



2024 : DHC : 2790



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

Reserved on: 4 April 2024
Pronounced on: 8 April 2024

+ W.P.(C) 12113/2023

JAI THROUGH HIS FATHER AMIT VERMA Petitioner
Through: Mr. Arkaneil Bhaumik, Mr.
Shashwat Kabi and Mr. Adhishwar Suri,
Advocates for Dr. Amit George, Advocate
(DHCLSC)

Versus

DIRECTORATE OF EDUCATION & ANR Respondents
Through: Mr. Utkarsh Singh and Ms.
Prasansha Sharma, Advs. for Mr. Santosh
Kumar Tripathi, SC (Civil) for DoE
Mr. Pramod Gupta, Ms. Nicole Gomez, Ms.
Nandita Rathi and Ms. Adyanshi, Advs. for
R-2

+ W.P.(C) 11869/2023 and CM 50795/2023

PAWAN KUMAR THROUGH
HIS FATHER SANAM GAUTAM Petitioner
Through: Mr. Arkaneil Bhaumik, Mr.
Shashwat Kabi and Mr. Adhishwar Suri,
Advocates for Dr. Amit George, Advocate
(DHCLSC)

Versus

DIRECTORATE OF EDUCATION & ANR Respondents
Through: Mr. Utkarsh Singh and Ms.
Prasansha Sharma, Advs. for Mr. Santosh
Kumar Tripathi, SC (Civil) for DoE
Mr. Pramod Gupta, Ms. Nicole Gomez, Ms.
Nandita Rathi and Ms. Adyanshi, Advs. for
R-2

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W.P.(C) 12113/2023 & contd. matters

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+ W.P.(C) 11832/2023, CMs 46229/2023 and 50793/2023

TEJAS NATH THROUGH

HIS FATHER ROHIT KUMAR

..... Petitioner

Through: Mr. Arkaneil Bhaumik, Mr. Shashwat Kabi and Mr. Adhishwar Suri, Advocates for Dr. Amit George, Advocate (DHCLSC)

Versus

DIRECTORATE OF EDUCATION & ANR Respondents

Through: Mr. Utkarsh Singh and Ms. Prasansha Sharma, Advs. for Mr. Santosh Kumar Tripathi, SC (Civil) for DoE
Mr. Pramod Gupta, Ms. Nicole Gomez, Ms. Nandita Rathi and Ms. Adyanshi, Advs. for R-2

CORAM:

HON'BLE MR. JUSTICE C.HARI SHANKAR

JUDGMENT

08.04.2024

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W.P.(C) 12113/2023 and W.P.(C) 11832/2023

1. Jai and Tejas, the petitioners in these two writ petitions are children belonging to the Economically Weaker Section (EWS) and Disadvantaged Group (DG) of the society. They applied, through their parents, for admission to the KG/Pre-primary class in the Respondent 2 school for the academic session 2023-2024.

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2. It needs to be mentioned that, by virtue of the proviso to Section 12(1)(c)¹ of the Right of Children to Free and Compulsory Education Act, 2009 (“the RTE Act”), the entry level class for the respondent-school² was Nursery/Pre-school. KG/Pre-Primary was, therefore, not the entry level class in the respondent-school. It is an admitted position that the EWS seats in Nursery/Pre-school in the respondent-school, as determined by the Directorate of Education (DoE), were carry forward seats, representing the number of Nursery/Pre-school entry level seats which were required to have been filed by the respondent-school in the Nursery/Pre-school entry level during 2022-2023 under the RTE Act, but which had remained unfilled.

Communications between the respondent-school and the DoE prior to the computerized draw of lots conducted by the DoE for 2023-2024

3. On 26 November 2022, the respondent-school wrote to the DoE, asserting that, despite all efforts, it was unable to admit its full strength of general category students over the past five years in Nursery/Pre-school and seeking reduction, for that reason, in the number of EWS *Nursery/Pre-school* seats which it would be required to fill in 2023-2024. According to the respondent-school, it would be able to fill only 15 general category Nursery/Pre-school seats in 2023-

¹ 12. **Extent of school's responsibility for free and compulsory education. –**

(1) For the purposes of this Act, a school, -

(c) specified in sub-clauses (iii) and (iv) of clause (n) of Section 2 shall admit in Class I, to the extent of at least twenty-five per cent of the strength of that class, children belonging to weaker section and disadvantaged group in the neighbourhood and provide free and compulsory elementary education till its completion:

Provided further that where a school specified in clause (n) of Section 2 imparts pre-school education, the provisions of clauses (a) to (c) shall apply for admission to such pre-school education.

² The respondent-school undisputedly falls within Section 2(n)(iv) of the RTE Act, which reads thus:

“(n) “school” means any recognised school imparting elementary education and includes—

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-2024. Accordingly, it was requested that the requirement of filling EWS/DG/CWSN (Disadvantaged Group) seats, *in Nursery/Pre-school* in 2023-2024, be limited to five seats.

