(2017) 01 DEL CK 0096

DELHI HIGH COURT

Case No: W.P.(C) No. 408 of 2017

Mount Carmel School	APPELLANT
Vs	
Delhi Development Authority	RESPONDENT

Date of Decision: Jan. 2, 2017

Acts Referred:

- Constitution of India, 1950 - Article 15(5), Article 226, Article 30(1)

Citation: (2017) 237 DLT 665

Hon'ble Judges: Mr. Manmohan, J.

Bench: Single Bench

Advocate: Mr. Romy Chacko with Mr. Varun Mudgal and Mr. Ashish Yadav, Advocates, for the Petitioners; Ms. Dhanesh Relan with Akshita Manocha and Ms. Isha Garg, Advocates, for the DDA; Mr. Sanjay Jain, Asg And Mr. S. Guru Krishnakumar, Senior Advocate With Mr. Rahul Mehra, Sr. Standing Counsel, Mr. Gautam Narayan, Mr. Santosh Kumar Tripathi, Assistant Standing Counsel, Mr. R.A. Iyer, Ms. R. Sneha And Mr. Tushar Sannu, Ms. Shruthi P. And Mr. S. Banerji, Advocates For . Mr. Anil Arora, Legal Assistant, DOE, for the GNCT Of Delhi

Final Decision: Disposed off

Judgement

@JUDGMENTTAG-ORDER

Mr. Manmohan, J.—CM Appl. 1846/2017 (exemption) in W.P.(C) 408/2017

CM Appl. 1848/2017 (exemption) in W.P.(C) 409/2017

Allowed, subject to just exceptions.

W.P.(C) 408/2017 & CM Appl. 1845/2017

W.P.(C) 409/2017 & CM Appl. 1847/2017

When the matters had initially come up for hearing on 17th January, 2017, this Court was inclined to pass a preliminary order. However, at the request of learned counsel

for the Government of NCT of Delhi (for short ''GNCTD''), the matters were adjourned to 19th January, 2017 on the ground that the respondents had engaged a senior counsel who would be available only on the said date. Once again on 19th January, 2017, the matters were adjourned as the learned ASG wished to peruse some judgments. Consequently, today, the matters have been taken up for preliminary hearing.

Primary prayers in the writ petitions and the impugned notification as well as impugned condition in the allotment letter

2. It is pertinent to mention that present writ petitions have been filed by private unaided minority schools praying primarily for quashing the Notification dated 07th January, 2017 issued by respondent No.2 to the extent it applies to them and for reading down Condition No.20 of the allotment letter issued by the first respondent and to declare that it cannot override the constitutional rights of the petitioners.

3. The relevant portion of the impugned Notification dated 07th January, 2017 is reproduced herein below:-

"2. .....

(vii) Private Unaided Recognised Schools of Delhi running on the land allotted by Delhi Development Authority/Other Government Land Owning Agencies, with the condition ''shall not refuse admission to the residents of the locality'' or ''shall undertake to admit 75% of the students of the neighbourhood and from the locality in which the school is located'' or any other similar condition for ensuring the admission in neighbourhood/locality, shall admit the children in entry level classes on neighbourhood criteria in the following manner.

(a) Criteria for Neighbourhood :

(i) Admission shall be offered to students residing within 1 km of the school.

(ii) In case the vacancy remains unfilled, students residing within 1 to 3 kms of the school shall be admitted.

(iii) If there are still vacancies, then the admission shall be offered to other students residing within 3 to 6 kms of the school.

(iv) Students residing beyond 6 kms shall be admitted only in case vacancies remain unfilled even after considering all the students within 6 kms area.

(b) Process of Admission within Neighbourhood :

(i) The school shall declare the total number of seats for General Category (Total seats ﷼ EWS/DG seats) as per the guidelines prescribed by the department.

(ii) The school shall first segregate the applications having residence within the first neighbourhood range of 0-1 km.

(iii) Out of the total applications from the first neighbourhood range of 0-1 km, the school shall first give admission to all siblings.

(iv) If the applications of sibling category, in neighbourhood range of 0-1 km are in excess of the seats of General Category, the draw of lots of all sibling applications (which have residence within 1 km), shall be conducted to admit the students against the number of available seats.

