

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.25418 of 2019

1. Association of Independent Schools Bihar, a society registered under the Society Registration Act, XXI, 1860 having its registered office at above Harilal Sweets, West Boring Canal Road, Patna, Bihar through its General Secretary Dr. Rajiv Ranjan Sinha, Son of Late Shiva Narain Sinha, Resident of West Boring Canal Road, P.O.- G.P.O., Police Station- Sri Krishnapuri, District- Patna.
2. Dr. Rajiv Ranjan Sinha Son of Late Shiva Narain Sinha Resident of West Boring Canal Road, P.O.- G.P.O., Police Station- Sri Krishnapuri, District- Patna.

... .. Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary, Education Department, Government of Bihar, Patna.
2. The Divisional Commissioner, Patna, Bihar.
3. The Regional Deputy Director, Education Department, Government of Bihar, Patna.

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr. Bindhyachal Singh, Sr. Advocate Mr. Prashant Sinha, Advocate Mr. Sanchit Singh, Advocate
For the Respondent/s	:	Mr. Binay Kr. Pandey, AC to GA-2

CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE RAJIV ROY

CAV JUDGMENT

(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 25-01-2024

The petitioner, an Association of private schools in the State of Bihar is aggrieved with the fee regulatory measure attempted by the State through a legislation as is evident from the Bihar Private Schools (Fee Regulation) Act, 2019 (for brevity, the Fee Regulation Act). The petitioners have sought for declaring Sections 3, 4 and 5 of the Fee Regulation Act



ultravires and also prayed for setting aside the letter dated 08.11.2019, issued by the Regional Deputy Director, Education Department, Patna, directing the private schools within the Patna division to ensure an increase of not more than 7 % in the fee amount realized from the students, applicable from the last academic year.

2. With regard to the direction issued by the Regional Deputy Director, a *status quo* was directed to be maintained by another Division Bench by order dated 19.12.2019. The Fee Regulation Act, by virtue of the said direction has remained defunct and as of now, the challenge against the Regional Deputy Director's communication cannot survive as the direction itself has worked itself out. We would confine ourselves to the grounds raised of the provisions being *ultravires*.

3. Sri. Bindhyachal Singh, learned Senior Counsel at the outset, pointed out that restricting the increase of fees to 7% in itself is arbitrary. Though there is a Fee Regulatory Committee constituted, there are no guidelines as to how the requests made by the private schools are to be considered. There could be various factors regulating the quantum of fees that would be payable; one of which could be the rural or urban



setting in which the school is placed. The Fee Regulatory Committee (for brevity, 'FRC') in the absence of guidelines on how to fix the fees has unbridled power, which could be exercised prejudicing the private schools, thus putting into jeopardy education of children, even when the parents are willing to pay the fees fixed. There is no rationale in providing by a legislation, that the increase in every subsequent year shall be confined to 7%. Sub-sections (4) and (5) of Section 4 militate against each other, and results in inconsistency.

4. The learned Senior Counsel would rely on the decisions in *Islamic Academy of Education and Anr. v. State of Karnataka and Anr*; AIR 2003 Supreme Court 3724, *T.M.A. Pal Foundation and Ors. v. State of Karnataka*; AIR 2003 Supreme Court 355 & *P.A. Inamdar and Ors. v. State of Maharastra and Ors.* AIR 2005 Supreme Court 3226 to argue that though the said decisions are with respect to minority institutions, the financial autonomy of the educational institutions declared therein, is unimpeachable and those decisions apply squarely. It is pointed out that the regulation is violative of Article 19(1)(g) of the Constitution of India. In addition to the argument of no guideline having been prescribed for the 'FRC' to follow, it has also been argued that there is no



appellate remedy provided, as was the case in the State of Rajasthan, wherein the legislation upheld, had two hierarchical authorities constituted to consider the regulatory measure of fees made by the original authority; one appellate and then revisional. The decision of the Hon'ble Supreme Court upholding the legislation in the State of Rajasthan, ***Indian School v. State of Rajasthan, (2021) 10 SCC 517***, is also relied on. In passing, it also asserted that the Central Board of School Education has a method of regulation, which is impinged upon by the subject legislation. Immediately it has to be observed that to a specific query as to the pleading regarding the regulatory measure of Central Board of Secondary Education; the learned Senior Counsel admits there is none.