4. It is important to note that the above representation was restricted to the number of EWS/DG/CWSN seats which the respondent-school would be called upon to fill *in Nursery/Pre-school* in the 2023-2024 academic year. *No reduction of seats was, therefore, sought in respect of KG/Pre-primary.*

5. On 13 January 2023, the DoE uploaded, on its website, the data regarding availability of general category and EWS/DG/CWSN seats in various schools, for the 2023-2024 academic session. 24 seats were shown as available in KG/Pre-primary class in the respondent-school. It was also indicated that these seats were carried forward unfilled seats of previous years. The schools were given time till 18 January 2023 to represent regarding any discrepancies in the data uploaded by the DoE. All schools were given time till 18 January 2023 to point out any discrepancies in the data uploaded by way of a written representation along with supporting documents. Failure, on the part of a school, to submit any such representation within the said period would entail a presumption that the data uploaded by the DoE was correct and could constitute the basis for conducting the computerized draw of lots on the basis of which children would be allocated schools in the EWS/DG category for 2023-2024.

(iv) an unaided school not receiving any kind of aid or grants to meet its expenses from the appropriate Government or the local authority;"

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6. The respondent-school represented to the DoE, apropos the above data uploaded on 13 January 2023, belatedly, on 23 January 2023. The representation merely reiterated the request contained in the respondent-school's earlier representation dated 26 November 2022, seeking reduction "*of the declared seats at the entry level class i.e. Pre-school/Nursery for the session 2023-2024*". No representation was made regarding the number of seats shown as available for being filled at the KG/Pre-primary level. In other words, the respondent school acknowledged and accepted the availability of 24 seats for being filled by EWS/DG/CWSN students at the KG/Pre-primary level for 2023-2024.

7. Apparently because the response was belated, the DoE did not take cognizance thereof.

8. However, apropos the earlier representation dated 26 November 2022, the Deputy Director of Education (DDE) communicated, to the respondent-school, the decision of the DoE to fix the seats available at the entry level *i.e. at Nursery/Pre-school*, to 47 general category and 16 EWS/DG/CWSN.

9. *This decision was accepted by the respondent-school, which did not choose to challenge it in any manner known to law.*

Apropos the petitioners

10. The applications of our little petitioners Jai and Tejas were subjected, along with others who had similarly applied, to computerized draw of lots by the DoE on 3 March 2023. The



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petitioners were found entitled, as per the result of the computerized draw of lots, to admission to KG/Pre-primary in the respondent-school and were duly intimated, accordingly, by the DoE.

11. The petitioners approached the respondent-school seeking admission, but were turned away. They, thereupon, filed the present writ petitions before this Court.

12. By interim orders passed by this Court, both the petitioners were granted provisional admission to the respondent-school in KG/Pre-primary. They were, in compliance with the said order so admitted and are, therefore, presently, studying with the respondent-school as EWS students.

Rival Contentions

13. The submission of Mr. Bhaumik, learned Counsel for the petitioners is that, as the respondent-school never sought any reduction in the number of KG/Pre-Primary EWS/DG/CWSN seats determined by the DoE for the 2023-2024 academic session, and as the computerized draw of lots was conducted based on the said data, the school was duty bound to comply with the result of the draw of lots and to admit the petitioners.

14. He submits that, moreover, the principle of carry forward of unfilled EWS/DG/CWSN seats in a particular class to the next class in the next year stands affirmed by the Division Bench of this Court in



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*Siddharth International Public School v. MACT*³ and by this Bench in its decision in *Anjali Pandey v. GNCTD*⁴.

15. Arguing by way of response, Mr. Pramod Gupta, learned Counsel for the respondent-school submitted initially that the present cases involves competing rights. The rights of the child under the RTE Act have counterbalanced against the rights and the autonomy of the school, as an unaided institution, to determine the fees that it can charge, which stands affirmed by a number of judicial pronouncements, starting with *T.M.A. Pai Foundation v. State of Karnataka*⁵. He has drawn my attention to Sections 12, 35⁶ and 38⁷ of the RTE Act. He, thereafter, took me chronologically through various circulars and orders issued by the DoE on 18 May 2012, 13 December 2012, 5 April 2013, 26 December 2014, 29 December 2015, 26 February 2016, 15 June 2021, 9 July 2021 and 23 December 2021. According to Mr. Pramod Gupta, the circulars and orders of the DoE, till 15 June 2021, correctly implemented the RTE Act, but the DoE suddenly chose to introduce a “new regime” w.e.f.⁸ the circular of 9 July 2021, which was foreign to the provisions of the RTE Act.

³ 2016 SCC Online Del 5276

⁴ 2024 SCC OnLine Del 584

⁵ AIR 2003 SC 355

⁶ 35. Power to issue directions. –

(1) The Central Government may issue such guidelines to the appropriate Government or, as the case may be, the local authority, as it deems fit for the purpose of implementation of the provisions of this Act.