(v) If the applications of sibling category within 0-1 km are less than the seats of General Category and if seats still remain vacant after exhausting sibling applications, the school shall admit the students on the basis of draw of lots from the remaining applications received under the neighbourhood range of 0-1 km.

(vi) In case the total applications of 0-1 km is less than the number of seats of General Category, and vacancies still remain unfilled after exhausting the applications from the distance range of 0-1 km, the applications from the second range of neighbourhood of 1-3 kms shall be considered in the above manner.

(vii) If vacancies still remain unfilled after exhausting the applications from the distance range of 1-3 kms, the applications from the third distance range of neighbourhood of 3-6 kms shall be considered in the above manner.

(viii) Students residing beyond 6 kms shall be admitted only in case vacancies remain unfilled even after considering all the student within 6 kms after following the procedure as mentioned above.

(c) Regarding Minority Schools

Minority schools shall have the right to reserve seats for the students belonging to the minority concerned. The extent of seats reserved and admission procedure to be followed for reserved seats shall be publicized through their websites and notice boards. The process of admission for the reserved seats shall be fair and transparent. The remaining unreserved seats shall be treated as Open/General Seats and admission to these seats will be conducted on the basis of neighbourhood limits as prescribed above in clause 14(vii)(a) & in the manner as prescribed in 14(vii)(b) above."

(Emphasis supplied)

4. The Condition No.20 of the allotment letters dated 31st August, 1994 in W.P.(C) 409/2017 and dated 09th March 2000 in W.P.(C) 408/2017 is reproduced herein below:-

"20. The society shall not refuse admission to the residents of locality."

(Emphasis supplied)

Arguments Of The Petitioners

5. Mr. Romy Chacko, learned counsel for the petitioners submits that the impugned Notification to the extent it applies to private unaided minority educational institutions violates Articles 30(1) and 15(5) of the Constitution. He further submits that the right to administer under Article 30 includes the right to manage the affairs of the institution, which among other things, include the right to admit a student as well as method and procedure of admission. In support of his submission, he relies upon a judgment of the Supreme Court in **The Ahmedabad St. Xaviers College Society & Anr. Etc. v. State of Gujarat & Anr., (1975) 1 SCR 173**.

6. Mr. Chacko further submits that minority educational institutions cannot be compelled to admit any student even if he/she is from general category irrespective of whether there is any clause in the lease deed or allotment letter providing for the same. He submits that Clause 20 of the allotment letter cannot override Article 30 of the Constitution. According to him, Article 30 cannot be ''subverted'' by a covenant in the lease deed.

7. Mr. Chacko states that this Court in **St. Columba''s School v. Lt. Governor of Delhi & Anr., WP(C) 131/2014, decided on 01st September, 2014**, had quashed similar Notifications dated 30th December, 2013 and 18th December, 2013 prescribing a procedure for admission of general category students in minority educational institutions. He further states that the admission criteria stipulated by the Notification dated 18th December, 2013 was quashed by this Court in **The Forum of Minority Schools v. Lt. Governor of Delhi & Anr., WP(C) 208/2014, decided on 2nd December, 2014** following the judgment in **Forum For Promotion Of Quality Education For All v. Lt. Governor of Delhi & Ors., WP(C) 202/2014, decided on 28th November, 2014**.

8. Mr. Chacko lastly submits that the impugned Notification has been issued by the respondents without noticing the judgment of this Court in **Kriti Sisodia Through her Guardian/Father Shri Anil Kumar Sisodia v. Directorate Of Education & Another, WP(C) 895/2007, decided on 08th February, 2007** wherein a Coordinate Bench of this Court has given complete autonomy to minority schools to frame the admission criteria. Arguments Of Respondent-Gnctd

9. On the other hand, Mr. Sanjay Jain, learned ASG submits that under the impugned Notification, the minority institutions are free to admit students from the minority community and thereafter whatever ''open slice'' remains i.e. vacant seats shall be filled in accordance with the neighbourhood criteria. According to him, only the minority character of the educational institutions cannot be taken away by law. He contends that the State has the power to regulate and by virtue of the impugned Notification, the character of the minority institutions has not been amended or abridged or annihilated.

