be recruited as per qualifications that may be prescribed. It is no secret that better working conditions will attract better teachers. More amenities will ensure that better students seek admission to that institution. ***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****. One also cannot lose sight of the fact that we live in a competitive world today, where professional education is in demand. We have been given to understand that a large number of professional and other institutions have been started by private parties who do not seek any governmental aid.* ***In a sense, a prospective student has various options open to him/her where, therefore, normally economic forces have a role to play. The decision on the fee to be charged must necessarily be left to the private educational institution that does not seek or is not dependent upon any funds from the Government****.*

"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****.*

* * * * *

"61. ***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*

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powers, admission of students ***and the fees to be charged****. ..... There is no compulsion on students to attend private schools. The rush for admission is occasioned by the standards maintained in such schools, and recognition of the fact that State-run schools do not provide the same standards of education. The State says that it has no funds to establish institutions at the same level of excellence as private schools.* ***But by curtailing the income of such private schools, it disables those schools from affording the best facilities because of a lack of funds****. If this lowering of standards from excellence to a level of mediocrity is to be avoided, the State has to provide the difference which, therefore, brings us back in a vicious circle to the original problem viz. the lack of State funds. The solution would appear to lie in the States not using their scanty resources to prop up institutions that are able to otherwise maintain themselves out of the fees charged, but in improving the facilities and infrastructure of State-run schools and in subsidizing the fees payable by the students there. 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.*"

(emphasis supplied)

67. Just about a year later, a 5-Judge Constitution Bench of the Supreme Court in *Islamic Academy* had the occasion to address the pointed question as to whether, in light of the Supreme Court decision in *T.M.A. Pai Foundation*, a private, un-aided educational institution is entitled to decide its own fee structure. The relevant extracts of the observations of the Supreme Court in *Islamic Academy* are the following:

"*6. In view of the rival submissions the following questions arise for consideration:*

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(1) whether the educational institutions are entitled to fix their own fee structure;

(2) ..... (4)

Question 1

"7. So far as the first question is concerned, in our view the majority judgment is very clear. ***There can be no fixing of a rigid fee structure by the Government. Each institute must have the freedom to fix its own fee structure taking into consideration the need to generate funds to run the institution and to provide facilities necessary for the benefit of the students. They must also be able to generate surplus which must be used for the betterment and growth of that educational institution****. In paragraph 56 of the judgment* [26]***,it has been categorically laid down that the decision on the fees to be charged must necessarily be left to the private educational institutions that do not seek and which are not dependent upon any funds from the Government****. Each institute will be entitled to have its own fee structure. The fee structure for each institute must be fixed keeping in mind the infrastructure and facilities available, the investments made, salaries paid to the teachers and staff, future plans for expansion and/or betterment of the institution etc.* ***Of course there can be no profiteering and capitation fees cannot be charged****.* ***It thus needs to be emphasized that as per the majority judgment imparting of education is essentially charitable in nature. Thus the surplus/profit that can be generated must be only for the benefit/use of that educational institution. Profits/surplus cannot be diverted for any other use or purpose and cannot be used for personal gain or for any other business or enterprise****. .....*

* * * * *

"156. While this Court has not laid down any fixed guidelines as regards fee structure, in my opinion, ***reasonable surplus should ordinarily vary from 6% to 15%, as such surplus would be utilized for expansion of the system and development of education****.*

(emphasis supplied)

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[26] Reference being to para 56 of *T.M.A. Pai Foundation*

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68. Most pertinently, while dealing with *Modern School* the Supreme Court has delineated the very same issues as have been raised before this court in the present batch of petitions. The decision of the 3-Judge Bench of the Supreme Court in *Modern School* requires a detailed, close and careful reading, since in the opinion of this court, the issues raised in the present petitions *stand authoritatively considered and concluded* by the Supreme Court in the following paragraphs of *Modern School*:

> "*14. At the outset, before analysing the provisions of the 1973 Act*[27]*, 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****.*
>
> *"15. As far back as 1957, it has been held by this Court in the case of State of Bombay v. R.M.D. Chamarbaugwala [AIR 1957 SC 699] that education is per se an activity that is charitable in nature. Imparting of education is a State function. The State, however, having regard to its financial constraints is not always in a position to perform its duties. The function of imparting education has been to a large extent taken over by the citizens themselves. In the case of Unni Krishnan, J.P. v. State of A.P. [(1993) 1 SCC 645] looking to the above ground realities, this Court formulated a self-financing mechanism/scheme under which institutions were entitled to admit*

[27] Reference being to the Delhi School Education Act, 1973

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50% students of their choice as they were self-financed institutions, whereas rest of the seats were to be filled in by the State. For admission of students, a common entrance test was to be held. Provisions for free seats and payment seats were made therein. The State and various statutory authorities including the Medical Council of India, University Grants Commission, etc. were directed to make and/or amend regulations so as to bring them on a par with the said Scheme. In the case of T.M.A. Pai Foundation v. State of Karnataka [(2002) 8 SCC 481] the said scheme formulated by this Court in the case of Unni Krishnan [(1993) 1 SCC 645] was held to be an unreasonable restriction within the meaning of Article 19(6) of the Constitution as it resulted in revenue shortfalls making it difficult for the educational institutions. ***Consequently, all orders and directions issued by the State in furtherance of the directions in Unni Krishnan case [(1993) 1 SCC 645] were held to be unconstitutional. This Court observed in the said judgment that the right to establish and administer an institution included the right to admit students; right to set up a reasonable fee structure; right to constitute a governing body, right to appoint staff and right to take disciplinary action. T.M.A. Pai Foundation case [(2002) 8 SCC 481] for the first time brought into existence the concept of education as an "occupation", a term used in Article 19(1)(g) of the Constitution.*** *It was held by majority that Articles 19(1)(g) and 26 confer rights on all citizens and religious denominations respectively to establish and maintain educational institutions. In addition, Article 30(1) gives the right to religious and linguistic minorities to establish and administer educational institution of their choice.* ***However, the right to establish an institution under Article 19(1)(g) is subject to reasonable restriction in terms of clause (6) thereof.*** *Similarly, the right conferred on minorities, religious or linguistic, to establish and administer educational institution of their own choice under Article 30(1) is held to be subject to reasonable regulations which inter alia may be framed having regard to public interest and national interest.* ***In the said judgment, it was observed (vide para 56) that economic forces have a role to play in the matter of fee fixation. The institutions should be permitted to make reasonable profits after providing for investment and expenditure. However, capitation fee***

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and profiteering were held to be forbidden. Subject to the above two prohibitory parameters, this Court in T.M.A. Pai Foundation case [(2002) 8 SCC 481] 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 [(2002) 8 SCC 481] .*

"16. The judgment in T.M.A. Pai Foundation case [(2002) 8 SCC 481] was delivered on 31-10-2002. The Union of India, State Governments and educational institutions understood the majority judgment in that case in different perspectives. It led to litigations in several courts. ***Under the circumstances, a Bench of five Judges was constituted in the case of Islamic Academy of Education v. State of Karnataka [(2003) 6 SCC 697] so that doubts/anomalies, if any, could be clarified. One of the issues which arose for determination concerned determination of the fee structure in private unaided professional educational institutions****. It was submitted on behalf of the managements that such institutions had been given complete autonomy not only as regards admission of students but also as regards determination of their own fee structure. It was submitted that these institutions were entitled to fix their own fee structure which could include a reasonable revenue surplus for the purpose of development of education and expansion of the institution. It was submitted that so long as there was no profiteering, there could be no interference by the Government. As against this, on behalf of the Union of India, State Governments and some of the students, it was submitted, that the right to set up and administer an educational institution is not an absolute right and it is subject to reasonable restrictions. It was submitted that such a right is subject to public and national interests. It was contended that imparting education was a State function but due to resource crunch, the States were not in a position to establish sufficient number of educational institutions and consequently the States were permitting private educational institutions to perform State functions.* ***It was submitted that the Government had a statutory right to fix the fees to ensure that there was no profiteering****. Both sides relied upon various passages from the majority judgment in T.M.A. Pai Foundation case [(2002) 8 SCC*

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481]. 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.

"17. In the light of the judgment of this Court in the case of Islamic Academy of Education [(2003) 6 SCC 697] the provisions of the 1973 Act and the Rules framed thereunder may be seen. ……Therefore, Rule 175 indicates accrual of income whereas Rule 177 indicates utilisation of that income. 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. Under Section 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 under Section 17(3) of the Act***.

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* * * * *

"20. We do not find merit in the above arguments. Before analysing the rules herein, it may be pointed out, that ***as of today, we have Generally Accepted Accounting Principles (GAAP)****. As stated above, commercialisation of education has been a problem area for the last several years.* ***One of the methods of eradicating commercialisation of education in schools is to insist on every school following principles of accounting applicable to not-for-profit organisations/non-business organisations****. Under the Generally Accepted Accounting Principles,* ***expense*** *is different from* ***expenditure****. All operational expenses for the current accounting year like salary and allowances payable to employees, rent for the premises, payment of property taxes are current revenue expenses. These expenses entail benefits during the current accounting period. Expenditure, on the other hand, is for acquisition of an asset of an enduring nature which gives benefits spread over many accounting periods, like purchase of plant and machinery, building, etc. Therefore, there is a difference between* ***revenue expenses*** *and* ***capital expenditure****. Lastly, we must keep in mind that accounting has a linkage with law.* ***Accounting operates within the legal framework****. Therefore, banking, insurance and electricity companies have their own form of balance sheets unlike balance sheets prescribed for companies under the Companies Act, 1956. Therefore, we have to look at the accounts of non-business organisations like schools, hospitals, etc. in the light of the statute in question.*

"21. In the light of the above observations, we are required to analyse Rules 172, 175, 176 and 177 of the 1973 Rules. The above rules indicate the manner in which accounts are required to be maintained by the schools. Under Section 18(3) of the said Act every recognised school shall have a fund titled "Recognised Unaided School Fund". ***It is important to bear in mind that in every non-business organisation, accounts are to be maintained on the basis of what is known as "Fund-Based System of Accounting". Such system brings about transparency. Section 18(3) of the Act shows that schools have to maintain Fund-Based System of Accounting****. The said Fund contemplated by Section 18(3), shall consist of income by way of fees, fine, rent, interest, etc. Section 18(3) is to be read with*

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Rule 175. Reading the two together, it is clear that each item of income shall be accounted for separately under the common head, namely, Recognised Unaided School Fund. Further, Rule 175 indicates accrual of income unlike Rule 177 which deals with utilisation of income. ***Rule 177 does not cover all the items of income mentioned in Rule 175. Rule 177 only deals with one item of income for the school, namely, fees****.* ***Rule 177(1) shows that salaries, allowances and benefits to the employees shall constitute deduction from the income in the first instance. That after such deduction, surplus if any, shall be appropriated towards pension, gratuity, reserves and other items of appropriations enumerated in Rule 177(2) and after such appropriation the balance (savings) shall be utilised to meet capital expenditure of the same school or to set up another school under the same management****. Therefore, Rule 177 deals with application of income and not with accrual of income. Therefore, Rule 177 shows that salaries and allowances shall come out from the fees whereas capital expenditure will be a charge on the savings.* ***Therefore, capital expenditure cannot constitute a component of the financial fee structure as is submitted on behalf of the schools. It also shows that salaries and allowances are revenue expenses incurred during the current year and, therefore, they have to come out of the fees for the current year whereas capital expenditure/capital investments have to come from the savings, if any, calculated in the manner indicated above****.* ***It is for this reason that under Section 17(3) of the Act, every school is required to file a statement of fees which they would like to charge during the ensuing academic year with the Director****. In the light of the analysis mentioned above, we are directing the Director to analyse such statements under Section 17(3) of the Act and to apply the above principles in each case. This direction is required to be given as we have gone through the balance sheets and profit-and-loss accounts of two schools and prima facie,* ***we find that schools are being run on profit basis and that their accounts are being maintained as if they are corporate bodies. Their accounts are not maintained on the principles of accounting applicable to non-business organisations/not-for-profit organisations****.*

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*"23. …… Under accounting principles, there is a difference between **appropriation of surplus** (income) on one hand and **transfer of funds** on the other hand. …… Therefore, reading Rules 172, 175 and 177, it is clear that appropriation of savings (income) is different from transfer of fund. Under clause 8[28], the management is restrained from transferring any amount from Recognised Unaided School Fund to the society or the trust or any other institution, **whereas Rule 177(1) refers to appropriation of savings (income) from revenue account for meeting capital expenditure of the school**. In the circumstances, there is no conflict between Rule 177 and clause 8.*

* * * * *

*"**Conclusion***

27. In addition to the directions given by the Director of Education vide Order No. DE.15/Act/Duggal.Com/203/99/23989-24938 dated 15-12-1999, we give further directions as mentioned hereinbelow:

*(a) **Every recognised unaided school covered by the Act shall maintain the accounts on the principles of accounting applicable to non-business organisation/not-for-profit organisation**.*

In this connection, we inter alia direct every such school to prepare their financial statement consisting of balance sheet, profit-and-loss account, and receipt-and-payment account.