(2) The appropriate Government may issue guidelines and give such directions, as it deems fit, to the local authority or the School Management Committee regarding implementation of the provisions of this Act.

(3) The local authority may issue guidelines and give such directions, as it deems fit, to the School Management Committee regarding implementation of the provisions of this Act.

⁷ (Not being extracted as it is not relevant)

⁸ with effect from



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16. To my mind, all circulars prior to circular dated 9 July 2021 are irrelevant. They dealt with earlier years with which we are not concerned.

17. Insofar as the circular of 9 July 2021 is concerned, it specifically stated that all schools were required to admit EWS/DG/CWSN students as per the declared strength of entry level class selected through the computerized draw of lots. A school, which desired exemption from doing so, was required to seek specific permission in that regard from the concerned DDE.

18. According to Mr. Pramod Gupta, this requirement of seeking exemption is foreign to the RTE Act. He submits that, so long as the school has made every effort to fill in all General category seats, the number of EWS/DG/CWSN category seats, which it would have to fill in, for that particular year, could not be more 25% of the actual number of General category seats which it could fill. Mr. Gupta places reliance, in this context, on paras 56 and 58 of *Anjali Pandey*, which read thus:

“56. Section 12(1)(c) of the RTE Act requires a school, falling under Section 2(n)(iv), to admit, in Class I, at least 25% of the strength of that class. The proviso to the clause extends its operation to preschool classes, where the school provides pre-school education. Though the expression “strength” is not defined in the clause, or indeed elsewhere in the RTE Act, it has necessarily to mean the number of students actually admitted. Else, it would lead to an incongruous situation in which, if a school has place for 100 students in Class I, but is able to admit only 20 General category students, it would be compelled to admit at least 25 EWS/DG students. To avoid such an anomalous situation, the word “strength”, as used in Section 12(1)(c) has necessarily to be read as meaning the total number which the School *is in a position to admit in that year*. Reckoned thus, it is apparent from the above tabular statement that, in each year from 2015-2016 to 2022-2023,

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the School actually admit EWS/DG students numbering over 25% (except in 2019-2020 when they admitted 24.46%) of the strength of its class.

58. Unaided schools function on fees, and the Court cannot, in its zeal to protect the interests of the student, compromise on the fees which the unaided school can legitimately earn, as such fees would be its sole source of sustenance. It is for this reason that the RTE Act envisages 25% as the minimum quota of EWS/DG students which an unaided school would have to admit in a year, reckoned as a percentage of the number of general category students that it admits for that year. Undoubtedly, this is a statutory mandatory imperative, and if a School falls short of fulfilling this is imperative in a particular area, it can legitimately be directed to fill up the backlog in the next year in the next higher class. Where, however, there is in fact no shortage in the number of EWS/DG candidates which the school was required to admit, to fulfil the 25% limit, in a particular year, it would be not only unfair but also illegal to regard the school as having unfilled vacancies, which can be carried forward to the next year. The carry forward principle can apply, therefore, only where there is a shortage in feeling of EWS/DG vacancies in earlier years, reckoned as a percentage of the number of general category students that the school has admitted.”

19. Mr. Gupta further submits that the circular dated 9 July 2021 was challenged before this Court by way of WP (C) 10839/2021 (*Action Committee Unaided Recognized Private School v. DoE*). He draws my attention to order dated 24 September 2021, passed by a coordinate Bench in the said writ petition. The School had sought to contend before this Court, in that case, that the circular dated 9 July 2021 was contrary to the judgment of this Court in WP (C) 3358/2013 (*The Sovereign School v. Directorate of Education*⁹). The coordinate Bench, in paras 6 and 8 of the order dated 24 September 2021,

⁹ 2013 SCC OnLine Del 3928



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observed that there was no *prima facie* conflict between the circular dated 9 July 2021 and the decision in the Sovereign School:

“6. Read in this context, I am of the view that the impugned circular is not contrary to the judgment in **Sovereign School**. The direction in the second paragraph to grant admission to all eligible candidates allotted to the schools, *is subject to the qualification contained in the following paragraph that a school can seek exemption from the DOE on the ground of lesser general admission*. The circular, in fact, itself makes reference to the judgment in *Sovereign School*. On a holistic reading of the circular, it requires schools to admit all the EWS/DG candidates whose names have been forwarded by the DOE, subject to the exemption granted on the ground of lesser general category admissions. The circular to this extent incorporates the judgment of this Court in *Sovereign School*.

8. The mechanism of the circular appears to be that if a school despite its best effort is unable to admit the sanctioned number of candidates in the general category, *then it may seek exemption from admitting all the eligible EWS/DG category candidates*. The school will naturally be required to admit the number of EWS/DG category candidates forwarded by the DOE corresponding to the number of general category candidates admitted. In the event the school contends that it has been unable to admit the sanctioned number of general category candidates despite its best efforts, *it may make an application for exemption to DOE and the admission to the balance number of EWS/DG category candidates will be subject to the result of the exemption application, which is required to be considered in terms of the parameters laid down in Sovereign School.*”

(Emphasis supplied)

20. Mr. Pramod Gupta has further drawn attention to a subsequent circular dated 23 December 2021 issued by the DoE, which called upon all schools to comply with the DoE Notification dated 28 February 2012, which directed that the number of seats at entry level would not be less than the highest number of seats at the entry level class during the last three years. According to Mr. Gupta, this circular



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did not contain any provision for exemption being claimed by the school from the requirement of admitting 25% of the strength of its general category students as EWS/DG/CWSN students. After this Circular, therefore, there was no provision for seeking exemption.