10. Mr. Jain states that by way of the impugned Notification, the State is only trying to enforce a contract that has been executed in the form of a lease deed/allotment

letter. In support of his submission, he relies upon the following judgments of the Supreme Court :

A. **St. Stephen''s College v. University of Delhi, (1992) 1 SCC 558** wherein it has been held as under:-

"59. The need for a detailed study on this aspect is indeed not necessary. The right to minorities whether religious or linguistic, to administer educational institutions and the power of the State to regulate academic matters and management is now fairly well settled. The right to administer does not include the right to maladminister. The State being the controlling authority has right and duty to regulate all academic matters. Regulations which will serve the interests of students and teachers, and to preserve the uniformity in standards of education among the affiliated institutions could be made. The minority institutions cannot claim immunity against such general pattern and standard or against general laws such as laws relating to law and order, health, hygiene, labour relations, social welfare legislations, contracts, torts etc. which are applicable to all communities. So long as the basic right of minorities to manage educational institution is not taken away, the State is competent to make regulatory legislation. Regulations, however, shall not have the effect of depriving the right of minorities to educate their children in their own institution. That is a privilege which is implied in the right conferred by Article 30(1)."

B. The Ahmedabad St. Xaviers College Society (supra) wherein it has been held as under:-

"A regulation which is designed to prevent maladministration of an educational institution cannot be said to offend clause (1) of Article 30. At the same time it has to be ensured that under the power of making regulations nothing is done as would detract from the character of the institution as a minority educational institution or which would impinge upon the rights of the minorities to establish and administer educational institutions of their choice. The right conferred by Article 30(1) is intended to be real and effective and not a mere pious and abstract sentiment; it is a promise of reality and not a teasing illusion. Such a right cannot be allowed to be whittled down by any measure masquerading as a regulation. As observed by this Court in the case of Rev. Sidhajbhai Sabhai, regulations which may lawfully be imposed either by legislative or executive action as a condition of receiving grant or of recognition must be directed to making the institution while retaining its character as minority institution effective as an educational institution. Such regulation must satisfy a dual test - the test of reasonableness, and the test that it is regulative of the educational character of the institution and is conducive to making the institution an effective vehicle of education for the minority community or other persons who resort to it.

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The application of the term ''abridge'' may not be difficult in many cases but the problem arises acutely in certain types of situations. The important ones are where a law is not a direct restriction of the right but is designed to accomplish another objective and the impact upon the right is secondary or indirect. Measures which are directed at other forms of activities but which have a secondary or indirect or incidental effect upon the right do not generally abridge a right unless the content of the right is regulated. As we have already said, such measures would include various types of taxes, economic regulations, laws regulating the wages, measures to promote health and to preserve hygiene and other laws of general application. By hypothesis, the law, taken by itself, is a legitimate one, aimed directly at the control of some other activity. The question is about its secondary impact upon the admitted area of administration of educational institutions. This is especially a problem of determining when the regulation in issue has an effect which constitutes an abridgment of the constitutional right within the meaning of Article 13(2). In other words, in every case, the Court must undertake to define and give content to the word ''abridge'' in Article 13(2). [See generally the Judgment of one of us (Mathew, J.) in **Bennett Coleman & Co. v. Union of India, (1972) 2 SCC 788**] The question to be asked and answered is whether the particular measure is regulatory or whether it crosses the zone of permissible regulation and enters the forbidden territory of restrictions or abridgment. So, even if an educational institution established by a religious or linguistic minority does not seek recognition, affiliation or aid, its activity can be regulated in various ways provided the regulations do not take away or abridge the guaranteed right. Regular tax measures, economic regulations, social welfare legislation, wage and hour legislation and similar measures may, of course have some effect upon the right under Article 30(1). But where the burden is the same as that borne by others engaged in different forms of activity, the similar impact on the right seems clearly insufficient to constitute an abridgment. If an educational institution established by a religious minority seeks no recognition, affiliation or aid, the state may have no right to prescribe the curriculum, syllabi or the qualification of the teachers."