*(b) **Every school is required to file a statement of fees every year before the ensuing academic session under Section 17(3) of the said Act with the Director. Such statement will indicate estimated income of the school derived from fees, estimated current operational expenses towards salaries and allowances payable to employees in terms of Rule 177(1). Such estimate will also indicate provision for donation, gratuity, reserve fund and other items under Rule 177(2) and savings thereafter, if any, in terms of the proviso to Rule 177(1)**.*

[28] of DoE Order dated 15.12.1999

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(c) ***It shall be the duty of the Director of Education to ascertain whether terms of allotment of land by the Government to the schools have been complied with***. *We are shown a sample letter of allotment issued by the Delhi Development Authority issued to some of the schools which are recognised unaided schools. We reproduce herein clauses 16 and 17 of the sample letter of allotment:*

> *"16. The school shall not increase the rates of tuition fee without the prior sanction of the Directorate of Education, Delhi Administration* ***and*** *shall follow the provisions of the Delhi School Education Act/Rules, 1973 and other instructions issued from time to time.*
>
> *17. ……"*

"28. We are directing the Director of Education to look into letters of allotment issued by the Government and ascertain whether they have been complied with by the schools. This exercise shall be complied with within a period of three months from the date of communication of this judgment to the Director of Education. ***If in a given case, the Director finds non-compliance with the above terms, the Director shall take appropriate steps in this regard***."

(emphasis supplied)

69. Furthermore, we cannot lose sight of the fact that in *P.A. Inamdar*, while dealing with the right provided under Article 30(1) of the Constitution to establish and administer an educational institution, a Constitution Bench of the Supreme Court has upheld the right of an institution to decide its own fee structure. In this verdict the Supreme Court has drawn a clear line of distinction between an institution *devising its own fee structure* and an institution *engaging in profiteering*. This is what the 7-Judge Bench had to say:

"***Q. 3. Fee; regulation of***

139. To set up a reasonable fee structure is also a component of "the right to establish and administer an institution" within the meaning of Article 30(1) of the Constitution, as per the law declared

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in Pai Foundation [(2002) 8 SCC 481]. Every institution is free to devise its own fee structure ***subject to the limitation that there can be no profiteering and no capitation fee can be charged*** *directly or indirectly, or in any form (paras 56 to 58 and 161 [answer to Question 5(c)] of Pai Foundation [(2002) 8 SCC 481] are relevant in this regard).*

*"**Capitation fees***

140. …… The charging of ***capitation fee*** *by unaided minority* ***and non-minority*** *institutions for professional courses is just not permissible.* ***Similarly, profiteering is also not permissible****. Despite the legal position, this Court cannot shut its eyes to the hard realities of commercialisation of education and evil practices being adopted by many institutions to earn large amounts for their private or selfish ends. If capitation fee and profiteering is to be checked, the method of admission has to be regulated so that the admissions are based on merit and transparency and the students are not exploited.* ***It is permissible to regulate admission and fee structure for achieving the purpose just stated****.*

"141. Our answer to Question 3 is 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."*

(emphasis supplied)

70. In fact, basis the judgment of the Supreme Court in *Modern School*, a group of schools acting under the banner of 'Action Committee, Unaided Private Schools of Delhi' and other petitioners had approached the Supreme Court by way of a review petition, seeking clarification as to whether money could be transferred from the Recognised Unaided School Fund of a particular school to another school set-up or operating under the same society or trust. Answering this review in favour of the schools, in its decision in ***Action Committee, Unaided Private Schools***

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of Delhi & Ors. vs. Director of Education & Ors.[29] the Supreme Court observed as follows:

> *"20. S/Shri Soli J. Sorabjee and Salman Khurshid, learned Senior Counsel appearing on behalf of the Action Committee and other review petitioners, submitted that Clause 8 of the Order issued by DoE dated 15-12-1999 is causing administrative difficulties which needs to be clarified. This Court vide majority judgment has held that Clause 8 is in consonance with Rule 177 of the Delhi School Education Rules, 1973. Rule 177 has been quoted hereinabove. Under Clause 8, DoE has stipulated that "no amount whatsoever shall be transferred from the recognised unaided school fund of a school to the society or the trust or any other institution". **According to the learned Senior Counsel, a rider needs to be introduced in Clause 8, namely, "except under the management of the same society or trust"**. Thus, according to the learned counsel, if the suggested rider is added in Clause 8 then the Management would have no grievance with the majority view. Thus, according to the learned counsel, Clause 8 should be read as follows:*
>
> > *"No amount whatsoever shall be transferred from the recognised unaided school fund of a school to the society or the trust or any other institution except under the management of the same society or trust."*
>
> *(emphasis supplied)*
>
> *According to the learned counsel, if the suggested rider is added to Clause 8 then it would subserve the object underlying the 1973 Act.*
>
> *"21. There is merit in the argument advanced on behalf of the Action Committee/Management. **The 1973 Act and the Rules framed thereunder cannot come in the way of the Management to establish more schools. So long as there is a reasonable fee structure in existence and so long as there is transfer of funds from one institution to the other under the same management, there cannot be any objection from the Department of Education**.*
>
> * * * * *

[29] (2009) 10 SCC 1

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> *"24. In this context it may be noted that in T.M.A. Pai Foundation case [(2002) 8 SCC 481] and in Islamic Academy of Education [(2003) 6 SCC 697] the principles for fixing fee structure have been illustrated.* ***However, they were not exhaustive. They did not deal with determination of surplus and appropriation of savings****. In fact in the majority view of the present matter, this Court has found that the above topics are not dealt with by the 1973 Rules and therefore Clause 8 was found not to be beyond Rule 177 or in conflict thereto as alleged. The additional directions given in the judgment of the majority vide para 27 in Modern School [(2004) 5 SCC 583] do not go beyond Rule 177 but they are a part of gap-filling exercise and discipline to be followed by the Management. For example: every school shall prepare balance sheet and profit and loss account. Such conditions do not supplant Rule 177.* ***If reasonable fee structure is the test then transparency and accountability are equally important****. In fact, as can be seen from reports of Duggal Committee and the earlier Committee, excessive fees stood charged in some cases despite the 1973 Rules because proper accounting discipline was not provided for in 1973 Rules. Therefore, the further directions given are merely gap fillers. Ultimately, Rule 177 seeks transparency and accountability and the further directions (in para 27) merely bring about that transparency. Lastly, it may be noted that the matter has come up to the Apex Court from public interest litigation. Hence there is no merit in the above plea.*

(emphasis supplied)

71. It is accordingly important that while assessing the surplus funds available with a school, the DoE must also bear in mind that it is permissible for a school to hold surplus funds, that may at some later stage, be used to set-up another school or educational institution operating under the management of the same society or trust.

72. A Division Bench of this court has also had the occasion to deal with a petition filed by a parents' association in *DAM–II*, in which the Division Bench summarised and re-articulated the regulatory powers of the DoE

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as regards fixation of fee by schools. The relevant paragraphs of the judgment in *DAM–II* read as follows:

> "*56. A conjoint reading of the judgments of the Supreme Court in Modern School (supra) as well as review petitions in the case of Action Committee Unaided Pvt. Schools (supra) would clearly demonstrate that the three points formulated are answered as under:*
>
> *1)* ***DoE has the Authority to regulate the quantum of fee charged by unaided schools under Section 17(3) of the 1973 Act. It has to ensure that the schools are not indulging in profiteering****.*
>
> *2)* ***The direction of DoE that no fees/funds collected from parents/students shall be transferred from the Recognized Un-aided Schools Fund to the society or trust or any other institution, was valid. However, it could be transferred under the same society or trust, which aspect is clarified in the review petition****.*
>
> *3)* ***Recognized unaided schools were entitled to set up Development Fund Account and could charge the students for the same, but that should not exceed 15% of the annual tuition fee****.*
>
> * * * * *
>
> *"61. Special Leave Petition against the aforesaid judgment was dismissed by the Supreme Court. After all Section 17(3) of the Act gives freedom to the unaided recognized schools* ***to fix the fee at the commencement of each academic session, file with the Director a full statement of the fees as levied during the ensuing academic session****. This would be necessary to the Government when we recommend the regulatory role of the Director to ensure that he fee charged is not unreasonable. Likewise,* ***the only other restriction is that during the academic session, there should not be further increase without the prior approval of the Director****. Again, this provision is made to check arbitrary increase in fee, time and again, after the academic session has commenced.* ***There may be circumstances which may justify enhancement of fee even during the academic session. However, the schools are required to justify those circumstances for which prior approval is mandated****. According to us,* ***this provision is in tune with the legal principle stated by the Supreme Court in so many judgments, viz., autonomy to the schools to fix their fee on the one hand and conferring authority upon the DoE to regulate the quantum of fee with limited***

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purpose to ensure that the schools are not indulging in profiteering. *The provision, thus, strikes a balance between the rights of the schools on the one hand and duty cast upon the DoE on the other hand. The only thing what is required at that stage is to We, therefore, are of the opinion that Section 17(3) does not suffer from any vires or arbitrariness and is not violative of Article 14 or 19(1)(g) of the Constitution of India.*

"62. With this, we revert back to the issues ***On Merits****:*

The clear legal position which emerges from the combined reading of the judgments of the Supreme Court, directly on the issue of revising tuition fee by Delhi schools under the Delhi Education Act, and already stated in detail above, demonstrates that ***the schools cannot indulge in commercialization of education which would mean that the fee structure has to be kept within bound so as to avoid profiteering. At the same time, "reasonable surplus" is permissible as fund in the form of such surplus may be required for development of various activities in the schools for the benefit of students themselves. The guiding principle, in the process, is "to strike a balance between autonomy of such institution and measures to be taken in avoiding commercialization of education". The autonomy of the schools can be ensured by giving first right to such schools to increase the fee. At the same time, quantum of fee to be charged by unaided schools is subject to regulation by the DoE which power is specifically conferred upon the DoE by virtue of Section 17(3) of 1973 Act****. This is specifically held by the Supreme Court in Modern School (supra) and Action Committee Unaided Private Schools (supra). Normally, therefore,* ***in the first instance, it is for the schools to fix their fee and/or increase the same which right is conferred upon the schools as recognized in TMA Pai (supra). The DoE can step in and interfere if hike in fee by a particular school is found to be excessive and perceived as "indulging in profiteering"****. … …"*

(emphasis supplied)

73. It would therefore appear, that notwithstanding a series of authoritative decisions by the courts, the question of fee fixation remained vexed, which led to another 5-Judge Constitution Bench of the Supreme Court

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having to render a decision in ***Modern Dental College & Research Centre & Ors. vs. State of Madhya Pradesh Ors.***[30] In *Modern Dental* the Supreme Court yet again emphasised the right of an educational institution to fix its own fee structure. The Supreme Court also observed that the fee charged by an educational institution may vary from institution to institution, depending upon the quality of education and other facilities that are made available by a particular institution. In this verdict, the following observations of the Supreme Court are instructive:

> "*71. We may again remind ourselves that though right to establish and manage educational institution is treated as a right to carry on "occupation", which is the fundamental right under Article 19(1)(g), the Court in T.M.A. Pai Foundation [T.M.A. Pai Foundation v. State of Karnataka, (2002) 8 SCC 481 : 2 SCEC 1] had also cautioned such educational institution not to indulge in profiteering or commercialisation. That judgment also completely bars these educational institutions from charging capitation fee. This is considered (sic, conceded) by the appellants themselves that commercialisation and exploitation is not permissible and the educational institutions are supposed to run on "no profit, no loss basis"*. ***No doubt, it was also recognised that the cost of education may vary from institution to institution and in this respect many variable factors may have to be taken into account while fixing the fee. It is also recognised that the educational institutions may charge the fee that would take care of various expenses incurred by these educational institutions plus provision for the expansion of education for future generation***. *At the same time, unreasonable demand cannot be made from the present students and their parents.* ***For this purpose, only a "reasonable surplus" can be generated***.
>
> * * * * *
>
> "*75.* ***To put it in a nutshell, though the fee can be fixed by the educational institutions and it may vary from institution to institution depending upon the quality of education provided by***

[30] (2016) 7 SCC 353

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each of such institutions, commercialisation is not permissible. *In order to see that the educational institutions are not indulging in commercialisation and exploitation, the Government is equipped with necessary powers to take regulatory measures and to ensure that these educational institutions keep playing vital and pivotal role to spread education and not to make money. So much so, the Court was categorical in holding that* ***when it comes to the notice of the Government that a particular institution was charging fee or other charges which are excessive****, it has a right to issue directions to such an institution to reduce the same*.