5. The learned Assisting Counsel to Government Advocate-2, Sri. Binay Kumar Pandey points out that the issue is no longer *res integra* and relies on a judgment of a Division Bench of the Gujarat High Court in **Writ Petition (PIL No. 132 of 2017)**; titled as **Atulkumar Niranjanbhai Dave v. The State of Gujarat and analogous cases decided on 27.12.2017**.

6. Though reference is made to a number of decisions, we are of the opinion that the issue is squarely covered by the judgment of the Hon'ble Supreme Court in



Indian School (supra). The legislation which came up for consideration in ***Indian School*** (supra), if compared with the instant legislation, would resolve the grounds raised in this case. Before comparison of the provisions of the legislation, we cannot but notice that in ***Indian School*** (supra), ***T.M.A. Pal Foundation*** (supra) and ***Society for Unaided Private Schools of Rajasthan v. Union of India, (2012) 6 SCC 1***, are referred to. It was argued that the maximum autonomy regarding administration, including decision on the quantum of fees to be charged by the private unaided schools, is in public interest since only then, good quality schools are established. The State, on the other hand, justified the setting up of an external regulatory committee, which it was asserted was consistent with the jurisprudential exposition of this Court in the various cited judgments and would not fall foul of Article 19(1)(g) or Article 30 of the Constitution of India.

7. In ***Indian School*** (supra) in paragraph no. 20, after noticing the exposition of law in ***T.M.A. Pal Foundation*** (supra) regarding absolute autonomy of private unaided school managements to determine the school fees, ***Modern Dental College & Research Centre v. The State of M.P; (2016) 7 SCC 353*** was also noticed. It was found that in the later decision it



was held:-

‘...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 each of such institutions, commercialization is not permissible; and in order to ensure that the educational institutions are not indulging in commercialization and exploitation, the Government is equipped with necessary powers to take regulatory measures and to ensure that the private unaided schools keep playing vital and pivotal role to spread education and not to make money. The Court further noted that when it comes to the notice of the Government that the institution was charging fee or other charges which are excessive, it has complete authority coupled with its duty to issue directions to such an institution to reduce the same so as to avoid profiteering and commercialization’.

8. It was found further in paragraph no. 21 that it was recognized by the various precedents :-

“...that primary education is a fundamental right, but it was not an absolute right as private schools cannot be allowed to receive capitation fee or indulge in profiteering in the guise of autonomy to determine the school fees itself. The Court plainly noted that every school management of private unaided school is free to devise its own fee structure, but the same can be regulated by the Government in the interests of general public for preventing profiteering



and/or charging of capitation fee. Further, fixation of fees needs to be regulated and controlled at the initial stage itself.

9. Regulatory measures hence were necessary to prompt basic well-being for individuals in need, as held in ***Modern Dental College & Research Centre*** (supra). Paragraph nos. 90 to 92 were extracted, which paragraphs are also extracted hereunder: -

“90. Thus, it is felt that in any welfare economy, even for private industries, there is a need for regulatory body and such a regulatory framework for education sector becomes all the more necessary. It would be more so when, unlike other industries, commercialization of education is not permitted as mandated by the Constitution of India, backed by various judgments of this Court to the effect that profiteering in the education is to be avoided.