11. Learned ASG submits that the freedom to contract available to a citizen cannot be curtailed or curbed relying upon the fundamental rights. According to him, a right to enforce a fundamental right against State action cannot be extended to challenge a right to enter into a contract giving up an absolute right in oneself in the interests of an association to be formed. In support of submission, he relies upon a judgment of the Supreme Court in **Zoroastrian Cooperative Housing Society Ltd. & Anr. v. District Registrar, Cooperative Societies (Urban) and Ors., (2005) 5 SCC 632**.

12. Mr. Jain further submits that the Supreme Court in **Modern Dental College & Research Centre & Ors. v. State of Madhya Pradesh & Ors., (2016) 7 SCC 353** has held that regulatory measures can be adopted by the State in respect of minority run institutions as well. The relevant portion of the said judgment relied upon by Mr.

Jain is reproduced herein below:-

"25.1. That the institutions have a fundamental right to establish, run and maintain professional institutions and the rights flow from Article 30(1) in respect of minority institutions and Article 19(1)(g) in respect of minority as well as nonminority private unaided institution;

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55. It would be necessary to clarify the position in respect of educational institutions run by minorities. Having regard to the pronouncement in **T.M.A. Pai Foundation v. State of Karnataka, (2002) 8 SCC 481 : 2 SCEC 1**, with lucid clarifications to the said judgment given by this Court in **P.A. Inamdar v. State of Maharashtra, (2005) 6 SCC 537 : 2 SCEC 745** , it becomes clear that insofar as such regulatory measures are concerned, the same can be adopted by the State in respect of minority-run institutions as well. Reliance placed by the appellants in **St. Stephen''s College v. University of Delhi, (1992) 1 SCC 558 : 1 SCEC 404** may not be of much help as that case did not concern with professional educational institutions.

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64. The exercise which, therefore, is to be taken is to find out as to whether the limitation of constitutional rights is for a purpose that is reasonable and necessary in a democratic society and such an exercise involves the weighing up of competitive values, and ultimately an assessment based on proportionality i.e. balancing of different interests."

13. Mr. Jain contends that the impugned Notification in the present writ petitions is different from the Notification that was impugned in the case of St. Columba''s School (supra).

Issue Notice

14. Having heard learned counsel for the parties, this Court is of the view that questions of law arise for consideration in the present matters. Accordingly, issue notice. Mr. Dhanesh Relan and Mr. Gautam Narayan, Advocates, accept notice for the DDA and GNCTD respectively. Respondents are permitted to file their counter affidavits within a period of four weeks. Rejoinder affidavit, if any, be also filed within a period of fourweeks thereafter.

Court''s Reasoning

Right to admit students is a facet of petitioners fundamental right under article 30 to administer educational institutions.

15. This Court is of the view that the right of the minorities to establish and administer educational institutions is governed by Articles 29 and 30 of the Constitution. It has been held in a catena of the judgments that the right of minority

educational institutions to admit students is a facet of their right to administer educational institutions. In the prima facie opinion of this Court, the State cannot interfere with the same except on the ground of maladministration - which has not been urged by the respondents in the present cases.

16. In fact, the Supreme Court in The Ahmedabad St. Xaviers College Society (supra) has held that the minorities based on religion have the right to establish and administer educational institutions imparting general secular education within the meaning of Article 30 of the Constitution. The relevant portion of the said judgment is reproduced herein below:-

"It will be wrong to read Article 30(1) as restricting the right of minorities to establish and administer educational institutions of their choice only to cases where such institutions are concerned with language, script or culture of the minorities.

The reasons are these. First, Article 29 confers the fundamental right on any section of the citizens which will include the majority section whereas Article 30(1) confers the right on all minorities. Second, Article 29(1) is concerned with language, script or culture, whereas Article 30(1) deals with minorities of the nation based on religion or language. Third, Article 29(1) is concerned with the right to conserve language, script or culture, whereas Article 30(1) deals with the right to establish and administer educational institutions of the minorities of their choice. Fourth, the conservation of language, script or culture under Article 29(1) may be by means wholly unconnected with educational institutions and similarly establishment and administration of educational institutions by a minority under Article 30(1) may be unconnected with any motive to conserve language, script or culture. A minority may administer an institution for religious education which is wholly unconnected with any question of conserving a language, script or culture.

