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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION (L) NO. 1876 OF 2010

1. Association of International Schools & Principals Foundation, an Association of Private Unaided Schools and having its address at Universal High, Brahmand Scheme, Phase VI, Off Ghodbunder Road, Thane.
2. Universal Education Foundation, a company incorporated under the provisions of Section 25 of the Companies Act, 1956 and address at Universal High, Brahmand Scheme, Phase VI, Off Ghodbunder Road, Thane. ... Petitioners

Versus

1. The State of Maharashtra, Summon/Notice/s to be served on Learned Government Pleader appearing for the State of Maharashtra under Order XXXVIII, Rule 4 of the Code of Civil Procedure, 1908.
2. The Department of Education, State of Maharashtra, through the Secretary, Mantralaya, Mumbai 32. ... Respondents

Mr. Aspi Chinoy, Sr. Counsel with Mr. Navroz Seervai, Sr. Counsel with Mr. Prateek Seksaria, Mr. Sanjay Jain, Mr. I.J. Nankani, Mr. Lalit Jain, Mr. H.S. Khokawala and Mr. Cesar Pereira i/by M/s. Nankani & Associates for Petitioners.

Mr. D.A. Nalawade, Government Pleader for Respondents.

**CORAM : D.K. DESHMUKH &
N.D. DESHPANDE, JJ.
DATED : SEPTEMBER 01, 2010.**

ORAL JUDGMENT (Per D.K. Deshmukh, J.):

Rule. Rule made returnable forthwith.

By consent of the parties, heard finally.

Petitioner No. 1 is an association of private unaided minority and private unaided school who run International Curriculum Schools. The petitioners have filed this petition challenging the Constitutional validity of section 2 and 4 of the Maharashtra Education Institutes (Prevention of Capitation Fees) Act, 1987 as also challenging the validity of Government Resolution dated 15.7.2010 and 22.7.1999. The subject matter of the Government Resolution dated 15.7.2010 is regulation of fees that are charged in unaided secondary schools. The subject matter of Government Resolution dated 22.7.1999 is also the same. It is the case of the State Government that these Government Resolutions have been issued in exercise of its power under the Maharashtra Education Institutes (Prevention of Capitation Fees) Act, 1987, hereinafter referred to as "Act" for the sake of brevity) including Section 13. Perusal of the G.R. dated 15.7.2010 shows that it refers to the provisions of Section 4(3) and Section 2 of the Act and states that the Government Resolution contains instructions about fees that can be charged by the unaided secondary schools affiliated to State Education Board as also other Educational Boards. The Petitioners challenge the validity of these

Government Resolutions on various grounds including the ground that such instructions and/or directions could not have been issued by the State Government. Perusal of the Government Resolution dated 15.7.2010 shows that it refers to Government resolution dated 22.7.1999. Perusal of Government Resolution dated 22.7.1999 shows that it has been issued by the State Government to regulate fees that are charged in the unaided and aided education institutions. The Government resolution dated 15.7.2010 sets out two committees one under the chairmanship of Divisional Deputy Director of Education and another under the Chairmanship of Director of Education for the purpose of approving the fees that are to be charged by the schools. If the appeal is to be preferred against the decision of the committee headed by the Divisional Deputy Director of Education, then the concerned institution may prefer such appeal before the State Level committee headed by the Director of Education.

So far as challenge to the provisions of the Act is concerned the Petitioner relied on the judgment of the Supreme Court in the case of **T.M.A. Pai Foundation and Others Versus State of Karnataka and Others, (2002) 8 Supreme Court Cases 481**. It is submitted that the eleven Judges Bench of the Supreme Court in its Judgment in T.M.A.