* * * * *

"77. ***This Court also held that for fixing the fee structure, the following considerations are to be kept in mind*** *: (Modern School case [Modern School v. Union of India, (2004) 5 SCC 583 : 2 SCEC 577], SCC p. 601, para 16)*

(a) ***the infrastructure and facilities available****;*

(b) ***investment made, salaries paid to teachers and staff****;*

(c) ***future plans for expansion and/or betterment of institution subject to two restrictions viz. non-profiteering and non-charging of capitation fees****.*

We may hasten to add here itself that Section 9 of the 2007[31] *Act takes care of the aforesaid parameters in abundance.*

(emphasis supplied)

74. It may be mentioned here for sake of completeness, that in at least 04 other cases, dealt with by two separate Co-ordinate Benches of this court, the same principle of fiscal autonomy for private, un-aided, recognised schools has been upheld, holding that the scope for interference by the DoE as the regulator is limited; and, in relation to fixation of fee, the scope of interference is *restricted only* to cases of *profiteering* or

[31] M. P. Niji Vyavasayik Shikshan Sanstha (Pravesh Ka Viniyaman Avam Shulk Ka Nirdharan) Adhiniyam, 2007

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commercialisation by a school (and of course, of charging of capitation fee, which is not an issue raised in the present proceedings). These cases are: *Action Committee;*[32] *Ramjas School;*[33] *Mahavir Sr. Model School;*[34] and *Bluebells School International Kailash.*

75. Interestingly, in *Indian School* the Supreme Court has viewed the same issue through the lens of the executive power of the State under Article 162 of the Constitution. In that case, the Supreme Court has, yet again, ruled that though the State has the power to regulate fixation of fee by private, un-aided schools, such power *can only be exercised* in circumstances where the school indulges in profiteering or commercialisation; but short of that, the State cannot interfere in the autonomy of a school to fix its own fee even under the cloak of Article 162 of the Constitution.

76. The relevant paragraphs of the judgment in *Indian School* may be noticed below:

> "*117. As such, it is not open to the State Government to issue directions in respect of commercial or economic aspects of legitimate subsisting contracts/transactions between two private parties with which the State has no direct causal connection, in the guise of management of pandemic situation or to provide "mitigation to one" of the two private parties "at the cost of the other". This is akin to — rob Peter to pay Paul. It is a different matter, if as a policy, the State*

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[32] filed against this decision is pending before the Division Bench; in which the Division Bench has, by way of an interim order, directed that "*... ... none of the land clause Schools will proceed to collect the amount constituting the interim fee hike... ...*"

[33] relates only to schools that are not subject to a 'land-clause' - cf. para 71; LPA No. 488/2022 filed against the judgment was disposed-of *vide* order dated 20.01.2025 as barred by limitation; issue on merits was kept open.

[34] In para 16 of this judgment the court observes : *"Thus, if there is no land clause, unaided schools are not mandated to obtain prior approval from the DoE for modifying their fee structure, but are only expected to submit a statement of fees as per Section 17(3)."* However the issue whether schools with a 'land clause' are required to take prior approval of the DoE has not been discussed or adjudicated in this case; and the foregoing observation is therefore clearly an *obiter-dictum*.

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Government takes the responsibility to subsidise the school fees of students of private unaided schools, but cannot arrogate power to itself much less under Article 162 of the Constitution to issue impugned directions (to school management to collect reduced school fee for the concerned academic year). We have no hesitation in observing that the asservation of the State Government of existence of power to issue directions even in respect of economic aspects of legitimate subsisting contracts/transactions between two private parties, if accepted in respect of fee structure of private unaided schools, is fraught with undefined infinite risk and uncertainty for the State. For, applying the same logic the State Government may have to assuage similar concerns in respect of other contractual matters or transactions between two private individuals in every aspect of life which may have bearing on right to life guaranteed under the Constitution. That would not only open pandora's box, but also push the State Government to entertain demands including to grant subsidy, from different quarters and sections of the society in the name of mitigating measures making it financially impossible and unwieldy for the State and eventually burden the honest tax payers — who also deserve similar indulgence. Selective intervention of the State in response to such demands may also suffer from the vice of discrimination and also likely to impinge upon the rights of private individual(s) — the supplier of goods or service provider, as the case may be. The State cannot exercise executive power under Article 162 of the Constitution to denude the person offering service(s) or goods of his just claim to get fair compensation/cost from the recipient of such service(s) or goods, whence the State has no direct causal relationship therewith.

*"118. **It is one thing to say that the State may regulate the fee structure of private unaided schools to ensure that the school management does not indulge in profiteering and commercialisation, but in the guise of exercise of that power, it cannot transcend the line of regulation and impinge upon the autonomy of the school to fix and collect "just" and "permissible" school fees from its students**. It is certainly not an essential commodity governed by the legislation such as the Essential Commodities Act, 1955 empowering the State to fix tariff or price*

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thereof. ***In light of consistent enunciation by this Court including the Constitution Bench, that determination of school fee structure*** *(which includes reduction of fixed school fee for the relevant period)* ***is the exclusive prerogative of the school management running a private unaided school****, it is not open to the legislature to make a law touching upon that aspect* ***except*** *to provide statutory mechanism to regulate fees for ensuring that it does not result in profiteering and commercialisation by the school management. Ex consequenti, the State Government also cannot exercise power under Article 162 of the Constitution in that regard.*"

(emphasis supplied)

77. Upon a conspectus of the foregoing legal landscape, the powers of the DoE to regulate fee fixation by a private, un-aided, recognised school, may be summarised in the following terms:

77.1. Section 17(3) of the DSE Act requires every recognised school (which would include every private, un-aided, recognised school) to *only* *submit* a statement of fees to the DoE *before* the commencement of each academic session. *No prior approval* of the DoE is required in relation to the statement of fees so submitted; nor does the school have to await permission of the DoE before charging fees *as per* the statement of fees so submitted. The DoE can only intervene if *during an on-going academic session*, a private, un-aided, recognised school demands fees *in excess of* what is stated in the statement of fees submitted to the DoE before the commencement of that academic session. That is to say, any *mid-session increase* in fees requires prior approval of the DoE. In view thereof, the orders/circulars/directions issued by the DoE to the extent they are contrary to the aforesaid position are *ultra-vires* the provisions of

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the DSE Act and the DSE Rules. *Point for determination No. 2.1 stands answered accordingly*.

77.2. The DoE's regulatory power over a private, un-aided, recognised school in relation to fixation of fees is *strictly ring-fenced*. In view of the Supreme Court precedents, notably *T.M.A. Pai Foundation, Islamic Academy, Modern School* and *P.A. Inamdar*, a private, un-aided, recognised school enjoys significant autonomy in fixing its fees *provided* the school does not indulge in *profiteering* or *commercialisation* and does not charge *capitation fees*. The DoE's authority to regulate fees does not extend to *general interference* in the fee structure of a private, un-aided, recognised school. As discussed above, the orders/circulars/directions under challenge in the present proceedings do not align with the law enunciated by the Supreme Court in the precedents hereinbefore cited, and are therefore in contravention of the law laid down by the Supreme Court. *Point for determination No. 2.2 stands answered accordingly*.

77.3. For clarity, 'profiteering' has been defined as "taking advantage of unusual or exceptional circumstances to make excessive profits".[35] The DoE can only intervene *if* a private, un-aided, recognised school is found to be indulging in profiteering or commercialisation or is charging capitation fees; and not merely because the school has surplus funds or wishes to increase its fees. The DoE cannot block a fee increase declared by a school in the

[35] *Bluebells School International Kailash*, para 49

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statement of fees filed *before* the commencement of an academic session *until such time that it finds* that the increase amounts to profiteering or commercialisation. Clearly therefore, the orders/circulars/ directions under challenge go beyond the DoE's mandated role under the law. *Point for determination No. 2.3 stands answered accordingly*.

77.4. The utilisation of funds collected by a school from students is governed by Rule 177 of the DSE Rules. The provisions regarding utilisation of school funds do not give to the DoE any power to interdict a fee fixation by a school; and *misuse or misapplication of funds by a school is a separate issue*. The mere existence of surplus funds in a school's accounts, in and of itself, is no ground for such intervention. The actions of the DoE complained-of in the present proceedings exceed the DoE's remit under the statute and are therefore beyond its regulatory functions as envisaged in law.

77.5. To reiterate, the scheme of the DSE Act *does not permit* the DoE to audit the accounts of a private, un-aided, recognised school *at the stage of fee fixation* by a school under section 17(3) of the DSE Act; but such audit *is envisaged* under section 18(5) of the DSE Act, under which provision a school is liable to file with the DoE its duly audited financial returns, which are liable to be audited by such authority as may be prescribed by the DoE. What is contemplated under section 18(5) of the DSE Act however is a separate and subsequent step, where the *audited financial and other returns* filed by a school with the DoE are liable to be audited by the prescribed authority, and *if* the DoE finds evidence

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of profiteering or commercialisation or charging of capitation fee, the DoE is entitled to take appropriate action against a particular school in exercise of its powers under the DSE Act.

77.6. Rule 180 of the DSE Rules prescribes that the returns contemplated in section 18(5) of the DSE Act shall be filed with the DoE by the 31st day of July of each year in accordance with Appendix II, further stipulating that the accounts and records of the school shall be subject to examination by auditors and inspecting officers authorised by the DoE and by the Comptroller and Auditor General of India.

77.7. To be sure, the stage for conducting an audit under section 18(5) of the DSE Act arises *after* the stage of filing of a statement of fee by the school under section 17(3) of the DSE Act. In the opinion of this court, a finding of profiteering or commercialisation by a school can only be returned by the DoE after conducting an audit under section 18(5) of the DSE Act based on the returns filed under Rule 180 of the DSE Rules.

78. However, it is the *admitted* position that *all the orders* impugned by the schools in the present batch of petitions have arisen from the schools having sought *prior approval* for increasing their fee at the commencement of an academic session, as DoE had directed the schools to do, contrary to what is contemplated under section 17(3) of the DSE Act. As has been held by this court, the law *does not require* a private, un-aided, recognised school to seek any *prior approval* whatsoever for increasing its fee *except* where a school proposes to increase its fee during an ongoing academic session.

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79. It may further be observed, that a perusal of the impugned orders would show that though there is passing reference in the orders that a given school has indulged in profiteering or commercialisation, those observations are only gratuitous rhetoric, arising from DoE's flawed understanding that schools are to follow accounting norms that are different from those contained in the ICAI Guidance Note or otherwise under the IT Act. These observations of profiteering or commercialisation are not based on any *definitive finding* by the DoE that a given school has indulged in profiteering or commercialisation.

80. Since in the present batch of matters, the DoE's decision to reject the fee-hike proposals made by the various schools, whether in whole or in part, *arises from a misconceived exercise*, the DoE's action is vitiated and untenable in law. Such exercise could not have been the basis for the DoE to disallow any fee-hike.

81. Furthermore, a perusal of the impugned orders also shows, that in each of the impugned orders the DoE has set-out their assessment of the financial books of individual schools; and the DoE has, in its own way, computed what they say are 'funds available' with a particular school in a given year. As discussed above, the DoE's understanding of how funds available with a school are to be calculated is flawed, since the DoE has *included* certain heads of funds which cannot be added to the funds available. Based on such calculation, the DoE has come to its own figure of the estimated *surplus funds* available with a particular school; and has thereby concluded that the school has *sufficient funds* for meeting the expenses for the ensuing academic year.