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.....If the scope of Article 30(1) is made an extension of the right under Article 29(1) as the right to establish and administer educational institutions for giving religious instruction or for imparting education in their religious teachings or tenets, the fundamental right of minorities to establish and administer educational institutions of their choice will be taken away.

Every section of the public, the majority as well as minority has rights in respect of religion as contemplated in Articles 25 and 26 and rights in respect of language, script, culture as contemplated in Article 29. The whole object of conferring the right on minorities under Article 30 is to ensure that there will be equality between the majority and the minority. If the minorities do not have such special protection they will be denied equality.

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The real reason embodied in Article 30(1) of the Constitution is the conscience of the nation that the minorities, religious as well as linguistic, are not prohibited from establishing and administering educational institutions of their choice for the purpose of giving their children the best general education to make them complete men and women of the country. The minorities are given this protection under Article 30 in order to preserve and strengthen the integrity and unity of the country.

The sphere of general secular education is intended to develop the commonness of boys and girls of our country. This is in the true spirit of liberty, equality and fraternity through the medium of education. If religious or linguistic minorities are not given protection under Article 30 to establish and administer educational institutions of their choice, they will feel isolated and separate. General secular education will open doors of perception and act as the natural light of mind for our countrymen to live in the whole.

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The entire controversy centres round the extent of the right of the religious and linguistic minorities to administer their educational institutions. The right to administer is said to consist of four principal matters. First is the right to choose its managing or governing body. It is said that the founders of the minority institution have faith and confidence in their own committee or body consisting of persons elected by them.

Second is the right to choose its teachers. It is said that minority institutions want teachers to have compatibility with the ideals, aims and aspirations of the institution. Third is the right not to be compelled to refuse admission to students. In other words, the minority institutions want to have the right to admit students of their choice subject to reasonable regulations about academic qualifications. Fourth is the right to use its properties and assets for the benefit of its own institution.

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..... Special safeguards were guaranteed for the minorities and they were made a part of the fundamental rights with a view to instil a sense of confidence and security in the minorities. Those provisions were a kind of a Charter of rights for the minorities so that none might have the feeling that any section of the population consisted of first-class citizens and the others of second-class citizens. The result was that minorities gave up their claims for reservation of seats. Sardar Patel, who was the Chairman of the Advisory Committee dealing with the question of minorities, said in the course of his speech delivered on February 27, 1947:

"This Committee forms one of the most vital parts of the Constituent Assembly and one of the most difficult tasks that has to be done by us is the work of this committee. Often you must have heard in various debates in British Parliament that have been held on this question recently and before when it has been claimed on

behalf of the British Government that they have a special responsibility - a special obligation - for protection of the interests of the minorities. They claim to have more special interest than we have. It is for us to prove that it is a bogus claim, a false claim, and that nobody can be more interested than us in India in the protection of our minorities. Our mission is to satisfy every interest and safeguard the interests of all the minorities to their satisfaction.'' (B. Shiva Rao: The Framing of India''s Constitution: Select Documents, Vol. II, p. 66.).....

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The idea of giving some special rights to the minorities is not to have a kind of a privileged or pampered section of the population but to give to the minorities a sense of security and a feeling of confidence. The great leaders of India since time immemorial had preached the doctrine of tolerance and catholicity of outlook.....

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It is upon the principal and teachers of a college that the tone and temper of an educational institution depend. On them would depend its reputation, the maintenance of discipline and its efficiency in teaching. The right to choose the principal and to have the teaching conducted by teachers appointed by the management after an overall assessment of their outlook and philosophy is perhaps the most important facet of the right to administer an educational institution. We can perceive no reason why a representative of the University nominated by the Vice-Chancellor should be on the Selection Committee for recruiting the Principal or for the insistence of head of the department besides the representative of the University being on the Selection Committee for recruiting the members of the teaching staff. So long as the persons chosen have the qualifications prescribed by the University, the choice must be left to the management. That is part of the fundamental right of the minorities to administer the educational institution established by them."