Pai Foundation (supra) has held that establishing secondary school is a fundamental right guaranteed by Article 19(1)(g) of the Constitution of India. Therefore, first challenge to the Government Resolution is that these schools have been set up by the Management in exercise of their fundamental right guaranteed by Article 19(1)(g) of the Constitution. Reasonable restrictions on their right can be placed by law. Relying on the observations of the Supreme Court in its judgment in the case of **State of Bihar and others Versus Project Uchcha Vidya, Sikshak Sangh and others, (2006) 2 Supreme Court Cases 545** it is submitted that reasonable restrictions on the fundamental right guaranteed under Article 19(1)(g) can be placed only by law enacted by Legislature and not by executive instructions issued under Article 162 of the Constitution of India. The learned counsel also took us through the judgment of the Supreme Court firstly in the case of **Islamic Academy of Education and another Versus State of Karnataka and others (2003) 6 Supreme Court Cases 697** and then judgment of the Supreme Court in the case of **P.A. Inamdar and Others Versus State of Maharashtra and Others, (2005) 5 Supreme Court Cases 537** to contend that these two judgments considered the judgment of the Supreme Court in T.M.A. Pai Foundation case only in so far as it relates

to professional colleges are concerned and that it did not consider that part of the judgment of the Supreme Court in T.M.A. Pai Foundation case which deals with secondary schools. The learned counsel appearing for the Petitioner, in so far as validity of the provisions of the Act challenged in the petition, submitted that the provisions are violative of fundamental right guaranteed by Article 19(1)(g) of the Constitution. He submits that the Supreme Court in its judgment in the case of T.M.A. Pai Foundation has in terms held that in so far as secondary schools are concerned, the decision on the fee to be charged has to be left to the private educational institution which do not depend on any aid from the State Government. It is submitted that the provisions in the Act in relation to the approval of fees by the State Government which are to be charged by the unaided institutions is contrary to the judgment of the Supreme Court in T.M.A. Pai Foundation Case. He relied on the observations of the Supreme Court in Paragraph 56 of that judgment. The learned counsel also invited our attention to the order passed by the Supreme Court in W.P. No. 2460 of 1982 dated 11.3.2003 in the case of Andheri Education Society and Anr. Vs. State of Maharashtra to contend that the Supreme Court has directed that all statutory enactments should be suitably amended to bring them in line

with law laid down by the Supreme Court in T.M.A. Pai Foundation case.

The learned Government Pleader appearing for the State Government submitted that Government Resolution has been issued in exercise of powers under the provisions of the Act including section 13. He submitted that section 4 of the Act gives power to the State Government to approve fees to be charged by the unaided institutions and in exercise of that power, Government has issued G.R. The learned counsel therefore, submits that the Government Resolutions are valid.

After hearing the learned Government Pleader on the validity of the Government Resolutions, we had indicated that we propose to accept the argument in relation to the validity of the Government Resolutions advanced on behalf of the Petitioner and therefore, we did not hear the learned Government Pleader at this juncture on the question as to the validity of the provisions of the Act which are challenged in the petition. We want to make it clear that we do not propose to pronounce on the challenge to the validity of the Act in this petition because in our opinion, it is not necessary. We leave that question open to be challenged by the Petitioner, if necessary at the future date.

So far as validity of the Government Resolutions is concerned, it is common ground that the G.R. of the year 2010 relies on the earlier Government Resolution dated 22.7.1999 for the purpose of indicating as to what are the contents of the tuition fees and what are approved items and it constitutes committee headed by the Divisional Deputy Director of Education for the purpose of approving the fees fixed by the unaided institutions. It provides that the committee headed by the Director of Education shall hear the appeal against the order that may be made by the committee headed by the Divisional Deputy Director of Education. It is clear from the perusal of the G.R. of 1999 and 2010 that the purpose of these G.R.s is to regulate and control the fees that are charged by the unaided educational institutions (secondary schools). The case of the State Government is that these Government Resolutions have been issued under Section 13 of the Act. Section 13 of the Act reads as under :

“13. Savings : Notwithstanding anything contained in this Act, all orders, circulars, resolutions, directions, rules, notifications, ordinances, statutes, schemes or appointments made or issued and all powers which ere vested or exercisable by any person or authority in respect of the matters referred to in this Act, whether in accordance with any law for the

time being in force or otherwise, and in force immediately before the commencement of this Act shall, so far as they are not inconsistent with the provisions of this Act, continue in force or continue to be so vested and be deemed to have been made or issued or vested under the provisions of this Act unless and until superseded by anything done or any action taken under this Act.”