21. Mr. Gupta further submits that the communication dated 2 December 2023 from the DoE to the respondent-school, whereby the DoE fixed the number of entry level general category and EWS/DG/CWSN seats which the respondent-school would be required to fill in 2023-2024 as 63 47 and 16 respectively, that the fixation was made “on the basis of the highest admission in general category in last five years”. Mr. Gupta takes exception to this mode of determining the number of EWS/DG/CWSN seats, stating that there is no statutory or administrative justification for adopting the highest number of general category seats, against which admission had taken place in the last five years in the respondent-school, as the basis to decide its claim for reduction of seats for the year 2023-2024. While acknowledging that the respondent-school has not specifically challenged the decision dated 2 December 2023, he submits that there is no need to challenge the said decision if it is *ex facie* illegal. He relies, for this purpose, on the judgment of the Supreme Court in *Bharathidasan University v. All India Council for Technical Education*¹⁰ and *SAIL v. National Union Waterfront Workers*¹¹. The only notification which envisaged past year figures as the basis for

¹⁰ (2001) 8 SCC 676

¹¹ (2001) 7 SCC 1



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deciding the fixation of general category and EWS/DG/CWSN seats in a subsequent year, he submits, is notification dated 7 January 2011 of the DoE, as amended on 28 February 2012, which envisaged the total number of seats at the entry level in any school not being less than the highest number of seats in the entry level class in the previous three academic years. Even though there is no basis, according to Mr. Gupta, even for fixing the highest of the number of entry level seats in the previous three academic years as the basis to determine the number of seats at the entry level for a subsequent year in the school, he submits that there is certainly no basis for fixing the number of seats as the highest of the previous five academic years.

22. Mr. Gupta also submits that the Notification dated 7 January 2011 was avowedly issued in exercise of the power conferred by sub section (1) of Section 3 of the Delhi School Education Act, 1973 (DSE Act) read with Rule 43 of the Delhi School Education Rules, 1973 (DSE Rules) and under the provisions of the RTE Act. He submits that the DoE could not have invoked the provisions of the DSE Act and the DSE Rules to issue a notification relatable to RTE Act. A specific objection to this effect has been taken by him in para 43 of the application filed on behalf of the respondent-school for vacating the interim order passed by this Court on 6 September 2023.

Submissions of Mr. Bhaumik in rejoinder

23. In rejoinder, Mr. Bhaumik, besides pointing out that the decision dated 2 February 2023 of the DoE on the representation of the respondent-school for reduction in the number of general category

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and EWS/DG/CWSN seats was never challenged by the respondent-school, also relies on the judgment of the coordinate Bench of this Court in **Rameshwar Jha v. The Principal Richmond Global School¹²**, which, he submits, fully covers the case. Mr. Bhaumik questions the correctness of Mr. Gupta's submission that his client was not required to challenge the communication dated 2 February 2023. Mr. Bhaumik submits that the judgment in **Bharathidasan**, on which Mr. Gupta relies, was passed in the case of an *ex facie* illegal regulation. As compared to that, the communication dated 2 February 2023 was an *in personam* communication from the DoE to the respondent-school. If it was not challenged, therefore, it was accepted.

Mr. Gupta's submissions in surrejoinder

24. In surrejoinder, Mr. Gupta questions the correctness of the judgment in **Rameshwar Jha**. He draws my attention to para 40 to 43 of the said decision which read thus:

“40. The DoE has in fact issued numerous Circulars clearly mandating that the admissions in the EWS/DG category have to be made proportionate (3 : 1) to the number of General Category admissions, actually made by the School. Going further, the DoE has also clarified by way of an illustration, in the said Circulars, that the admissions shall be made in seriatim, in the order of the names appearing in the list of selected candidates forwarded by the DoE to the School.

41. It is also stated that as a matter of fact, the schools were prohibited by the DoE from making any extra admissions, beyond 25% of the actual general category admissions and it was stated that no 'reimbursement under the RTE Act shall be made for such extra admissions.



42. Further, even the State of Rajasthan, has issued guidelines for admissions in Private Unaided Schools under section 12(1)(c) of the RTE Act, inter alia, mandating that admissions shall be made against EWS/DG category seats, only in proportion to the general category admissions. It has been stated that for every 3 admissions made in the general category, the 4th admission shall be of a child from the EWS category and the said roster of admission shall be followed for every 3 general category admissions.