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82. As held by a Co-ordinate Bench of this court in *Mahavir Sr. Model School*,[36] the *mere availability of the surplus funds* in the hands of the school cannot, in and of itself, lead to the conclusion that the school has indulged in profiteering or commercialisation of education. A school may hold a certain quantum of surplus funds, and may put those funds to justifiable use for the betterment, improvement and development of the school, without that amounting to profiteering or commercialising. To be sure, the observation of the Supreme Court in *Islamic Academy*, to the effect that a *reasonable surplus* in the hands of the educational institution, "*... ... should ordinarily vary from 6% to 15% ... ...*" was not an observation cast in stone, as is evident from the wording of that observation itself:

> "*156. While this Court* ***has not laid down*** *any fixed guidelines as regards fee structure, in my opinion,* ***reasonable surplus should ordinarily vary from 6% to 15%****, as such surplus would be utilized for expansion of the system and development of education.*"

(emphasis supplied)

83. For purposes of clear interpretation, it may also be noted that the observation of the Supreme Court in *Modern School*, saying that "*… … we are of the view that the management of recognised unaided schools should be permitted to charge development fee not exceeding 15%, of the total annual tuition fee ... ...*"[37], was also made *only* in relation to development fee that a school may charge and *cannot be read as an observation generally limiting the extent of surplus funds that a school may hold*.

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[36] cf. paras 29 to 31
[37] cf. para 25

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84. It is astounding that the DoE's manner of computing the funds available with a school is wholly contrary even to the consistent pronouncements of the courts, including those of the Supreme Court. This approach has led to an erroneous and unsustainable determination by the DoE that a given school possesses adequate funds, and that *any proposal* for a fee increase would necessarily amount to profiteering or commercialisation. It is also pertinent to observe, that were a school to maintain its accounts in a manner inconsistent with what is prescribed for not-for-profit institutions, the financial management of the school would run foul of the provisions of the IT Act. In practical terms, such a position would compel the school to maintain two distinct sets of accounts - one, for compliance with the Income Tax laws, and another, for adherence to the DSE Act. Needless to say, such a situation cannot be countenanced.

85. Indeed, the interpretation adopted by the DoE regarding the manner in which a school is to utilise its funds not only runs contrary to the provisions of the Income Tax laws but also falls foul of Rule 176 of the DSE Rules itself, which prohibits the diversion of funds for purposes other than those for which they are collected. The DoE's view is therefore, inconsistent both with established fiscal principles as well as the very regulatory framework that the DoE is tasked to uphold. *Point for determination No. 2.4 stands answered accordingly*.

VII. ANSWER TO POINT FOR DETERMINATION NO. 4

4. Whether the DoE's regulatory powers are different in relation to schools that are not governed by a 'land-clause' or 'prior approval clause' compared to those schools that are governed by such clause.

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86. Much emphasis has been laid by the DoE on the judgment of the Division Bench in *Justice for All*, to argue that the said judgment empowers them to enforce the 'land-clause' by regulating fee-hike by schools to ensure that schools do not indulge in profiteering and commercialisation. It is the DoE's contention that a school governed by a land-clause must obtain *prior* approval from the DoE before effecting any fee-hike *at any stage* of an academic year.

87. However, a plain reading of the said decision would show that nowhere in that case has the Division Bench observed anything beyond what is contained in the statutory provisions. The scope of regulation by the DoE is summarized in para 17 of the Division Bench ruling in *Justice for All*, which is required to be noted:

> *"17. Thus it is clear that the schools cannot indulge in profiteering and commercialization of school education. Quantum of fees to be charged by unaided schools is subject to regulation by DoE* ***in terms of the power conferred under Section 17(3) of DSE Act, 1973*** *and he is competent to interfere* ***if hike in fee by a particular school is found to be excessive and perceived as indulging in profiteering****. So far as the unaided schools which are allotted land by DDA are concerned, in the light of the decision of the Supreme Court in Modern School v. Union of India (supra), we are clear in our mind that* ***they are bound to comply with the stipulation in the letter of allotment****. Para 28 of the majority judgment in Modern School v. Union of India (supra) upholds the binding nature of the stipulation in the letter of allotment issued by the DDA that the* ***school shall not increase the rate of tuition fees without the prior sanction of DoE****."*

(emphasis supplied)

88. It is necessary to clarify that the 137 schools that are petitioners in the present batch of matters are all *private, un-aided, recognised schools.* However, some of the petitioner schools are situate on 'private land', that is to say, on land that is privately owned by the school or by the body

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that owns the school; while other schools are situate on land allotted to them by a land-owning/land administering agency of the government. Furthermore, *some* of the schools to whom land has been allotted by government hold the land on lease/license basis under letters of allotment, some of which letters contain a covenant which requires the school to seek *prior permission* of the DoE for fixing or increasing its fee. Such covenant is commonly referred to as a 'land-clause'.

89. Clearly therefore, the Division Bench has observed that schools cannot be allowed to indulge in profiteering and commercialisation; that the quantum of fee to be charged by the un-aided schools is subject to regulation by DoE *in terms of* the power conferred under section 17(3) of the DSE Act; and that the DoE is competent to interfere *if* the fee hike is found to be excessive *and* the school is perceived as *indulging in profiteering*.

90. Furthermore, the Division Bench has also said that in light of the decision of the Supreme Court in *Modern School*, un-aided schools that have been allotted land by the governmental agencies are bound to comply with the terms of the allotment letter, which stipulation is binding; and that schools cannot increase their tuition fee without prior sanction of the DoE. In the opinion of this court, the observations of the Division Bench are perfectly in consonance and accord with, and do not detract from or augment, the provisions of section 17(3) of the DSE Act nor of the land-clause. This is the clear inference that can be drawn from the concluding para of *Justice for All*, where the Division Bench has reiterated that the fee chargeable by an un-aided school is subject to regulation by the DoE in terms of the power conferred under section

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17(3) of the DSE Act; and that the DoE is competent to interfere in a fee increase, if it is found to be excessive and the school is perceived as indulging in profiteering. As a matter of fact, in *Justice for All* the Division Bench has relied upon the decision of the Supreme Court in *Modern School* observing that schools are bound to comply with the stipulation in their letter of allotment of land.

91. In the opinion of this court, para 27(c) of *Modern School* is being mis-interpreted by the DoE to mean that it is the bounden duty of the DoE *to enforce* the land-clause and demand that a private, un-aided, recognised school must seek prior permission of the DoE before increasing its fee if the school is situate on land allotted by governmental agency. In doing so, the DoE loses sight of the fact that the direction of the Supreme Court in that case is for the DoE "to look into letters of allotment" and "ascertain" compliance with the land-clause - *not enforce* the land - clause; and if the DoE finds non-compliance, to "take appropriate steps" in that regard which steps would not imply that the DoE can overstep its powers under the DSE Act and the DSE Rules.

92. Being an agency tasked with implementing the provisions of the DSE Act, the DoE cannot overlook those provisions and instead begin implementing the land-clause. Implementation of the land-clause is the remit of the land-owning/land administering agency; and if the DoE notices non-compliance with the land-clause, the proper course for the DoE is to inform the land-owning/land administering agency about such infraction, leaving it to that agency to take appropriate steps in that regard.

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93. Also, on a plain reading of the land-clause referred-to in *Modern School*, it is clear that the very same clause also requires a school to "follow the provisions" of the DSE Act. Furthermore, a clause contained in a letter of allotment/lease/license, which is a *contractual covenant* between the two parties, cannot amend the provisions of a statute, *viz.,* the DSE Act. Therefore, if the DSE Act only requires a school to give *prior intimation* to the DoE about increase of fee at the beginning of the academic session; and *prior sanction* of the DoE is *only* required if there is an increase during an ongoing academic session, the land-clause cannot impose an additional condition upon a school, which is in excess of what the DSE Act requires.

94. Now, *if* there is dissonance between the wording of the land-clause, which is only a contractual term between the land-owning/land administering agency and the school *and* section 17(3) of the DSE Act, which is a statutory provision, clearly the statutory provision must prevail. Therefore, a school with a 'land-clause' in its allotment letter/lease/license *would also not require prior approval* for increasing its fee, *except* if it proposes to increase its fee mid-session, since a *contractual land-clause* cannot operate to detract from or amend the *statutory provisions* of the DSE Act and the DSE Rules.

95. To be abundantly sure, by embedding a land-clause in the allotment letter or lease deed, the land-owning/land administering agency *cannot confer* upon the DoE any additional powers to *enforce an obligation* against a school in excess of the provisions of section 17(3) of the DSE Act. Equally, the DoE *cannot acquire* any additional power to enforce any additional obligations against a school, arising from the land-clause

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to which the DoE is not even a signatory. Clearly, it is section 17(3) that must govern the relationship between the school and the DoE; and the land-clause can at best only govern the relationship between the school and the land-owning/land administering agency.

96. The correct construction of the land-clause, is one which harmonises the wording of the land-clause with the wording of the section 17 of the DSE Act - *viz.,* that a school cannot increase its fee *during* an ongoing academic session *without prior sanction* of the DoE. The first part of the land clause must therefore be read so as to be in conformity with the provisions of the DSE Act. In the opinion of this court, this is the correct interpretation of the directions issued by the Supreme Court in *Modern School*.

97. Ergo, the land-owning/land administering agency and the DoE must operate within their own respective domains; and remain within the remit of their respective powers under the separate statutes under which they are created.

98. It may be stated for completeness, that breach of the land-clause *may entail* consequences for a school *at the hands of the land-owning/land administering agency*, but breach of the land-clause cannot result in consequences for the school *at the hands of the DoE*.

99. In the opinion of this court, it is in fact possible to read the land-clause in consonance with section 17(3) of the DSE Act, so as not to violate either. The correct and meaningful reading of the land-clause is that the requirement of prior sanction comprised in the land-clause arises *only* when a school seeks to increase its fee mid-session, which is perfectly in accord with the requirement contained in section 17(3).

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100. Accordingly, this court is of the view, that *regardless* of whether there *is* or *is not* a land-clause in the terms of allotment of land to a private un-aided, recognised school, the law does not require the school to take prior permission or sanction of the DoE to increase its fee at the commencement of an academic session; and the only requirement is that a private, un-aided, recognised school must file its statement of fee with the DoE before commencement of every academic session in terms of section 17(3). In the opinion of this court, irrespective of whether a school is governed by land-clause or prior approval clause or not, *the DoE's regulatory powers* under the DSE Act and the DSE Rules remain the same. *Point for determination No. 4 stands answered accordingly*.

VIII. ANSWER TO POINT FOR DETERMINATION NO. 1

> *1. Whether the orders/circulars/directions issued by the Directorate of Education ('DoE') dealing with fee-hike proposals by private, un-aided schools are in violation of principles of natural justice, in that*
>
> > *1.1. these have been issued without affording an opportunity of hearing to the schools;*
> >
> > *1.2. these have been issued without making available to the schools the recommendations for fee fixation made by chartered accountants appointed by the DoE, which have been relied upon by the DoE;*
> >
> > *1.3. these have been passed without issuing any show cause notice to the schools in relation to the disallowances that were proposed to be made by the DoE.*

101. It may be stated here that the specifics and particulars of the fee-hike proposals submitted by the various petitioner schools, the years for which such proposals were submitted, and the dates of their rejection by the DoE, are irrelevant for the present consideration, since this court proposes to deal only with the issue as to whether such proposals could have been rejected *without a show cause notice* having been issued

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and/or without an opportunity of hearing *before the DoE* having been granted to the schools.

102. It is the admitted position that in several of the cases in the present batch of matters, the DoE did not issue to the concerned school a show-cause notice and/or did not afford to the school an opportunity of hearing *before the Director of Education*; and without hearing, their fee-hike proposals were rejected.

103. This very issue had come-up before a Co-ordinate Bench of this court in *Bal Bharati Public School*, in which the Co-ordinate Bench held as follows:

> "*31. Though several arguments were advanced by learned Counsel appearing on both sides, as reflected hereinabove, regarding the requirement of obtaining prior approval of the proposed hiking of fees by the School, as well as the merits of the impugned decision, I do not think it necessary to enter into the said submissions, or examine their merit, as, in my view, the impugned Order cannot sustain even on the ground of violation of the principles of natural justice.*
>
> "*32. The issue of whether an opportunity of personal hearing could be read into a provision which does not, expressly, provide therefor, has come in for judicial scrutiny in a number of cases, of which one may refer, with advantage, to the judgement in Swadeshi Cotton Mills v. U.O.I., (1981) 1 SCC 664, which contains the following incisive exploration into the various facets of the principles of natural justice and fair play and, in particular, the doctrine of audi alteram partem: ... ...*
>
> * * * * *
>
> "*35. That the petitioner was not, in fact, heard, before the impugned Order, dated 9th July, 2018, was passed, is an irrefutable fact. Mr. Ramesh Singh, however, submits that, in the first place, the scheme of* ***the DSE Act did not require any such prior hearing*** *to be granted to the petitioner, before the passing of the impugned Order*

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and, secondly, that the communication, dated 4th July, 2018, ***effectively waived the opportunity of personal hearing****, as extended by the DOE on 30th June, 2018, and exhorted the DOE to take a decision, on the matter, on merits.* ***The two questions that arise for consideration are, therefore, (i) whether the DSE Act, and the DSE Rules, empowered the DOE to do away with the requirement of prior hearing, before the passing of impugned Order dated 9th July, 2018 and (ii) whether the communication, dated 4th July, 2018, from the petitioner, to the DOE passing the impugned order without any opportunity of hearing to the petitioner, amounted to a waiver, by the petitioner, of such opportunity****.*

"36. Both these issues, in my opinion, would be required to be answered against the DOE, and in favour of the petitioner.