(emphasis supplied)

The majority judgment in st. stephen''s college did not accept the argument that the minority character of the college would not be affected or prejudiced, if students belonging to non-christian community are given admission solely on the basis of marks obtained in the qualifying examination and not in the interview

17. Subsequently, the Supreme Court in St. Stephen''s College (supra) rejected the argument that the minority character of the college would not be affected or prejudiced, if students belonging to non-Christian community are given admission solely on the basis of marks obtained in the qualifying examination and not in the interview. The admission programme impugned in the said case as mentioned in the judgment is reproduced herein below :-

"62. The grievance of the University and the Students'' Union is that the College Admission Programme is a device to manipulate the merits and not a scientific test to assess performance of candidates. The selection is made by judging the candidates at the interview and the marks secured in the qualifying examinations are not taken into account for selection. The marks are only relevant for calling the candidates for interview. We have carefully examined the College Admission Programme and in our opinion, the contention urged for the University and Students'' Union is misconceived. The purpose of the interview is not to reassess or remeasure the merits of the applicants in the qualifying examinations. The marks secured in the qualifying examinations are indeed relevant for selection and the interview is only supplementary test. The College fixes different cut-off percentage of marks in different subjects. The candidates are called for interview in the ratio of 1:4 or 1:5 depending upon the candidate''s choice of selection of courses of study. The interview is conducted by men of high integrity, calibre and qualification.

They are men who deal with education and the students. During the interview, questions are asked to test the candidate''s knowledge of the subject and his general awareness of the current problems. The student is also required to furnish in the application form his interest, hobbies, values, career plan etc. Each member of the Interview Committee grades the performance of the candidates and the selection is made for each course of study by taking into consideration the opinion expressed by all the members of the Interview Committee. By consensus the final list of candidates is prepared. The selection is thus made on the basis of the candidate''s academic record and performance at the interview keeping in mind his/her all round competence, capacity to benefit from being in the College as well as potential to contribute to the life of College. Judging the performance by grading is a well known method followed in the academic field."

(emphasis supplied)

18. Consequently, the Supreme Court in St. Stephen''s College (supra) upheld an admission programme which was at variance with that of the Delhi University even though it dealt with admission of general students in non-religious courses as according to it, the admission programme was better than the blind method of selection based on marks secured in the qualifying examination and it did not lead to any mal-administration.

Eleven judge bench of the supreme court in t.m.a. pai foundation & ors. has held that unaided private schools have to be given maximum autonomy with regard to admission of students at the school level as it is not possible to grant admission at that stage on the basis of merit

19. The Eleven Judge Bench of the Supreme Court in **T.M.A. Pai Foundation & Ors. v. State of Karnataka & Ors. (2002) 8 SCC 481** has held that unaided private schools have to be given maximum autonomy with regard to admission of students

at the school level as it is not possible to grant admission at that stage on the basis of merit. The relevant portion of the said judgment reads as under :-

"60. Education is taught at different levels, from primary to professional. It is, therefore, obvious that government regulations for all levels or types of educational institutions cannot be identical; so also, the extent of control or regulation could be greater vis-a-vis aided institutions.

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 powers, admission of students and the fees to be charged. At the school level, it is not possible to grant admissions on the basis of merit. It is no secret that the examination results at all levels of unaided private schools, notwithstanding the stringent regulations of the governmental authorities, are far superior to the results of the government-maintained schools. 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)

Modern dental college & research centre judgment did not either overrule or set aside the ahmedabad st. xaviers college society or T.M.A. pai foundation & ors. judgments

20. The judgment of the Supreme Court in Modern Dental College & Research Centre (supra) did not either overrule or set aside the judgment of the Supreme Court in The Ahmedabad St. Xaviers College Society (supra) or in T.M.A. Pai

Foundation & Ors. (supra). It only distinguished the St. Stephen''s College (supra) judgment by holding that it did not deal with professional educational institutions. Since in the present cases, this Court is concerned with lower level of educational institutions like primary schools, the St. Stephen''s College (supra) judgment shall apply with full vigour. Prima facie, this Court is of the view that the judgment in Modern Dental College & Research Centre (supra) dealt with an issue of regulation in the form of a State Act and not a notification by the State Government interpreting a covenant executed between the Petitioners and the President of India. Applying the doctrine of proportion, the Supreme Court in Modern Dental College & Research Centre (supra) held that the State Act which curbed malpractices constituted a reasonable restriction under Article 19.