43. Similarly, the State of Karnataka has also clarified that Unaided Schools shall earmark at least 25% of seats as per the strength of the Class at entry level as on 30th September every year, for EWS/DG category candidates, as per the data filled by the Schools in UDISE (Unified District Information System for Education), which contains the names, details, etc. of the actual general category candidates admitted by the school till 30th September.”

25. Mr. Gupta submits that the decision in *Rameshwar Jha* does not address any of the submissions encapsulated in paras 40 to 43 thereof.

26. Finally, Mr. Gupta submits that the respondent-school had, in its representation dated 20 January 2023, also questioned the correctness of the computation of the number of general category and EWS/DG/CWSN seats at the entry level in the respondent-school as contained in the communication dated 23 November 2022.

Analysis

27. It is true that, in order dated 21 December 2023 in WP (C) 12113/2023, this Court expressed a *prima facie* view that, given the rival contentions advanced at the bar, several contentious issues arose for consideration including, *inter alia*, the interplay between the



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judgments of the Single Judges of this Court in *Sovereign School* and *Rameshwar Jha*.

28. However, in the peculiar facts of these cases, that discussion may not strictly arise for consideration.

29. Counterbalancing of rights – sufficiently ensured

29.1 It is true that, as Mr. Pramod Gupta correctly submitted, in such cases, there are competing interests and competing equities, at work. One has to counterbalance the rights of the students to education with the rights of the school to charge fees. More specifically, one has to counterbalance the rights of the EWS/DG child, who is unable to afford the normal fees charged by the school, with the rights of the school, as an unaided educational institution, to extract, from all its students, the fees which it normally charges.

29.2 It is also true that the private unaided schools survive on fees and that, therefore, placing a burden on such schools in excess of that which the law places on them, in the matter of recovering the normal fees charged by such schools from students to whom the school imparts education, might be counterproductive in the long run. At the same time, every child irrespective of the economic strata to which she or he belongs, has a right to aspire to be educated in the best of schools. It is also an undeniable truth that all schools are not of the same standard.

29.3 It is to counterbalance these rival equities and specifically to cater to the interest of the schools to recover fees, that a system has

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been put into place by the DoE in which, before carrying out the computerised draw of lots, the DoE uploads, on its website, the data reflecting the number of general category and EWS/DG/CWSN category seats available in every school for the ensuing academic year and calls upon the schools to represent against any discrepancy in the data within the stipulated time provided in that regard.

29.4 If the school represents within the said period, three possible exigencies may follow. The representation may be accepted in full, accepted in part or rejected altogether.

29.5 *Anjali Pandey*, and the effect of the stay granted by the Division Bench

29.5.1 *Anjali Pandey* was a case in which the representation by the school for reduction in the number of EWS seats for the ensuing academic year was pending on the day when Amitanjali, the daughter of Amit and Anjali Pandey, was shortlisted for admission to the entry level class in the Sovereign School. Subsequently, the representation of the School was allowed and the number of EWS seats available with it in that case was sized down, resulting in there being no vacancy in which Amitanjali could have obtained admission. I had, in this circumstance, expressed a view that, as the representation of Sovereign School for sizing down the number of EWS seats for the ensuing academic year had been accepted by the DoE, the school was entitled to the benefit of the said decision. Accordingly, I had directed the DoE to allocate Amitanjali to another alternate school.



29.5.2 Even while so directing, in the special circumstances which obtained in Amitanjali's case, I had clarified, in para 59 of that decision, as under:

“**59.** There is, however, another side to the proverbial coin. The DOE, each year, invites data from schools and works out the number of EWS/DG students which the school would have to admit to remain in compliance with the mandate of the RTE Act. The schools are given time to verify the data and report any errors to the DOE. If any school desires exemption, it can also apply to the DOE in that regard as per the procedure envisaged, setting out the reasons for its request. *If, however, a school has neither chosen to seek exemption, nor reported any error to the DOE in respect of the computation of EWS/DG vacancies in a particular year within the time provided by the DOE in that regard, it would be bound to admit the student(s) who, as per the computerized draw of lot that follows, are allocated to its rolls. It cannot, then, turn round and question the computation, by the DOE, of the number of EWS students that it would have to admit that year.*”

(Emphasis supplied)

Paras 56 and 58 of **Anjali Pandey**, which Mr Gupta cited, encapsulate what I regard as the general legal position, whereas para 59 addresses the specific circumstance in which the school does not respond to the data uploaded by the DoE within the time provided in that regard.

29.5.3 The operation of my judgment stands stayed by the Division Bench of this Court by order dated 19 March 2024 passed in LPA 216/2024 (**Anjali Pandey v. GNCTD**). The consequence is that, despite the representation of the Sovereign School having been accepted and the number of EWS seats in the Sovereign School for the ensuing academic year having been sized down as it sought, Amitanjali continues to be entitled to be educated as an EWS student in the Sovereign School, subject, of course, to the outcome of the LPA.