"37. The normal principle to be applied is against jettisoning of the audi altertam partem requirement. The paragraphs, from Swadeshi Cotton Mills (supra), extracted hereinabove, highlight the importance of the said principle, as a cardinal principle of natural justice and fair play of considerable vintage. It is noticed that the audi alteram partem principle is devised by the court, to ensure that a just decision was arrived at, and operates as a healthy check on abuse or misuse of power and that, therefore, its reach should neither be narrowed nor circumscribed. The said principle, it is further noted, applies, equally, to administrative and quasi-judicial acts. ***Exclusion of the principle is to be inferred only where such exclusion is to be found, either specifically or by necessary implication, in the provisions of the statute****. In such cases, no doubt, the Court is proscribed from ignoring the mandate of the legislature. In examining, however, whether the statute excludes the audi alteram partem principle, either expressly or by necessary implication, the court is to be guided by (i) the language of the statute, (ii) the basic scheme of the provision, (iii) the nature of the power, (iv) the purpose of conferment of the power and (v) the effect of exercise of the power. Urgency can be cited as a ground to avoid compliance with the audi alteram partem rule, in the sense of grant of a prior opportunity of hearing before taking of the decision, only where the situation is emergent, and calls for immediate action, failing which imminent danger, injury or hazard to paramount public interest can be foreseen.*

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Other circumstances, in which the audi alteram partem principle, in the form of a prior opportunity of hearing, may not be mandatory are where considerations of public safety or public health are involved to the extent that "the clearest case of public injury flowing from the least delay is self-evident". In all other circumstances, it would be impermissible to do away with the requirement of a prior opportunity of hearing, before taking of a decision, on the grounds of urgency. The concept of "civil consequences" has also, significantly, been explained, as covering "infraction of not merely property or personal rights, but of civil liberties, material deprivation and non-pecuniary damages and, in its comprehensive connotation, (covering) everything that affects a citizen in his civil life". Holistically seen, the judgment cautions courts from excluding the requirement of a pre-decisional hearing, even if it is to be minimal. It is only when "viewed pragmatically, it would paralyse the administrative progress or frustrate the need for utmost promptitude", that the principle can be jettisoned. Every effort has to be made to salvage the applicability of the audi alteram partem principle, at the pre-decisional stage.

* * * * *

*"39. The above observations are not intended to represent an exhaustive delineation of all the issues that arise for consideration. Needless to say, the petitioner would be entitled to place, **before the DOE**, all materials justifying the proposed increase of fee for the 2017-2018 academic session, as already recovered by the petitioner. The petitioner would also be entitled to contend that no prior approval of the DOE was required, before the fees were so enhanced, and to make submissions on the applicability, in this context, of the judgment of the Supreme Court in Modern School (supra), on which the DOE relies.*

* * * * *

*"41. Principles of natural justice are required to be applied in a pragmatic, rather than a dogmatic, manner. **The various communications, addressed by the DOE to the petitioner, reveal, clearly, that a mass of information, involving several documents, had been requisitioned thereby. Even given the sheer volume of the material sought from the petitioner, the petitioner ought to have been extended an opportunity of personal hearing, in order to***

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explain the said material, before the DOE proceeded, on its own, to analyse the material in the manner it thought best. After all, the records of the institution could best be explained by the institution itself, irrespective of whether such explanation meets with the approval of the authority, taking the ultimate decision, or not. *Such an opportunity, in the present case, has, clearly, not been extended, by the DOE, to the petitioner, thereby vitiating the impugned Order, dated 9th July, 2018, even on that score.*"

(emphasis supplied)

104. It is also the grievance raised by several petitioner schools that the DoE did not make available to them the recommendations for fee fixation made by the chartered accountants appointed by the DoE, even though those recommendations were relied upon by the DoE in rejecting their fee-hike proposals.

105. In a case concerning the very same issue raised by a private, un-aided, recognised school, another Co-ordinate Bench of this court in *Mahavir Sr. Model School* had this to say:

"***Understanding the impugned order : Unpacking the legal issues at stake***

23. This brings us to the grounds of challenge to the impugned order. Schools have alleged breach of the principles of natural justice due to denial of opportunity to respond to the allegations. This principle of audi alteram partem is the cornerstone of procedural fairness and is vital to ensure a just and equitable outcome in any legal process. It has been contended that the impugned order was issued without prior notice of proposed disallowances. There is no convincing response to this contention. The court is of the view that purported inconsistencies mentioned in the impugned order should have been revealed to the schools before passing of the impugned order, giving them adequate opportunity to respond. Adherence to this principle would make the decision-making process fair, transparent and would preclude bias or prejudice from influencing the outcome of a case. ***Thus, DoE must ensure that the schools are provided all***

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relevant material and information, including the basis for any objections or concerns raised by the regulatory authorities, while scrutinising the statement of fee. This would allow the schools to present their stand in a meaningful way. *That said, in the opinion of the court, instead of remanding the matter back to DoE at this juncture, it would be appropriate to evaluate the validity of the impugned order on its own merits.*"

(emphasis supplied)

106. The very same issue was again raised by a private, un-aided, recognised school before another Co-ordinate Bench of this court in *Ramjas School* in which the court held :

"*91. This Court also finds substance in the submission, of Mr. Sunil Gupta, regarding infraction, by the DoE, of the principles of natural justice. The* ***Order, dated 26th December, 2016, of the DoE, is completely silent, regarding the findings of the statutory inspection committee****, constituted under Rule 180 of the DSE Rules. For no apparent reason, whatsoever,* ***the DoE chose not to act on the said report and, instead, invited comments from an "independent team of accountants and financial experts as a second level check****". The report, and the findings, of this "independent team", consequent to the said "second level check" were never shared with the petitioner; neither was the petitioner co-opted in the said proceedings, or afforded any opportunity by the said "independent team".* ***The DoE, however, apparently chose not to rest content even with the findings of the said "independent team", but subjected those findings to further analysis by a third committee, constituted vide Order dated 4th October, 2016****, "comprising of senior officer and accounts functionaries".* ***The justification for this "third level check" is, again, not forthcoming from the record****. Needless to say, the petitioner was not included in the deliberations, even by this committee, or afforded any opportunity by it.* ***The findings of this "third" committee were also never shared with the petitioner and, in fact, have not even been placed on record before this Court****. Adverse findings, arrived against the petitioner, following such a procedure, cannot sustain the scrutiny of law for an instant.* ***There***

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***has been complete abandonment, by the DoE, of the most fundamental principles of natural justice and fair play**, while passing the Order, dated 26th December, 2016 which has, as an inexorable consequence, to perish.*"

(emphasis supplied)

107. This court is in complete and respectful agreement with the views expressed by the Co-ordinate Benches in the aforesaid decisions; and would also share the observations made in those cases.

108. Additionally, this court would also rely upon a decision of the Constitution Bench of the Supreme Court in ***Gullapalli Nageswara Rao vs. A.P. State Road Transport Corpn.***,[38] to highlight that it is imperative that a hearing must be given to a noticed-party *before the same person, who is to decide the matter*. In this case, the Constitution Bench has emphasized the *inefficacy* of a process where one person hears, and someone else decides a matter. The Supreme Court has very aptly described this position as destructive of the concept of judicial hearing and reducing the hearing to an empty formality, in the following words:

> *"31. The second objection is that while the Act and the Rules framed thereunder impose a duty on the State Government to give a personal hearing, the procedure prescribed by the Rules impose a duty on the Secretary to hear and the Chief Minister to decide.* ***This divided responsibility is destructive of the concept of judicial hearing***. ***Such a procedure defeats the object of personal hearing. Personal hearing enables the authority concerned to watch the demeanour of the witnesses and clear-up his doubts during the course of the arguments, and the party appearing to persuade the authority by reasoned argument to accept his point of view***. ***If one person hears and another decides, then personal hearing becomes an empty formality***. *We therefore hold that the said procedure followed in this case also offends another basic principle of judicial procedure."*

(emphasis supplied)

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[38] 1958 SCC OnLine SC 49

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109. It does not require much debate to hold, that if the material on which DoE's decision was based, in particular, the recommendations of their chartered accountants, was not made available to a school; and a school was not granted a hearing before the Director of Education it would not have been possible for the school to place before the DoE their point of view or to persuade them to accept a given fee-hike proposal by offering requisite justification for it. Such course of action adopted by the DoE was clearly in the teeth of the principles of natural justice.

110. As a sequitur to the above, Point for Determination No. 1 is answered by holding that the orders/circulars/directions issued by the DoE dealing with fee-hike proposals submitted by private, un-aided, recognised schools:

> Without issuing any show cause notice to the schools in relation to the disallowances that were proposed to be made by the DoE;
>
> *and/or*
>
> Without making available to the schools the recommendations for fee fixation made by the chartered accountants appointed by the DoE, which have been relied upon by the DoE;
>
> *and/or*
>
> Without affording an opportunity of hearing to the schools *before the Director of Education*
>
> are clearly in violation of the settled principles of natural justice for any quasi-judicial or administrative action, and therefore deserve to be set- aside. *Point for determination No.1 stands answered accordingly*.

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IX. ANSWER TO POINT FOR DETERMINATION NO. 3

> *3. Whether the directions issued and the disallowances made by the DoE in relation to fee fixation are contrary to the provisions of the Income Tax Act, 1961 and other taxation statutes, settled accounting principles and guidance notes/practice directions issued by the Institute of Chartered Accountants of India. More specifically, whether school accounts are to be maintained on the accrual/mercantile system of accounting or the cash system of accounting.*

111. To answer the larger point raised by way of these points for determination, to begin with it must be noticed, that in *Modern School* the Supreme Court has squarely dealt with this issue, and has clearly held that since schools are to be run as 'not-for-profit' establishments, their accounts are to be maintained in accordance with the "Fund-Based System of Accounting", as mandated by section 18(3) of the DSE Act. The Supreme Court has also observed that schools must follow the extant GAAP and adhere to accounting principles suitable for 'not-for-profit' and non-business organizations. It has been held that under GAAP, there is a clear distinction between 'revenue expenses' and 'capital expenditure', whereby items of revenue expenses (such as teachers' salaries, allowances, etc.) are to be included in the fee charged to students; but items of capital expenditure (such as building fund, depreciation fund, etc.) cannot be charged from students.[39]

112. Furthermore, the ICAI Guidance Note *inter-alia* answers the above queries in the following manner:

> *"2. …… It has, however, been found that the present system of accounting and financial reporting followed in schools does not adequately meet the accountability concerns of the donor-agencies, including Government, and other stakeholders such as the parents of*

[39] Modern School, para 20, 21

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the students who provide funds to the schools in the form of fees and donations[40]*. The basis of accounting being followed in schools is generally not based on scientific accrual basis of accounting and also the accounting practices which are being followed are diverse.*

Objectives

3. The objectives of this Guidance Note are to recommend –

(i) application of sound accounting principles pertaining to recognition, measurement and disclosure of various items of income and expenses, assets and liabilities in the financial statements of schools keeping in view the peculiarities of the activities of the schools, and

(ii) formats of financial statements keeping in view not-for-profit being the objective of the school,

with a view to harmonise the diverse accounting practices being followed in the schools.

* * * * *

"5. For the purpose of this Guidance Note, a school is considered as the reporting entity and, therefore, it has to keep separate books of account and has to prepare separate financial statements. Thus, if a society or a trust runs two schools, each school should maintain its separate books of account and prepare separate financial statements as recommended in this Guidance Note. This, however, does not preclude the society or the trust from preparation of the financial statements of the society or the trust as a whole, including therein income, expenses, assets and liabilities pertaining to the school(s) established by it, as per the requirements of any statute or a regulator or otherwise.