In Pramati educational & cultural trust & ors., the supreme court held that the power under article 21-a of the constitution cannot extend to making any law which would abrogate the right of the minorities to establish and administer schools of their choice

21. In **Pramati Educational & Cultural Trust & Ors. v. Union of India & Ors., WP(C) 416/2012, decided on 06th May, 2014**, the Supreme Court went to the extent of holding that the power under Article 21-A of the Constitution cannot extend to making any law which would abrogate the right of the minorities to establish and administer schools of their choice. It also held that if the Right of Children to Free and Compulsory Education Act, 2009 is made applicable to minority schools aided or unaided, the right of the minorities under Article 30(1) of the Constitution would be abrogated. The relevant portion of the said judgment reads as under :-

45. Under Article 30(1) of the Constitution, all minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice. Religious and linguistic minorities, therefore, have a special constitutional right to establish and administer educational schools of their choice and this Court has repeatedly held that the State has no power to interfere with the administration of minority institutions and can make only regulatory measures and has no power to force admission of students from amongst non-minority communities, particularly in minority schools, so as to affect the minority character of the institutions. Moreover, in **Kesavananda Bharati Sripadagalvaru v. State of Kerala & Anr.** (supra) Sikri, CJ., has even gone to the extent of saying that Parliament cannot in exercise of its amending power abrogate the rights of minorities. To quote the observations of Sikri, CJ. In **Kesavananda Bharati Sripadagalvaru v. State of Kerala & Anr.** (supra):

"178. The above brief summary of the work of the Advisory Committee and the Minorities Subcommittee shows that no one ever contemplated that fundamental rights appertaining to the minorities would be liable to be abrogated by an amendment of the Constitution. The same is true about the proceedings in the Constituent Assembly. There is no hint anywhere that abrogation of minorities''

rights was ever in the contemplation of the important members of the Constituent Assembly. It seems to me that in the context of the British plan, the setting up of Minorities Subcommittee, the Advisory Committee and the proceedings of these Committees, as well as the proceedings in the Constituent Assembly mentioned above, it is impossible to read the expression "Amendment of the Constitution" as empowering Parliament to abrogate the rights of minorities."

Thus, the power under Article 21A of the Constitution vesting in the State cannot extend to making any law which will abrogate the right of the minorities to establish and administer schools of their choice.

46. When we look at the 2009 Act, we find that Section 12(1)(b) read with Section 2(n)(iii) provides that an aided school receiving aid and grants, whole or part, of its expenses from the appropriate Government or the local authority has to provide free and compulsory education to such proportion of children admitted therein as its annual recurring aid or grants so received bears to its annual recurring expenses, subject to a minimum of twenty-five per cent. Thus, a minority aided school is put under a legal obligation to provide free and compulsory elementary education to children who need not be children of members of the minority community which has established the school. We also find that under Section 12(1)(c) read with Section 2(n)(iv), an unaided school has to admit into twenty-five per cent of the strength of class I children belonging to weaker sections and disadvantaged groups in the neighbourhood. Hence, unaided minority schools will have a legal obligation to admit children belonging to weaker sections and disadvantaged groups in the neighbourhood who need not be children of the members of the minority community which has established the school. While discussing the validity of clause (5) of Article 15 of the Constitution, we have held that members of communities other than the minority community which has established the school cannot be forced upon a minority institution because that may destroy the minority character of the school. In our view, if the 2009 Act is made applicable to minority schools, aided or unaided, the right of the minorities under Article 30(1) of the Constitution will be abrogated. Therefore, the 2009 Act insofar it is made applicable to minority schools referred in clause (1) of Article 30 of the Constitution is ultra vires the Constitution. We are thus of the view that the majority judgment of this Court in **Society for Unaided Private Schools of Rajasthan v. Union of India & Anr.** (supra) insofar as it holds that the 2009 Act is applicable to aided minority schools is not correct."

(Emphasis Supplied)

The respondents'' submission that the state by way of the impugned notification is only trying to enforce a contract in the form of a lease deed/allotment letter which constitutes a waiver of fundamental right seems prima facie untenable

22. This Court in St. Columba''s School (supra) following the dictum in **Pramati Educational & Cultural Trust & Ors.** (supra) has opined that as the Constitution Bench has held that even after amending the Constitution the State cannot abrogate the rights of the minorities to establish and administer schools of their choice, then by a covenant in a lease deed, Government certainly cannot appropriate the right to nominate non-minority EWS students to a minority school.