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29.5.4 The implications of the stay granted by the Division Bench have to be appreciated. The result is that, even in the case in which the representation of the school against the data uploaded by the DoE seeking reduction of the number of EWS seats for the ensuing academic year had been accepted, the Division Bench has allowed Anjali Pandey, pending disposal of the LPA, to continue to study with the Sovereign School as an EWS student. *The right of the child to be educated as an EWS student in the school, as per the outcome of the computerized draw of lots conducted by the DoE has, therefore, been accorded pre-eminence.*

29.6 In the present writ petitions, the respondent-school does not enjoy the benefit which was available to the Sovereign School in *Anjali Pandey*. *No reduction in the number of EWS seats for KG/Pre-primary was ever sought by the respondent-school. The representations dated 26 November 2022 and 20 January 2023, by the respondent-school, sought reduction in the number of EWS/DG/CWSN seats at the Nursery/Pre-school entry level. The respondent-school never sought reduction of the number of seats of EWS/DG/CWSN available with it for KG/Pre-primary.*

29.7 The data uploaded by the DoE, on its website, on 13 January 2023 specifically indicated that, 24 EWS/DG/CWSN carry forward seats were required to be filled by the respondent-school in the 2023-2024 academic session. All schools were given time till 18 January 2023 to represent against any discrepancy contained in the said data. *No representation was submitted by the respondent-school within that*

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period. It was only on 20 January 2023 that the respondent-school submitted a representation. In that representation, too, the respondent-school only sought reduction of the notified number of EWS/DG/CWSN seats in its Nursery/Pre-school entry level. No reduction of the EWS/DG/CWSN seats at the KG/Pre-primary level was sought.

29.8 Failure to represent against the data uploaded by the DoE regarding the number of general category and EWS/DG/CWSN seats which a school is required to fill in the ensuing academic year would result, *ipso facto*, in the data being regarded as correct and the DoE being entitled to proceed to hold a computerized draw of lots on that basis. No school can seek amnesty for any delay on its part in responding to the data. It cannot be sought to be legitimately contended by the school that, as there was only a day's, or perhaps two days', delay in representing, the DoE ought to have considered the representation. The DoE has an arduous task to perform, and cannot be fairly expected to be entertaining belated representations. Time is of the essence in the matter of providing admission to young children who are first entering the doors of a formal educational system.

29.9 The system which is in place, therefore, adequately counterbalances the competing rights of the school to charge fees and of the EWS/DG/CWSN child to free education as envisaged by the RTE Act.

30. In the facts of the present case – Outcome of computerized draw of lots binding on respondent-school

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30.1 Having, thus, failed to represent against the notified data uploaded by the DoE on its website on 13 January 2023 within the time provided in that regard and having, even in its belated representation dated 20 January 2023, only sought reduction in the number of EWS/DG/CWSN seats at the Nursery/Pre-school level, the respondent-school acquiesced and consented to the computerized draw of lots being conducted on the basis of the data uploaded by the DoE on 13 January 2023, insofar as it indicated that there were 24 carry forward EWS/DG/CWSN seats available in KG/Pre-primary in the respondent-school.

30.2 With that, no further defence can be permitted to be raised by the respondent-school. The DoE had specifically put the respondent-school on notice with respect to the number of EWS/DG/CWSN seats which were required to be filled by it in KG/Pre-primary for the 2023-2024 academic session. The respondent-school was permitted to represent against the said data. The respondent-school did not choose to do so. It limited its objection, which was itself belated, to the data relating to the number of seats available in Nursery/Pre-school.

30.3 There is no dispute that the computerized draw of lots, which followed, was on the basis of the data uploaded by the DoE on 13 January 2023. Insofar as KG/Pre-primary was concerned, the respondent-school had accepted the said data and offered no objection thereto. It was on the basis of the said data that the petitioners, in these writ petitions, were shortlisted for admission to KG/Pre-primary in the respondent-school. They cannot, therefore, be denied admission.

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30.4 Having itself agreed, by failing to represent against the notice dated 13 January 2023, to the number of EWS/DG/CWSN seats which, it was required to fill in KG/Pre-primary for 2023-2024 academic session, and the allocation of the petitioners to the respondent-school having been made on that basis, it is obvious that the respondent-school cannot refuse to admit the petitioners.

31. Power of DoE to issue Circulars

31.1 Having itself acted as per the Circulars and Orders issued by the DoE and in fact also claimed exemption on that basis, the respondent-school, in a writ petition filed by the aggrieved student, cannot, in my view, seek to use the petition as a vehicle to launch its independent challenge to the validity of the Circulars and Orders.

31.2 The challenge is, even otherwise, totally bereft of substance. Section 38, which deals with the power to make rules, has no relevance to the issue. Section 35(2) of the RTE Act more than adequately empowers the appropriate government to issue guidelines and give directions, as it deems fit, to schools for implementation of the provisions of the RTE Act. The power is advisedly wide, comprehensive and expansive, and it would do disservice to the legislative intent if a Court were, by judicial fiat, to seek to circumscribe its boundaries. The power of the DoE to discharge the functions of the appropriate government which, in the case of a State and a Union Territory, is defined, in sub-clauses (A) and (B) of Section 2(a)(ii) as “the State Government” and “the Government of that Union Territory”, is not in question.