* * * * *

*"**Definitions***

7. For the purpose of this Guidance Note, the following terms are used with the meanings specified:

Accounting period means the period of 12 months commencing on the first day of April every year.

Accounting policies are the specific principles, bases, conventions, rules and practices adopted by a school in preparing and presenting financial statements.

Accrual basis means a basis of accounting under which transactions and other events are recognized when they occur (and not only when cash or its equivalent is received or paid). Therefore, the transactions and events are recorded in the accounting records

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[40] *Such concerns have been expressed, for example, by the Supreme Court in Modern School Vs. Union of India and Ors. (2001) and the Report of the Committee on Fee Hike and Other Charges in Recognised Unaided Private Schools in Delhi (1999) constituted by the Government of National Capital Territory of Delhi pursuant to the judgment of the Hon'ble High Court of Delhi, dated 30/10/1998 in C.W. No. 3723 of 1997.*

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and recognized in the financial statements of the periods to which they relate. The elements recognized under accrual accounting are assets, liabilities, revenue and expenses.

* * * * *

*"**Basis of Accounting***

15. The commonly prevailing bases of accounting are:
(a) cash basis of accounting; and
(b) accrual basis of accounting.

16. Under cash basis of accounting, transactions are recorded when the related cash receipts or cash payments take place. Thus, revenue (e.g., from fees, etc.) is recognised when cash is received. Similarly, expenditure on acquisition and maintenance of assets used in rendering of services by an organization as well as on employee remuneration and other items is recorded when the related payments are made. No subsequent account is taken of whether the asset is still in use, has reached the end of its useful life, or has been sold. Thus, cash-based information fails to show a proper picture of financial position and performance. A cash-based system does not provide information about total costs of an organisation's activities.

17. Accrual basis of accounting is the method of recording transactions by which revenues, expenses, assets and liabilities are reflected in the accounts in the period in which they accrue. Accrual basis of accounting attempts to record the financial effects of the transactions and other events of an enterprise in the period in which they occur rather than recording them in the period(s) in which cash is received or paid by the organisation. Accrual basis recognises that the economic events that affect an organisation's performance often do not coincide with the cash receipts and payments. The goal of accrual basis of accounting is to relate the accomplishments (measured in the form of revenues) and the efforts (measured in terms of costs) so that the reported net income measures an organisation's performance during a period rather than merely listing its cash receipts and payments. Apart from income measurement, accrual basis of accounting recognises assets, liabilities or components of revenues and expenses for amounts received or paid in cash in past, and amounts expected to be received or paid in cash in future. One of the resultant advantages is that if offers the opportunity to the organisation to improve management of assets. Similarly, accrual-based accounting provides useful information about the real level of an organisation's liabilities, relating to both debts and other obligations such as employee entitlements. Accrual is, thus, a scientific basis of accounting and has conceptual superiority over the cash basis of accounting. It is, therefore, recommended that all

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schools should maintain their books of account on accrual basis for all elements of financial statements.

* * * * *

*"**Recognition Criteria for Items of Expenses***

52. An item that meets the definition of 'expense' becomes eligible to be recognised in the income and expenditure account when and only when:

(a) it is probable that the consumption or loss of future economic benefits resulting in a reduction in assets and/or an increase in liabilities has occurred;

(b) the consumption or loss of future economic benefits can be measured reliably.

53. Under accrual basis of accounting, expenses are recognised on the following bases:

(i) Identification with revenue transactions

Costs directly associated with the revenue recognised during the relevant period (in respect of which whether money has been paid or not) are considered as expenses and are charged to income for the period."

* * * * *

"Depreciation

56. Most schools use buildings, computers, furniture and fixtures and other assets having long life. Such assets are used by the school over their useful life and, accordingly, depreciate over that period. Such assets are known as 'depreciable assets'.

57. Depreciation is a measure of the wearing out, consumption or other loss of value of a depreciable asset arising from use, effluxion of time or obsolescence through technology and market changes. Depreciation is allocated so as to charge a fair proportion of the depreciable amount in each accounting period during the expected useful life of the asset. Thus, the purpose of charging depreciation is to spread the cost of a depreciable asset over its useful life so as to charge it is an expense in the income and expenditure account. A corresponding depreciation fund may be created by a school, as a management decision or under a legal requirement, if any, to replace the asset on the expiry of its useful life. Thus, non-creation of a depreciation fund, if there is no legal requirement, does not adversely affect true and fair view of the financial statements even though it may be financially prudent to do so.

* * * * *

"Salaries, allowances and retirement benefits

59. A substantial portion of the revenue of a school is applied towards payment of salaries, allowances and retirement benefits to teaching and non-teaching employees. The expenditure

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should be booked as expense in the period in which the employee renders service.

60. As far as accounting for retirement benefits is concerned, it is recommended that the principles laid down in Accounting Standard (AS) 15, 'Accounting for Retirement Benefits in the Financial Statement of Employers '(Issued 1995), should be followed, the salient features of which, from the perspective of a school, are given below:

> *(i) The cost of providing retirement benefits to employees should be allocated to periods during which the services are rendered by the employees. This is because a school assumes obligation to pay retirement benefits in respect of an accounting period in consideration of services rendered by the employees during that period. Accounting for retirement benefit costs on cash basis, i.e., only when employees receive payments (termed as pay-as-you-go method), is not appropriate.*
>
> *(ii) … …*
>
> *(iii) … …*

* * * * *

"Investments

72. As per Accounting Standard (AS) 13, investments are "assets held by an enterprise for earning income by way of dividends, interest, and rentals, for capital appreciation, or for other benefits to the investing enterprise". Schools may invest their funds in securities such as, government bonds and units. They may also invest monies received in respect of specific funds created by them with a view to liquidate them at the time of incurrence of the expenditure for the specified purpose.

* * * * *

"Fund Based Accounting

95. Schools may receive grants/donations and other forms of revenue the use of which is unrestricted, (i.e., these funds can be used for the general purposes of the school) or the use of which is subject to the restrictions imposed by the contributors (i.e., such funds can only be used for specific purposes and, therefore, are not available for the school's general purposes). Also, the schools may, on their own, earmark certain funds for specific purposes, e.g., library fund for purchase of books for the library. For the purpose of appropriate presentation of these funds in the financial statements, it is necessary to understand their nature and characteristics, which are described below:

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(a) Unrestricted funds: Unrestricted funds refer to funds contributed to a school with no specific restrictions. These funds are used for the general purposes of the school. All revenues (donations, grants, investment income, fees, etc.) not subject to external restrictions are a part of 'unrestricted funds'. For the purpose of presentation in the income and expenditure account and the balance sheet the unrestricted funds are classified into two categories, viz., designated funds and general fund.

(i) Designated funds: Designated funds are unrestricted funds which have been set aside by the school for specific purposes or to meet future commitments, e.g., library fund and science fund. Unlike restricted funds, any designations are self-imposed and are not normally legally binding. The school can lift the designation whenever it wishes to and reallocate the funds to some other designated purpose(s).

(ii) General fund: 'Unrestricted funds' other than the 'designated funds' are a part of the 'General fund'.

(b) Restricted funds: Restricted funds are subject to certain conditions set out by the contributors and agreed to by the school when accepting the contributions. The restriction may apply to the use of the moneys received or income earned from the investment of such moneys or both.

Endowment funds are a form of restricted funds. Endowment funds are those funds which have been received with a stipulation from the donor that the amount received should not be used for any purpose and only the income earned from investments of these funds can be used either for general purposes of the school or for specific purposes, depending on the terms of the contribution made. Usually, the amount received is invested outside the school as per the terms of the contribution, if any.

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The manner of creation, utilisation of various types of funds, including income from investments of the funds, has been dealt with in the following paragraphs.

* * * * *

"***Restricted Funds***

99. Restricted funds that represent the contributions received whose use is restricted by the contributors, are credited to a separate fund account when the amount is received and reflected separately in the balance sheet. Such funds may be received for meeting revenue expenditure or capital expenditure. Where the fund is meant for meeting revenue expenditure, upon incurrence of such expenditure, the same is charged to the income and expenditure account ('Restricted Funds 'column); a corresponding amount is transferred from the concerned restricted fund account to the credit of the income and expenditure account ('Restricted Funds 'column). Where the fund is meant for meeting capital expenditure, upon incurrence of the expenditure, the relevant asset account is debited which is depreciated as per the recommendations contained in this Guidance Note. Thereafter, the concerned restricted fund account is treated as deferred income, to the extent of the cost of the asset, and is transferred to the credit of the income and expenditure account in proportion to the depreciation charged every year (both the income so transferred and the depreciation should be shown in the 'Restricted Funds 'column). The unamortised balance of deferred income would continue to form part of the restricted fund. Any excess of the balance of the concerned restricted fund account over and above the cost of the asset may have to be refunded to the donor. In case the donor does not require the same to be refunded, it is treated as income and credited to the income and expenditure account pertaining to the relevant year ('General Fund 'column). Where the restricted fund is in respect of a non-depreciable asset, the concerned restricted fund account is transferred to the 'General Fund' in the balance sheet when the asset is acquired."

(emphasis supplied)

113. Once a school is required to maintain its accounts as a not-for-profit organisation for purposes of the IT Act, and to that end the ICAI

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Guidance Note as referred-to above, in purported exercise of its powers under the DSE Act, the DoE surely cannot foist upon a school an accounting system *that is in conflict* with the provisions of the IT Act and the ICAI Guidance Note. It must be borne in mind that the ICAI Guidance Note was in fact drawn-up because prior to that, schools were not adequately meeting the accountability concerns of donor agencies, including the government and other stakeholders such as parents, who provide funds to schools. The ICAI Guidance Note was intended to streamline the basis of accounting being followed across schools, so as to bring it in line with the scientific accrual basis of accounting and other accepted accounting practices. The objectives of the ICAI Guidance Note bear repetition:

> *"**Objectives***
>
> *3. The objectives of this Guidance Note are to recommend–*
>
> *(i). application of sound accounting principles pertaining to recognition, measurement and disclosure of various items of income and expenses, assets and liabilities in the financial statements of schools keeping in view the peculiarities of the activities of the schools, and*
>
> *(ii). formats of financial statements keeping in view not-for-profit being the objective of the school,*
>
> *with a view to harmonise the diverse accounting practices being followed in the schools."*

(emphasis supplied)

114. The DoE cannot seek to enforce a parallel accounting regime for schools, which is in dissonance with settled accounting principles and practices, including the GAAP, ICAI Guidance Note as well as the extant taxation system.

115. It is hardly available to the DoE to arrogate to itself the prerogative of asking a school *not to follow* the ICAI Guidance Note.

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116. From a perusal of the impugned orders passed by the DoE, it is evident that in each of the cases, the DoE has *added* monies that are held by the schools under various heads such as contingency fund/reserve fund/development fund/other similar funds to the 'funds available' with the school for paying salaries and allowances to teachers and staff. Based on accepted accounting principles, such monies *cannot* be deployed to defray operational expenses of a school, such as towards salaries, allowances and other such expenses.

117. In fact Rules 176 and 177(3) of the DSE Rules and section 18(4)(b) of the DSE Act specifically *prohibit diversion of money* collected for a certain purpose for use towards a different purpose, by laying down that income derived for a specific purpose must be used only for that purpose. The essence of DoE's stand, that as long as a school *has money lying in its account*, regardless of the head of account in which the money is held, such money is to be treated as funds available with the school, and *all such money must be used* by the school for paying salaries and allowances to teachers and staff and for other operational expenses, *amounts to forcing a school to mis-utilise funds contrary to statutory provisions and prohibitions*; and is completely inconsistent with fiscal discipline and prudence.

118. Even though as the impugned orders contain a detailed audit of the schools' finances, which audit is *per-se* permissible under Rule 180 of the DSE Rules, the impugned orders still cannot sustain in law since on a perusal of the orders it is clear that in calculating the 'surplus funds' available with the schools, the DoE has proceeded on a wholly misconceived and illegal basis by adding to the 'surplus funds' monies

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held by the schools in specific funds, though such monies cannot be deployed towards payment of salaries and allowances to teachers and staff, or for other operational expenses.