23. The respondents'' submission that the State by way of the impugned Notification is only trying to enforce a contract in the form of a lease deed/allotment letter which constitutes a waiver of fundamental right seems prima facie untenable as the Supreme Court in The Ahmedabad St. Xaviers College Society (supra) has held that a fundamental right under Article 30 cannot be bartered away or surrendered as it is for a living generation. The relevant portion of the judgment in The Ahmedabad St. Xaviers College Society (supra) is reproduced herein below :

"It is doubtful whether the fundamental right under Article 30(1) can be bartered away or surrendered by any voluntary act or that it can be waived. The reason is that the fundamental right is vested in a plurality of persons as a unit or if we may say so, in a community of persons necessarily fluctuating. Can the present members of a minority community barter away or surrender the right under the article so as to bind its future members as a unit'' The fundamental right is for the living generation. By a voluntary act of affiliation of an educational institution established and administered by a religious minority the past members of the community cannot surrender the right of the future members of that community. The future members of the community do not derive the right under Article 30(1) by succession or inheritance."

(Emphasis Supplied)

24. Consequently, this Court is prima facie of the view that the State cannot enforce a contract or a covenant in the lease deed/allotment letter in violation of the fundament right guaranteed under Article 30 of the Constitution, as it constitutes a basic feature of the Constitution. Accordingly, this Court is prima facie of the view that the judgment in Zoroastrian Cooperative Housing Society Ltd. & Anr. (supra) is inapplicable to the present cases.

This court is prima facie of the view that the petitioners are entitled in law to admit students in general category according to their own procedure so long as the same is fair, reasonable and does not lead to maladministration

25. This Court is also of the prima facie opinion that the petitioners are entitled in law to admit students in General Category according to their own procedure so long as the same is fair, reasonable and does not lead to maladministration and the impugned Notification violates the fundamental right of a private unaided minority school management to maximum autonomy in day-to-day administration including the right to admit students.

This court is prima facie of the view that the impugned notification has converted unaided minority schools after sixteen years in w.p.(c) 408/2017 and twenty-two years in w.p.(c) 409/2017 into a neighbourhood school.

26. In fact, this Court is prima facie of the view that the impugned Notification by providing that admission shall be offered to students residing within one kilometre from the school has deprived the unaided minority schools of their right to administer and establish educational institutions and has converted them into a neighbourhood school. It is pertinent to mention that for the last sixteen years neither the lessor i.e. the President of India nor GNCTD had defined the concept of locality or implemented/enforced it.

27. Consequently, impugned Notification dated 07th January, 2017 so far as they relate to petitioners are stayed till the disposal of writ petitions. Accordingly, CM Appl. No. 1845/2017 in WP(C) 408/2017 and CM Appl. No. 1847/2017 in WP(C) 409/2017 stand disposed of. At the cost of repetition, it is clarified that the aforesaid observations are prima facie in nature arrived at to put in place an interim arrangement pending disposal of the writ petitions.

28. List the writ petitions on 21st March, 2017 for disposal.

Epilogue

29. Before adjourning the present cases, this Court would like to observe that every year by issuing a Notification either in the month of January or late December when admission forms are about to be issued or have already been issued, the State cannot spring a ''surprise'' upon its citizens. The State is supposed to issue Notifications and Orders to facilitate and not to cause confusion and anxiety. There is nothing urged to show as to why the impugned Notification has been issued at the ''eleventh hour'' and not a few months in advance. Such Notifications not only create uncertainty and confusion, but also put pressure upon Courts who have to give priority to these matters leaving aside all the prior commitments i.e. matters which have already been listed for hearing. This Court last year in another Nursery Admission matter in **Suman Mishra v. Government of NCT of Delhi, W.P.(C) 962/2016** held that, "the State cannot take its citizens, especially the children by surprise. Both the parents as well as the children are entitled to fundamental right to education and to plan their future".

30. Consequently, it is directed that respondents in future shall issue Notifications/Officer Orders/Circulars with regard to admission to schools at least three months prior to the commencement of the admission process.