91. Thus, when there can be regulators which can fix the charges for telecom companies in respect of various services that such companies provide to the consumers; when regulators can fix the premium and other charges which the insurance companies are supposed to receive from the persons who are insured; when regulators can fix the rates at which the producer of electricity is to supply the electricity to the distributors; we fail to understand as to why there cannot be a regulatory mechanism when it comes to education which is not treated as purely economic activity but welfare activity aimed at achieving more



egalitarian and prosperous society by empowering the people of this country by educating them. In the field of education, therefore, this constitutional goal remains pivotal which makes it distinct and special in contradistinction with other economic activities as the purpose of education is to bring about social transformation and thereby a better society as it aims at creating better human resource which would contribute to the socio-economic and political upliftment of the nation. The concept of welfare of the society would apply more vigorously in the field of education. Even otherwise, for economist, education as an economic activity, favourably compared to those of other economic concerns like agriculture and industry, has its own inputs and outputs; and is thus analysed in terms of the basic economic tools like the laws of return, principle of equimarginal utility and the public finance. Guided by these principles, the State is supposed to invest in education up to a point where the socio-economic returns to education equal to those from other State expenditures, whereas the individual is guided in his decision to pay for a type of education by the possibility of returns accruable to him. All these considerations make out a case for setting up of a stable regulatory mechanism.

92. In this sense, when imparting of quality education to cross-section of the society, particularly, the weaker section and when such private educational institutions are to rub shoulders with the State managed educational institution to meet the challenge of implementing ambitious constitutional promises, the matter is to be examined in a different



hue. It is this spirit which we have kept in mind while balancing the right of these educational institutions given to them under Article 19(1)(g) on the one hand and reasonableness of the restrictions which have been imposed by the impugned legislation. The right to admission or right to fix the fee guaranteed to these appellants is not taken away completely, as feared. *T.M.A. Pai Foundation* [*T.M.A. Pai Foundation v. State of Karnataka*, (2002) 8 SCC 481, paras 60 and 61 : 2 SCEC 1] gives autonomy to such institutions which remains intact. Holding of CET under the control of the State does not impinge on this autonomy. Admission is still in the hands of these institutions. Once it is even conceded by the appellants that in admission of students “triple test” is to be met, the impugned legislation aims at that. After all, the sole purpose of holding CET is to adjudge merit and to ensure that admissions which are done by the educational institutions, are strictly on merit. This is again to ensure larger public interest. It is beyond comprehension that merely by assuming the power to hold CET, fundamental right of the appellants to admit the students is taken away. Likewise, when it comes to fixation of fee, as already dealt with in detail, the main purpose is that the State acts as a regulator and satisfies itself that the fee which is proposed by the educational institution does not have the element of profiteering and also that no capitation fee, etc. is charged. In fact, this dual function of regulatory nature is going to advance the public interest inasmuch as those students who are otherwise meritorious but are not in a position to meet unreasonable demands of capitation fee, etc.



are not deprived of getting admissions. The impugned provisions, therefore, are aimed at seeking laudable objectives in larger public interest. Law is not static, it has to change with changing times and changing social/societal conditions.”

10. It was then held so by the Hon’ble Supreme Court in *Indian School* (supra) in paragraph no. 24: -

24. After this jurisprudential exposition, it is not open to argue that the Government cannot provide for external regulatory mechanism for determination of school fees or so to say fixation of “just” and “permissible” school fees at the initial stage itself.

11. Next, the learned Judges dealt with the question as to whether the impugned enactments stand the test of reasonableness, rationality and balance the rights of educational institutions; being private unaided schools guaranteed to them by Article 19(1)(g) of the Constitution of India. In resolving these grounds, the Hon’ble Supreme Court elaborately looked at the Act and the Rules brought out in the State of Rajasthan, and it was on an examination of the various provisions that the grounds were negated.

12. The Rajasthan Act constituted a School Level Fee Committee (for brevity, the ‘SLFC’), which is an internal



committee to be constituted within the school. The Chairperson is nominated by the school management, the Secretary, is the Principal, and out of eight members, three are from among the teachers and five from the Parent Teachers Association. The term of the 'SLFC' was for a period of one academic year, and it was to meet at least once in three months. The proposal of the management regarding the fees to be levied was to be first submitted before the 'SLFC', at least six months before the commencement of the academic year. The fees can be levied only by the approval of the 'SLFC' which will also have the authority to decide fees afresh.