119. Having regard to the well-recognised and binding principles embodied in GAAP as applicable to not-for-profit institutions, as well as the ICAI Guidance Note governing such entities, it is difficult to comprehend how the DoE could insist that a school disregard these established accounting principles and practices, and treat *all amounts* reflected in its books of accounts as funds available for operational expenditure, such as the payment of salaries and allowances to teachers. It is indeed perplexing that a statutory authority such as the DoE should direct an educational institution to deploy its financial resources in a manner inconsistent with recognised accounting norms and in violation of statutory requirements.

120. It must be stated in clear terms, that the scope and ambit of the DSE Act and the role to be performed by the DoE in enforcing the provisions of that statute, does not empower the DoE to change settled accounting practices and principles, merely because as part of its role under the DSE Act, the DoE is also tasked with preventing commercialisation and profiteering by schools.

121. Arising from the above discussion, the clear mandate of the law is that a private, un-aided, recognised school must maintain its accounts on the 'accrual system' of accounting in accordance with the IT Act and the ICAI Guidance Note. Consequently, the impugned directions issued by the DoE in connection with fee-hike proposals that are subject matter of the present petitions are held to be contrary to the provisions of the IT Act and the ICAI Guidance Note; and are accordingly impermissible and

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untenable in law. *Point for determination No. 3 stands answered accordingly*.

X. ANSWER TO POINT FOR DETERMINATION NO. 5

5. Whether the orders/circulars/directions issued by the DoE do not put in place a 'fair scheme' for fee fixation, in that

5.1. they do not allow a school to have a 'reasonable surplus', to be applied for future growth, development and expansion of the school, including for construction of school buildings, or for addition or improvement of infrastructural facilities, or for development/establishment of another educational institution run by the same society/trust/body;

5.2. they do not allow a school to hike fee to meet revenue expenditure (e.g., payment of salaries and allowances etc.);

5.3. they direct that savings and income from previous years retained by way of Contingency Reserve Fund, Development Fund, Depreciation Reserve Funds, be applied towards revenue expenditure, instead of being retained for capital expenditure;

5.4. they do not allow a school to hike fee for repayment of loans (and interest thereon) taken for development of the school;

5.5. they do not allow a school to retain funds for meeting statutory liabilities and obligations e.g., for payment of gratuity, leave encashment, retiral benefits etc.; and treat those monies as funds available for meeting revenue expenditure;

5.6. they do not allow a school to charge 'earmarked' levies such as activities fee, smart-card fee, annual fee, admission fee etc., as part of the fee payable by a student;

5.7. they do not allow a school to retain funds for purchase of capital assets e.g., school buses, vehicles etc. for use of students, staff and management of the school;

5.8. they do not allow fee collected to be applied towards payment of salaries/remuneration of full-time Chairman/ Director /Manager /Consultant/ Managing Committee members ;

5.9. they do not allow fee collected to be applied towards payment of remuneration to a school's employees at rates higher than Government employees or more than minimum wage;

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5.10. they do not allow increase of more than 10% in proposed budgetary expenses above the previous year's expenses;

5.11. they do not approve projected fee for an Academic Session based on the statutorily audited balance sheet of the school;

5.12. they add monies deposited pursuant to court orders, lying under lien with the court, to the funds available with a school for meeting revenue expenditure;

5.13. they do not allow award of scholarships from school funds, and direct that scholarships awarded be recovered from the society/trust/body running the school;

5.14. they treat un-refunded caution money as part of funds available with the school for meeting revenue expenditure.

122. While answering the point for determination No. 5, this court would preface its views by stating that a 'fair scheme' for fee fixation would be one that permits a school to avail the scheme set-out in Rule 177 of the DSE Rules as regards utilisation of the income derived by the school, while also permitting the school sufficient fiscal flexibility to provide infrastructure and other facilities to its students and also plan its future development and growth.

123. Rule 177 sets-out a neat scheme for utilization of the "income derived" by a school "by way of fees". The scheme is as follows:

123.1. *First*, the income derived is to be utilized for meeting the pay, allowances and other benefits admissible to employees of the school;

123.2. *Second*, from the income derived (i) provision is to be made for payment of pension, gratuity, and other specified retirement and other benefits to employees *plus* (ii) provision is to be made for expansion of the school or expenditure of developmental nature *plus* (iii) provision is to be made for expansion of school building

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or expansion or construction of any building/hostel *plus* (iv) provision is to be made for co-curricular activities of students *plus* (v) provision is to be made for reasonable reserve fund not less than 10% of the "savings".

123.3. *Third*, the "savings" arrived at after applying the income towards the first and second heads mentioned above, are to be utilized for capital or contingent expenditure *or* for the following educational purposes: (i) award of scholarships to students; (ii) establishment of any other recognised school; (iii) assisting other school or educational institution under management of same society or trust;

123.4. *Fourth*, earmarked funds collected for specific purposes, *e.g.,* sports, co-curricular activities, excursions, magazines, annual charges etc. are to be spent solely for the benefit of the students and are not to be included in the savings.

124. Also, Rule 176 of the DSE Rules says that income derived for a specific purpose shall be spent *only* for that purpose.

125. Since Rule 177(1) of the DSE Rules provides that the "income derived" by a school by way of fees is to be utilised, in the first instance, to meet the pay, allowances and other benefits admissible to its employees, it is elementary that if the pay, allowances and other benefits admissible to employees are to increase, for any reason, such increase must be defrayed from the *income derived* by the school *by way of the fee charged* to the students. Rule 177 does not say that increase in the pay, allowances or other benefits to be given to the employees are to be paid by the school *from any other earmarked funds or surplus fund* retained by the school. Therefore, to defray any increase in the pay, allowances

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and other benefits payable to its employees, which would include its teachers, staff, and contractual employees, *a school must increase the income derived by way of fee*, by hiking its fee. This course of action is clearly permissible on a bare reading of Rule 177(1) of the DSE Rules.

126. Keeping the above in mind, in the opinion of this court, and based on the relevant rulings of the courts, the queries under Point for Determination No. 5 are answered as follows:

126.1. In its decision in *TMA Pai, Islamic Academy, Modern School, PA Inamdar, Action Committee, Cochin University of Science and Technology,* and *Modern Dental College*, the Supreme Court has specifically held that a school is entitled to have a 'reasonable surplus', which in the case of schools covered by the DSE Act, would mean a 'surplus' in terms of Rule 177 of the DSE Rules. The utilization of such surplus would be governed by the scheme of Rule 177, as set-out above; and it cannot be the DoE's diktat that a school should utilize its surplus towards meeting revenue expenses such as salaries of staff, teachers or contractual employees.

126.2. A surplus, by its very definition, is a *financial buffer* to be utilised in times of need, towards legitimate purposes as permissible under the DSE Act, and cannot be utilised for day-to-day or recurring expenses.

126.3. To reiterate, the availability of a reasonable surplus in the hands of a school is specifically contemplated under Rule 177(2)(e) of the DSE Rules, and a school cannot be expected to operate on a

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hand-to-mouth basis, with no surplus available in its hands. *Point for determination No. 5.1 stands answered accordingly*.

126.4. At the risk of repetition, since the pay, allowances and other benefits admissible to employees are to be paid from the "income derived" by a school "by way of fee",[41] any increase in the pay, allowances and other benefits admissible to employees of the school, such as teachers, staff and contractual employees, must also necessarily be defrayed from the income derived by the school by way of fee charged to the students. The DoE cannot require a school to defray such revenue expenses by utilizing any revenue fund or any earmarked fund that the school may be holding for other specific purposes, since those funds are created in accordance with the scheme of Rule 177 of the DSE rules and are intended to be used for specific purposes, which may arise now or in the future. Also, Rule 176 specifically bars the utilization of income that may be derived from collections of earmarked funds for specific purposes for any other purpose. On the same analogy, money retained for capital or contingent expenditure cannot be applied towards revenue expenses; and any such requirement imposed by the DoE is impermissible. *Points for determination Nos. 5.2 and 5.3 stand answered accordingly*.

126.5. Insofar as the repayment of loans and interest thereon is concerned, this court is of the view, that if the loan is taken for the infrastructural or other development of a school as permissible

[41] Rule 177(1)

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under Rule 177 of the DSE Rules, *e.g.,* for expansion of the school building, or the establishment or expansion of hostel accommodation, or for any expenditure of a developmental nature (including for adding buses and other vehicles for use of the students or staff or employees of a school), the repayment of such loan and interest thereon would have to be incurred from the "income derived" by the school "by way of fees" charged to the students. *Provided* the purpose for which the loan is taken is legitimate, the liability for repayment of such loan or interest thereon cannot be excluded from the consideration of fee chargeable to students. *Point for determination No. 5.4 stands answered accordingly*.

127. It needs no explanation that a school must be permitted to retain funds for meeting their statutory liabilities and obligations, such as payment of gratuity, leave encashment and other retiral benefits, as specifically provided in Rule 177(2)(a) of the DSE Rules. In fact, the Rule contemplates that "savings" for purposes of Rule 177 shall be arrived at *after* providing *inter-alia* for pension, gratuity and other retiral benefits admissible to the employees of the school. Therefore, to treat the funds retained by a school for meeting these statutory liabilities as 'funds available' to defray revenue expenses is anathematic to basic fiscal prudence. *Point for determination No. 5.5 stands answered accordingly*.

128. Rule 177(3) of the DSE Rules mandates that a school must spend any funds collected for a specific purpose, *e.g.,* for sports, co-curricular activities, subscriptions for excursions and magazines and annual charges *solely* for the benefit of students; and that such funds are not be

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included in the "savings" under Rule 177(2). This implies that a school *is permitted* to charge earmarked levies for specific purposes and activities *provided of course* such levies are used for the earmarked purpose. If a school abides by the purpose, the school cannot be faulted for collecting of such charges and any objection by the DoE in that respect is impermissible. *Point for determination No. 5.6 stands answered accordingly*.

129. The creation of a depreciation reserve fund towards replacement of capital assets on expiry of their useful life is specifically contemplated in paras 56-57 of the ICAI Guidance Note. The amount lying in the depreciation reserve fund is money that would be required by a school at a later date to replace capital assets, such as school buses, vehicles etc., once the useful life of the asset is over. For the DoE to add the money lying in the depreciation reserve fund to the 'funds available' with a school, would imply that at a subsequent stage the school would not have the funds to replace a capital asset. This is clearly impermissible. *Point for determination No. 5.7 stands answered accordingly*.

130. Even though the DSE Act and the DSE Rules contemplate the role of a 'manager'[42] in relation to a school under the scheme of management made under section 5 of the DSE Act, the DoE goes so far as to contend that the manager of a school is *not an employee* of the school and therefore cannot be paid any salary from the school fund. However, rules 59(2)(n) and 91 of the DSE Rules specifically contemplate payment of

[42] section 2(m) of the Delhi School Education Act, 1973

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salary to a manager (provided the manager is not also the head of the school). Extrapolating the same argument, the DoE has also contended, that since there is no position of a Chairman/Director/Manager/ Consultant/Managing Committee/Member in a government school, persons holding those positions in a private, un-aided, recognised school would not be entitled to any remuneration, honorarium or allowance, except to attend meetings. The DoE's stand in this behalf is wholly untenable for the reason that any institution requires an administrative setup if it is to be run professionally and efficiently. Even for a school to retain its recognition with the DoE, the school must comply with the fairly complex and arcane provisions of the DSE Act and the DSE Rules. Surely that task cannot be left only to the faculty members; and such matters must be entrusted to the administrative setup of the school. It is noteworthy, that the DSE Act provides that a school must have a Managing Committee and contemplates a fairly large membership of such committee. A Managing Committee is necessary to guide the policy and plans of the educational institution, which would then be implemented by an executive and administrative setup. That being the case, the DoE cannot dictate to a private, un-aided, recognised school as to how its executive and administrative setup is to be structured. The DoE cannot decide as to whether a school should have a Chairperson and/or a Director and/or any other such office bearer anymore than it can dictate as to how many teachers a school may have. Ergo, a private, un-aided, recognised school must have the liberty to decide its own executive and administrative structure. Now, for the DoE to expect that the persons manning the executive and administrative positions in a

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school *must do so gratis, can only be envisaged in la-la-land*. Persons tasked with the responsibility of managing the affairs of a school cannot be expected to work for free, nor can they be paid from a source other than the fees charged from students.