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31.3 There is, therefore, no transgression, by the DoE, of the power that the RTE Act vests in it, in the issuance of the various Orders and Circulars from time to time, to govern the allocation of entry level seats, year-wise, to EWS/DG/CWSN children.

Conclusion

32. The petitioners are, therefore, entitled to succeed.

33. The provisional admissions granted to the petitioners by the interim orders passed by this Court are regularized. The petitioners shall continue to be provided education by the respondent-school as EWS/DG category students in accordance with the provision of the RTE Act and the law applicable in that regard. They shall also be entitled to all facilities to which EWS students are entitled including school uniform, text book etc. and the like.

34. These writ petitions are, accordingly, allowed.

W.P.(C) 11869/2023

35. The only difference between this case and WP (C) 12113/2023 and WP (C) 11832/2023 is that the petitioner Pawan Kumar, an EWS category child, sought admission not to KG/Pre-primary but to Nursery/Pre-school for the academic session 2023-2024, in the respondent-school.

36. Respondent-school bound by seat fixation as communicated on 2 February 2023 – Applicability of *Bharathidasan University*.

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36.1 The fact that the petitioner in this writ petition is an aspirant for admission to Nursery/Pre-School cannot make any substantial difference to the case, for the simple reason that the computerized draw of lots for, Nursery/Pre-school admission in the respondent-school was conducted on 3 March 2023 *after* the decision, on the respondent-school's representation dated 26 November 2022, was communicated by the DoE to the respondent-school on 2 February 2023. The petitioner was, therefore, found entitled to admission in Nursery/Pre-school in the respondent-school against the number of EWS/DG seats as communicated by the DoE to the respondent-school *vide* the said communication dated 2 February 2023.

36.2 The communication dated 2 February 2023 has never been challenged by the respondent-school. It, therefore, binds the respondent-school.

36.3 Mr. Gupta sought to contend, relying on the decision in *Bharathidasan University*, that failure to challenge the communication dated 2 February 2023 did not estop the respondent-school from questioning its correctness. For this purpose, he draws my attention to the following passage from the report in *Bharathidasan University*:

“14. The fact that the Regulations may have the force of law or when made have to be laid down before the legislature concerned does not confer any more sanctity or immunity as though they are statutory provisions themselves. Consequently, when the power to make regulations is confined to certain limits and made to flow in a well-defined canal within stipulated banks, those actually made or shown and found to be not made within its confines but outside them, the courts are bound to ignore them when the question of their enforcement arises and the mere fact that there was no

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specific relief sought for to strike down or declare them ultra vires. particularly when the party in sufferance is a respondent to the lis or proceedings cannot confer any further sanctity or authority and validity which it is shown and found to obviously and patently lack. It would, therefore, be a myth to state that Regulations made under Section 23 of the Act have "constitutional" and legal status, even unmindful of the fact that any one or more of them are found to be not consistent with specific provisions of the Act itself. Thus, the Regulations in question, which AICTE could not have made so as to bind universities/UGC within the confines of the powers conferred upon it, cannot be enforced against or bind a university in the matter of any necessity to seek prior approval to commence a new department or course and programme in technical education in any university or any of its departments and constituent institutions.”

36.4 There is no analogy between the position which was before the Supreme Court in *Bharathidasan University* and that which is before this Court in the present case. The Supreme Court in *Bharathidasan University* was concerned with regulations, which were *ultra vires* to the extent that they were made beyond the power to frame regulations. The Supreme Court held that, where the power to frame regulations was conferred within a narrow canal and the regulations transgressed the boundaries of that canal, the Court had to ignore them, even if they were not challenged.

36.5 We are not concerned, in the present case, with any such situation. The question of the number of EWS seats required to be filled by a school for an ensuing year is, at the very least, a mixed question of fact and the law. The DoE had, on 13 January 2023, uploaded the data with respect to the number of EWS/DG/CWSN seats which were required to be filled by the respondent-school in Nursery/Pre-school in 2023-2024. The representation against the said data by the school was submitted beyond the time granted in that



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regard. It was not, therefore, entitled to consideration. However, earlier representation dated 26 November 2022, by the respondent-school, seeking an identical reduction in the number of EWS/DG/CWSN seats available with it, was disposed of by the DoE *vide* communication dated 2 February 2023, which fixed the number of EWS/DG/CWSN seats for Nursery/Pre-school for 2023-2024 as 16. That communication was never challenged by the school.

36.6 The school, therefore, clearly accepted the fact that it was required to fill in 16 EWS/DG/CWSN in Nursery/Pre-school seats in 2023-2024.