13. An appeal was provided to the Divisional FRC constituted under Section 7, wherein the officers of the Government, sourced both from the education and treasury departments, along with two representatives of the schools and two representatives of the Divisional Commissioner; the Chairman of the Committee, was enabled. There was a further Revision Committee under Section 10 to be constituted by the State Government, wherein the Secretary in-charge of the Department of Elementary Education was the Chairperson, and the members sourced from the departments of education and two representatives of the private schools, and two nominated



by the State Government.

14. In the subject legislation, challenged here, there is no 'SLFC' as has been constituted in the State of Rajasthan, which is an internal committee within the school. In fact, in ***Indian School*** (supra) the Managements argued that having teachers in the committee would result in impeding proper administration since the nominated teachers could align with the parents; which argument was not accepted by the Court.

15. Insofar as the regulation as brought under Section 4 of the subject Act, by sub-section (2), the schools have been granted a *carte blanche* insofar as increase in the fees to a maximum of 7 %, over and above that of the previous academic year. Rather than restricting the determination of fees or restricting the management from enhancing the fees at all, the subject enactment provides for an increase up to 7% without any reference to the authorities under the Act. In the Rajasthan enactment the internal committee has to consider and approve every stipulation of fees at the commencement of the academic year. In the State Of Bihar, as per the impugned enactment, only in cases where the management is of the opinion that the increase should be beyond 7%, it has to approach the 'FRC' before which a detailed proposal is to be submitted. This has to



be done before six months prior to the commencement of the next academic session. The Chairman of the 'FRC' constituted under Section 3 is the Divisional Commissioner, with its members being the Regional Deputy Director, Education, the District Education Officer of the divisional headquarter, two representatives of private schools nominated by the Divisional Commissioner, and two guardian representatives nominated by the Divisional Commissioner.

16. We cannot accept the ground raised of no further appeal having been provided since Section 8 of the subject enactment provides an appeal against the decision of the 'FRC' to be filed before the State Appellate Authority constituted under the Bihar State School Teacher and Employees Dispute Redressal Rules 2015. The said Appellate Authority constituted under the Dispute Redressal Rules of 2015 is comprised of a retired judge of the High Court and a retired officer of the Indian Administrative Service, not below the rank of Principal Secretary, the former of whom would be the Chairperson of the Authority.

17. Juxtaposing the scheme of the present Act with that of the Rajasthan Act, it has to be found that there is no arbitrariness vitiating the procedure delineated in the subject



Act. While the Rajasthan Act required the school to approach its internal committee, the 'SLFC', at the commencement of each year, whether there is an increase or not, in the subject enactment, there is an autonomy given to the management to increase the fees every year, restricting it to below 7% of that levied in the previous year. The Rajasthan Act, viewed in this perspective has two external authorities or independent Committees constituted hierarchically, to determine on any approval or disapproval made by the internal committee of the school. In the legislation impugned here, only when the management of the school decides to hike the fees above 7% it has to approach the 'FRC' and an appeal is provided to a duly constituted Appellate Authority.

18. Both the enactments thus provide two forums, in the hierarchy of original and appellate authorities, to oversee the decision of the school, that too early when the fees exceed 7% of the previous academic year in the State of Bihar and the School Level Fee Regulatory Committee, in the State of Rajasthan. Comparing the two enactments, when the internal committee's decision can be challenged before two authorities. As per the subject legislation, the decision of the school has to be with the approval of the independent committee constituted



under the Act, and there is an appeal provided again to an independent Appellate Authority constituted by the State.

19. Further submission is made by the petitioner regarding the inconsistency in sub-sections (4) and (5) of Section 4, which are extracted hereunder: -

4. Regulation of Fees in private schools:-

(4) The State Government shall have power to revise the seven percent limit from time to time.

(5) Any increase of more than seven percent proposed by a school shall be subject to due approval of the Fee Regulatory committee after its detailed scrutiny.