131. It must also be noticed that a government school ordinarily functions under the overall administration and management of the Directorate of Education; and therefore, individual government schools do not require a full administrative setup. However, a private school would require such administrative setup, which may include a Chairperson, a Director, a Manager and other such administrative officers and support staff to run the establishment, in addition to the teachers who would discharge the teaching function. A proper and efficient administrative and support structure would be necessary for a student to get an enriching curricular and extra-curricular experience, for which experience parents send their wards to attend private schools. Looked at from this perspective, applying the "income derived" by a school "by way of fee" to defray the pay allowances and other benefits admissible to the administrative personnel and set-up would be perfectly legitimate. The assessment of a fee-hike proposal must therefore necessarily take into account such expenses. Any objection by the DoE in that respect is impermissible. *Point for determination No. 5.8 stands answered accordingly*.

132. The stand taken by the DoE in relation to the pay scales and allowances admissible to employees of private, un-aided, recognised schools based on their reading of section 10(1) of the DSE Act is *completely contrary* to a plain reading of that provision. Section 10 of the DSE Act mandates that the scales of the pay, allowances, medical facilities, pension,

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gratuity, provident fund and other prescribed benefits of a private, un-aided, recognised school *shall not be less* than those of the employees of the corresponding status in schools run by the government. No provision bars a private school to pay its employees including teachers, staff and contractual employees at rates *higher than government school employees*. In fact, as observed by the Supreme Court in *T.M.A. Pai Foundation*, to attract better talent, and to remain competitive as an educational institution, it is necessary for an institution to offer better terms, including higher remuneration and benefits to its employees. Therefore, any action of the DoE that does not allow a school to pay higher remuneration to its employees, is impermissible. *Point for determination No. 5.9 stands answered accordingly*.

133. It is common knowledge that budgetary expenses for an institution, or for that matter even a household, require increase from year-to-year if only on account of inflation. Therefore, to not allow increase in budgetary expenses above the previous year's expenses, by a reasonable percentage at least covering for inflation, cannot be held to be permissible. *Point for determination No. 5.10 stands answered accordingly*.

134. Section 18(5) of the DSE Act requires a school to file with the DoE, every year, its duly audited financial and other returns, based on which the DoE is entitled to conduct an audit. Statutorily audited accounts of a school have a certain credibility, and it is therefore permissible for a school to set-down its projected fee for a given academic session based on such accounts. The DoE can therefore assess a fee-hike statement (even at the commencement of an academic session) based on statutorily

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audited accounts of a school. However, it is clarified that *no prior approval* is required for fee-hike at the commencement of an academic session, as has been held above. *Point for determination No. 5.11 stands answered accordingly*.

135. It should not need articulation, that monies lying under lien with a court are to be disposed-of and dealt with *only* in accordance with court orders. For the DoE to take the position that such monies are also 'funds available' with schools for meeting revenue expenses is wholly misconceived, and bordering on the contemptuous. Such monies can never be taken as part of the funds available to the school. *Point for determination No. 5.12 stands answered accordingly*.

136. Proviso (a) to Rule 177(1) of the DSE Rules specifically permits a school to utilize its "savings" for awarding scholarships to students; and there is no requirement that the scholarships awarded are to be recovered from the society or trust that owns the school. Such requirement imposed by the DoE is wholly impermissible. *Point for determination No. 5.13 stands answered accordingly*.

137. Caution money held by a school is to be refunded, on demand, to a student graduating or dropping out from school, as per rules. If such money is spent on revenue expenses, it may no longer be available when a student demands its refund. Any contrary requirement by the DoE in this behalf, is impermissible. *Point for determination No. 5.14 stands answered accordingly*.

138. While still on the DoE's objections as to utilization of funds by a private, un-aided, recognised school, it may also be observed that a plain reading of Rules 173 and 174 of the DSE Rules show that there is no requirement

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in law that the school fund is to be retained in a nationalized or a scheduled bank, or at a post office *in the joint names* of the Deputy Director of Education and the Manager of the school as contended on behalf of the DoE. All that Rule 173 requires is that the school fund is to be kept deposited in a nationalized bank or a scheduled bank or a post office "in the name of the school". Furthermore, Rule 174 says that *withdrawals* from the school fund shall be made jointly by the Head of the school and the Manager of the school or jointly by the Head of the school and a duly authorized Managing Committee member (if the Head of the school is also the Manager of the school). The objection taken by the DoE that the school fund must only be kept in the joint names of the Deputy Director of Education and the Manager of the school is therefore wholly misconceived and without basis.

XI. ANSWERS TO POINTS FOR DETERMINATION NOS. 6, 7 & 8

> *6. Whether the DoE is empowered to impose upon a school a decision in relation to fee-hike that is contrary to the decision of the school's Managing Committee, taken by majority, on which committee the DoE has its representatives.*
>
> *7. Whether the DoE should be required to approve or reject the statement of proposed fee submitted by a school in a time-bound manner; and if so, within what time-line; and failing that, should the proposed fee be deemed to have been approved.*
>
> *8. Whether the fee-hike permitted by the DoE for a particular Academic Session should be applicable from the first day of that Academic Session; and not from the date of the order permitting the increase. What should be the position in relation to fee-hike proposals filed several years ago, that are still pending with the DoE.*

139. As a sequitur to what has been held above, and in answer to the point for determination No.6, this court is of the view, that *in principle*, the DoE *has the power* to impose upon a school a decision in relation to fee-hike overriding the decision taken by a majority of the managing committee

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of the school, even though the managing committee comprises representatives of the DoE. However, the DoE can *only* exercise this power *provided* – and this is a serious *caveat* – the DoE *first makes a determination* that the school has indulged in *profiteering* or *commercialisation* based on an audit to be conducted by the prescribed authority under section 18(5) of the DSE Act, but *not on a presumption* at the stage when the school submits its statement of fees for an ensuing academic session under section 17(3) of the DSE Act.

140. Furthermore, since the nominees of the DoE sit on the managing committee of every private, un-aided, recognised school, and have a voice in the decisions taken by the managing committee, a fee-hike decision taken unanimously by the managing committee or with the consent of the nominees *should ordinarily be respected*, since it is expected that the DoE's representatives on the managing committee would have applied their mind and given their consent with due consideration to the aspects of profiteering and commercialisation, before approving a fee-hike. *Point for determination No. 6 stands answered accordingly*.

141. Insofar as point for determination No.7 is concerned, since this court has held that *no prior approval* is required for a school to hike its fee *at the commencement of an academic session*, the question of submitting the statement of fee for purpose of *seeking approval or rejection* at that stage, does not arise. As a result, the question of there being any timelines for that purpose, is also irrelevant.

142. However, if a school proposes to hike its fee *during an ongoing academic session*, in the opinion of this court a fair and equitable system

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would be to put down strict timelines to be met by both sides for the process. To this end, the following directions are issued: *(i)* The school must submit its proposal for a mid-session fee-hike at least 02 months before the date from which the school proposes to implement its fee-hike; and *(ii)* the DoE must take a decision on the fee-hike proposal within the said period of 02 months, failing which, the fee-hike proposal must be deemed to have been approved. Most importantly, the DoE's decision as to a fee-hike proposal must be based on a determination of profiteering or commercialisation by a school after conducting an audit under section 18(5) of the DSE Act following the principles of natural justice, as have been enunciated above. Such a system would address the interests of all parties, including the students attending the school, and would obviate the immense financial complications that arise for the schools as well as for the parents on account of the tardiness displayed by the DoE in taking such decisions thus far. *Point for determination No. 7 stands answered accordingly*.

143. As to the date from which a fee-hike proposal approved by the DoE should come into force, the answer is that such a proposal would relate only to a mid-session fee-hike which the school would have proposed from a certain date; and if such proposal is permitted by the DoE, the increased fee would be applicable from the date proposed by the school. The date on which the DoE grants the permission would have no relevance to the date from which the mid-session fee-hike would come into effect. The status of long-pending fee-hike proposals have been answered hereinafter. *Point for determination No. 8 stands answered accordingly*.

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XII. SUMMARY OF DECISION

144. To summarise, this court holds – *nay only reaffirms*:

144.1. That under section 17(3) of the DSE Act *no prior permission or sanction* is required by a private, un-aided, recognised school to increase its fee *at the commencement of an academic session*; and the only statutory obligation upon a school is that it must *file* its *statement of proposed fee* with the DoE *prior* to commencement of an academic session;

144.2. That under section 17(3) of the DSE Act however, a private, un-aided, recognised school *does require prior approval* of the DoE *if* the school proposes to implement a fee-hike *during an ongoing academic session*. In order to put in place a fair and time-bound approval system for such mid-session fee-hike, the procedure set-out above is required to be followed;

144.3. That *mere availability of surplus funds* with a private, un-aided, recognised school, howsoever large, cannot be the sole basis for the DoE to infer that the school is indulging in *commercialisation* or *profiteering,* and to thereby object to fee-hike by a school. The aspect of commercialisation or profiteering can only be examined and determined by the DoE after conducting a full-dressed financial audit of a school by the prescribed authority in terms of section 18(5) of the DSE Act, based on duly audited financial and other returns that a school files before the DoE;

144.4. That a private, un-aided, recognised school is not expected to follow a system of accounting different from what is required of a 'not-for-profit institution' under the Income-tax Act, 1961 and the

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ICAI Guidance Note dated 21.07.2005 [GN(A) 21], which note specifically prescribes how schools are to maintain their accounts. The DoE is not empowered to demand that a school should maintain a different, parallel set of accounts in accordance with the DoE's diktat and to assess the funds available with a school on that basis;

144.5. That there is no distinction between a private, un-aided, recognised school with a 'land-clause' and one without a 'land-clause' insofar as the powers, role and obligations *of the DoE under the DSE Act* are concerned. A 'land-clause' does not override or supplant the statutory scheme under sections 17 and 18 of the DSE Act and Rule 177 of the DSE Rules. If after a full-dressed audit of the accounts of a 'land-clause' school, the DoE finds that the school is indulging in profiteering or commercialisation, the DoE may inform the land-owning/land administering agency accordingly; and such agency may take action against the school as may be permissible under the terms of the lease.

144.6. That as per Rule 180 of the DSE Rules the accounts of a private, un-aided, recognised school are open to inspection by auditors and inspecting officers of the DoE, as well as by any authorized officer of the Comptroller & Auditor General of India ('CAG'). Though this rule clearly mandates transparency of the accounts of a school, such transparency does not translate to a requirement that a school must obtain *prior permission* of the DoE for increasing its fee at the commencement of an academic session; and

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144.7. That within the bounds of the DSE Act and the DSE Rules, as interpreted by the courts, a private, un-aided, recognised school enjoys financial autonomy, and it is not for the DoE to dictate or micro-manage how the fiscal affairs of a school are to be conducted.

145. In the above view of the matter, the orders passed by the DoE *to the extent they have rejected* the fee-hike proposals by schools at the commencement of an academic session cannot be sustained in law, since such orders have been passed on the basis of a misconceived exercise conducted by the DoE demanding that the schools must seek *prior* approval for increasing their fee even at the commencement of an academic session. *All such impugned orders are accordingly quashed and set-aside.*

146. Insofar as the fee-hike proposals that are still pending consideration before the DoE are concerned, since those proposals are also based on the misconceived notion that prior approval of the DoE was required for fee-hike even at the commencement of an academic session, such proposals pending with the DoE stand closed.

147. However, before closing the present batch of petitions, this court must also attempt to redress the utterly confused position that has resulted from the repeated, misconceived actions of the DoE. Since the DoE has sat on fee-hike proposals for several years, the petitioner schools have been unable to legitimately increase their fee over several academic sessions, placing some of them in serious financial disarray. *If however*, the pending fee-hike proposals, some of which relate back to the year 2016-17, are allowed to be implemented at this stage after lapse of

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several years, it would put an inordinate and unacceptable burden on the parents/students, who would have to pay arrears of fee for the past several years.

148. On the other hand, the schools entertain a justifiable grievance, that their financial position has become precarious over the last several academic sessions, since they have been unlawfully disallowed from increasing their fee from time-to-time, proportionately with their financial needs and economic realities at the relevant time.

149. Consequently, the obduracy of the DoE to act in excess of its authority, and in disregard of the law laid-down by the Supreme Court as well as in several pronouncements of this court, has placed both the parents and the schools in an unenviable position.

150. In the circumstances, while this court is unable to offer full redressal *to both* the parents and the schools, it appears that the equitable option would be to direct that the fee increase *last proposed* by various schools in their respective statements of fee filed with the DoE *would apply but only from the next academic session beginning April 2027*; and no school shall demand or recover from any parent or student any arrears of fee or other charges retrospectively for the past academic sessions.

151. All petitions are disposed-of in the above terms.

152. Pending applications, if any, also stand disposed-of.

ANUP JAIRAM BHAMBHANI, J.

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