36.7 The allocation of the petitioner to the respondent-school was also on that basis.

36.8 In such circumstances, it is obvious that ***Bharathidasan University*** cannot come to the rescue of the respondent to now contest its liability to admit the petitioner on the basis of the computerized draw of lots conducted by the DoE.

37. Carry forward of unfilled vacancies

37.1 On the aspect of whether backlog unfilled EWS/DG vacancies of a particular class in a particular year in a school can be carried forward to the next class in the next year, the judgment of the Division Bench in ***Siddharth International Public School*** concludes the issue. I have not come across any decision of a Division Bench or of the Supreme Court, which rules to the contrary.



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37.2 The judgment in *Siddharth International Public School*

37.2.1 Priyanshu, a 7-year-old boy, was injured in a motor accident. His left leg had to be amputated below the knee. The financial position of his family was poor. Priyanshu's mother, therefore, applied for admission of her son under the EWS category in a school. The Motor Accident Claims Tribunal (MACT), before whom the case of compensation for the injuries suffered by Priyanshu was pending, directed the Siddharth International Public School ("SIPS" hereinafter) to admit Priyanshu as an EWS student in Class I. SIPS challenged the decision on three grounds; firstly, that Priyanshu was overage for admission to Class I, secondly, that the MACT did not have the jurisdiction to direct admission of Priyanshu and, thirdly, that there were no vacant EWS seats in the school.

37.2.2 A learned Single Judge of this Court, *vide* judgment dated 26 August 2016, agreed with the contention that the MACT did not have the jurisdiction to direct admission of Priyanshu in the SIPS. The learned Single Judge, however, maintained the direction, exercising his jurisdiction under Article 226 of the Constitution of India and invoking, for the purpose, Section 12(1)(c) of the RTE Act. SIPS appealed to the Division Bench.

37.2.3 The Division Bench endorsed the opinion of the learned Single Judge that the contention of SIPS, that there were only 7 EWS vacancies in Class I for the academic year 2015-2016 (with which the case was concerned), which had been filled up, merited rejection. In



upholding the view of the learned Single Judge, the Division Bench held thus, in paras 9 and 10 of the judgment:

"9. The contention that there were only seven seats under EWS Category was considered and negated by the learned Single Judge in the light of Clauses 3 and 4 of the order of the Government of NCT of Delhi dated 07.01.2011 and Clause 2(d) of the Guidelines for Admission to Entry Level Classes in Private Unaided Recognized Schools of Delhi. It is relevant to note that the Deputy Education Officer, Zone-VI, Directorate of Education, GNCTD filed an affidavit dated 05.04.2016 in the writ petition stating that -

"In case of the Petitioner Siddharth International Public School, the said Petitioner School had a total of thirty-eight (38) seats for the academic year 2015-16 in the pre-primary class. Thus, as per the statutory mandate, a total of nine (9) seats had to be reserved for EWS category students. However, as per records submitted by the Petitioner School itself for the academic year 2015-16, in pre-school, only seven (7) students were admitted for EWS category. Thus, at least two (2) EWS Category seats were vacant in pre-primary category for the year 2015-16. As the students of Pre-primary Grade for 2015-16 will get promoted to Class I for the academic year 2016-17, there are at least two vacancies in EWS Category in Class I for the year 2016-17. A True Copy of the Chart Showing the Total Class-wise and Category-wise enrolment of students in the Petitioner School for 2015-16 is annexed herewith as Annexure A-5 at page 13."

10. *In the light of the said affidavit, we do not find any substance in the contention of the appellant that there are no vacancies under the EWS Category and that the appellant school had already satisfied the 25% requirement mandated under RTE Act.*"

(Emphasis supplied)

37.2.4 The Division Bench has, therefore, accorded its imprimatur to the proposition that unfilled EWS/DG category vacancies of a



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particular year can be carried forward to the next class in that school for the next year, and would be required to be filled accordingly.

37.3 So long as this position remains undisturbed, it would not be open to any school to contend, at least before a Single Judge of this Court, that unfilled EWS/DG backlog vacancies of a particular year cannot be directed to be filled in the next year in the next class. In other words, for example, unfilled KG/pre-primary EWS/DG vacancies in a particular year would have to be filled by the concerned school by admitting a corresponding number of EWS/DG students in Class I in the next year. Any school, refusing to do so, would expose itself to appropriate action in accordance with the DSE Act and the DSE Rules.

Conclusion

38. This writ petition also, therefore, succeeds.

39. The provisional admission of the petitioner Pawan Kumar to Nursery/Pre-school in the respondent-school as an EWS student is regularized.

40. The petitioner would be entitled to all facilities to which the EWS student is entitled including text books, school uniform and the like.

41. This writ petition is also, therefore, allowed accordingly with no order, as to costs.

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CM 50795/2023 in W.P.(C) 11869/2023

42. This application does not survive for consideration and stands disposed of.

CMs 46229/2023 and 50793/2023 in W.P.(C) 11832/2023

43. These applications do not survive for consideration and stand disposed of.

C.HARI SHANKAR, J

APRIL 8, 2024

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