20. We do not discern any inconsistency as such since sub-section (4) confers power on the State Government to revise the 7% limit from time to time. Sub-section (5) mandates that an increase of more than 7% should be subject to due approval of the 'FRC'. The provisions only further the regulatory measure and does not fetter the autonomy of the management to increase the fees within the limit provided. It sure does confer power on the Government to revise the limit. When a revision is made by the State Government in the higher limit, necessarily sub-section (5) would have to be read with the cap so specified by the State Government.



21. Sub-section (5) deals with the powers and functions of the 'FRC', and it primarily confers power on the authority to determine whether the fees enhanced by the school beyond the limit prescribed is in conformity with the details furnished by the school and determine whether there are any collection of excess fees.

22. True, there are no guidelines prescribed insofar as assessing the various factors which would lead to the determination of reasonable fees, in the subject legislation, which was available in Section 8 of the Rajasthan Act, hedged in by additional factors as provided for in the Rules. The absence of guidelines cannot *ipso facto* result in invalidation of the Act framed, especially one in the nature of regulation aimed at ensuring that education is not commercialized and reduced to mere means of profiteering.

23. The State Government has been granted sufficient power to make rules under the subject enactment, which has not been made till date. It would be sufficient to direct the State Government to make rules, and till then, the factors for determining the fees to be adopted from the Rajasthan Act and the Rules, which are as extracted herein below from paragraph nos. 31 and 32 of ***Indian School*** (supra)



shall be followed: -

“Factors for determination of fee.—The following factors shall be considered while deciding the fee leviable by a school, namely—

- (a) the location of the school;
- (b) the infrastructure made available to the students for the qualitative education, the facilities provided and as mentioned in the prospectus or website of the school;
- (c) the education standard of the school as the State Government may prescribe;
- (d) the expenditure on administration and maintenance;
- (e) the excess fund generated from non-resident Indians, as a part of charity by the management and contribution by the Government for providing free-ship in fee or for other items under various Government schemes given to the school for the Scheduled Castes, the Scheduled Tribes, Other Backward Class and Special Backward Class students;
- (f) qualified teaching and non-teaching staff as per the norms and their salary components;
- (g) reasonable amount for yearly salary increments;
- (h) expenditure incurred on the students over total income of the school;
- (i) reasonable revenue surplus for the purpose of development of education and expansion of the school; and
- (j) any other factor as may be deemed reasonable.”

“Additional factors for determination of fee.—The following factors shall be considered while deciding the fee in addition to the factors specified



above: -

(i) facilities made available by the school under e-governance i.e. hardware and software facilities;

(ii) strength of students;

(iii) other facilities made available to students such as swimming pool, horse riding, shooting, archery and performing art, etc.;

(iv) supply of books, notebooks, etc. and other educational material provided to students;

(v) provision of meal or snacks; and

(vi) any other factor submitted by the management before the Fee Regulatory Committee found relevant and reasonable by it.”

24. While upholding the enactment brought out in the State of Rajasthan, the Hon’ble Supreme Court read down Sections 4, 7 and 10 in the following manner in paragraph nos. 37, 47, 48 and 53, which are extracted herein below from *Indian School* (supra):-

37. Section 4 predicates that every private school shall constitute the Parent-Teachers Association, which is to be formed by the head of the school within thirty days from the beginning of each academic year. Section 4(1)(b) envisages that every teacher of the school and parent of every student in the school shall be a member of the Parent-Teachers Association. Section 4(1)(c) provides that on formation of the Parent-Teachers Association, a lottery shall be conducted by drawing a lot of the willing parents to constitute SLFC. In the context of this provision, it was urged that for choosing the willing parent to become member of SLFC by draw of lots, no eligibility criteria has been prescribed in the 2016 Act or the 2017 Rules. Besides, willing parent of the ward, who is admitted in



the school against the 25% quota of free education under the RTE Act, may also fit into this category even though he would have no stakes in the fee structure proposed by the school management. The argument seems to be attractive, but for that reason the provision need not be struck down or declared as violative of any constitutional right of management of the school. This provision can be read down to mean that the draw of lots would be in respect of willing parents whose wards have been admitted against the seats other than the seats reserved for free education under the RTE Act. Further, for ensuring that the willing parent must be well informed and capable of (meaningful) interacting in the discourse on the proposal of fee structure presented by the school management, he/she must have some minimum educational qualification and also familiar with the development of school, management of finances and dynamics of quality education. The desirability of such eligibility of the willing parent ought to be specified.

47. From the bare perusal of Section 7(1), it is noticed that first five members are official members. It is a broad-based independent committee which includes two representatives of private schools in the divisional area “nominated by the Divisional Commissioner” and similarly two representatives of parents “nominated by the Divisional Commissioner”. The representation is given to the stakeholders concerned in the matter of determination of fee structure and in particular in the matter of enquiry into the factum whether fee structure proposed by the school management concerned entails in profiteering or otherwise. In reference to Section 7(2)(a), we must observe that the term of office of representatives of the private schools and, in particular parents has been earmarked as two years from the date of their nomination. This would mean, necessarily, that the parent concerned would be eligible until his/her ward continues in the school during the tenure and is not a member of SLFC of any school within the divisional area. Any member not fulfilling this criterion would be deemed to have vacated his office forthwith and, in his



place, a new member can be nominated by the competent authority from amongst the parents of the wards pursuing studies in the school in the divisional area concerned. Moreover, while nominating representative of parents, the Divisional Commissioner must keep in mind that the person so nominated must possess basic qualification of accounting, development of a school and dynamics of quality education; and whose ward has not secured admission against 25% quota of free education under the RTE Act. Thus understood, even Section 7 of the 2016 Act does not violate the fundamental right guaranteed under Article 19(1)(g) of the Constitution in respect of establishment of educational institution.

48. Needless to underscore that the Divisional Commissioner, who is empowered to nominate two representatives of private schools would keep in mind that his/her nominees are from the schools within the divisional area and at least one amongst them should be chosen from a minority school so that representation is given to all stakeholders, including minority and non-minority private unaided schools. At the same time, it must be borne in mind that such a person is already not a member of SLFC of any school in the divisional area. The dispensation provided in Section 7, is, thus, to create an independent machinery for adjudication of the question as to whether the fee structure proposed/determined by the school management of the school concerned entails in profiteering, commercialisation or otherwise.

53. Section 10 deals with constitution of Revision Committee. This Committee discharges the function of an appellate authority where the aggrieved party, namely, school management or the Parent-Teachers Association can assail the decision of the DFRC. This is a final adjudicatory body created under Section 10 consisting of official members including two representatives of private schools nominated by the State Government and two representatives of parents nominated by the State Government. This is again a broad-based independent Committee to consider the revision preferred against



the decision of the DFRC, constituted on similar lines. The latter Committee is constituted under Section 7 of the 2016 Act. The observations made in reference to the Constitution of the DFRC under Section 7 hitherto would, therefore, apply with full force to this provision as well.

25. Respectfully following the judgment of the Hon'ble Supreme Court in *Indian School* (supra), we find the Fee Regulatory Act to be valid subject to the following: -

(i) the nomination of two guardian representatives by the Divisional Commissioner to the 'FRC' shall be of only parents of children not entitled to the beneficial provisions of the Right to Education Act, 2009. The term of the representatives of private schools and guardians shall be for a period of two years, and a guardian representative shall not be allowed to continue if the ward is not studying in any of the private unaided schools within the division. The nominated parents should have a basic education and some experience in finances;

(ii) one of the representatives of the managements nominated by the Divisional Commissioner shall be from a minority institution,



if there is one in the Division;

(iii) the ‘FRC’ and the appellate committee shall consider the factors as coming out from the Rajasthan Act and specified in paragraph 22 above, in determining the reasonable fees subject, however, to the State prescribing such conditions by Rules.

26. We find absolutely no reason to set aside the enactment and reject the writ petition, with the above directions.

(K. Vinod Chandran, CJ)

Rajiv Roy, J: I agree

(Rajiv Roy, J)

Aditya Ranjan/-

AFR/NAFR	
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