Perusal of the above quoted provision shows that the heading of the provisions is “saving”. In other words, it is a saving clause of the enactment and purpose of every saving clause of enactment is to save what is done before the commencement of the Act to the extent it is not in consistent with the provisions of the Act. The reading of provisions of section 13 shows that action taken by State Government before the Commencement of the Act to the extent they are not inconsistent and or contrary to the provisions of the Act have been saved. The Act has come into force in the year 1987 and therefore, in our opinion, neither the G.R. of 1999 or G.R. of 2010 can be related to the provisions of Section 13 of the Act. Perusal of the provisions of section 3 of the Act shows that demand or collection of capitation fee by the educational institutions is prohibited. Term “capitation fee” is defined by section 2(a) of the Act which reads as under :

“Capitation Fee” means any amount, by whatever name called, whether in cash or kind, in excess of the prescribed or, as the case may be approved, rates, of fees regulated under section 4:”

Perusal of the above provision shows that any amounts which are demanded by the institution in excess of the prescribed fee or approved fee is capitation fee. Section 4 deals with approval of fee which is relevant for our purpose it reads as under :

“4. Regulation of fees :

1. It shall be competent for the State Government to regulate the tuition fee or any other fee that may be received or collected by any educational institution for admission to, and prosecution of study in any class or standard or course of study of such institution in respect of any or all classes of students.
2. The fees to be regulated under sub section (1) shall-
 - (a) in the case of the aided institutions, be such as may be prescribed by a university under the relevant University Law for the time being in force in the State or, as the case may be, by State Government, and
 - (b) In the case of the un-aided institutions, having regard to the usual expenditure excluding any expenditure on lands and buildings or on any such other items as the State Government may notify, be such as the State

Government may approve;

Provided that, different fees may be approved under clause (b) in relation to different institutions or different classes or different standards or different courses of studies or different areas.

3. The fees, to be prescribed or approved under sub section (2), shall include the following items, namely ;
 - (a) tuition fees, whether on term basis or monthly or yearly basis;
 - (b) Term fee per academic term;
 - (c) Library fee and deposit as security per year or for the entire course;
 - (d) Laboratory fee and deposit as security per year or for the entire course;
 - (e)Gymkhana fee on yearly basis;
 - (f) Caution money for the entire course;
 - (g) Examination fee, if any, per year or for the entire course;
 - (h) Hostel fee, Messing charges, if these facilities are provided, whether on term basis or on monthly or yearly basis.
 - (i) Any such other fee or deposit as security or amount for other item, as the State Government may approve.
4. The fees regulated under this section shall ordinarily remain in force for a period of three years and the State Government shall appoint a committee of persons who, in the opinion of the State Government, are experts in educational field, for taking the review of the fee structure and may, after considering the report of the Committee, revise the fees if it considers it expedient to do so.

5. Every educational institution or, as the case may be, management shall issue an official receipt for the fees or deposits or any other amounts collected for any purpose, which shall be specified in such receipt.”

Perusal of sub section (1) of section 4 shows that it confers power on the State Government to regulate tuition fees and other fees that can be charged by the Educational Institutions both aided and un aided. Clause (a) of sub section (2) of Section 4 lays down that the fees to be charged by the aided educational institutions are to be prescribed by the University or by the State Government. The term “prescribed” is defined by Section 2(f) of the Act to mean prescribed by the rules made under the Act. Thus so far as fee that can be charged in aided institution is concerned, it to be fixed by the State Government by framing rules in exercise of its rule making power under the Act which is to be found in section 12 of the Act. So far as unaided institutions are concerned, the State Government has two kinds of power, one to specify items of expenditure which are to be excluded from usual expenditure which is to be taken into consideration while determining the amount of fees to be charged and secondly the power which is vested in the State Government is to approve the fees that may be fixed by the unaided

institutions. The perusal of the G.R. shows that it enumerates the items that are to be taken into consideration while fixing the amount of fee. So far as G.R. of 2010 is concerned, it merely reiterates what is stated in 1999 resolution in that regard. None of these resolutions provide for the State Government approving fees fixed by the institutions on the contrary, they contemplate the constitution of committee of which State Government is not part for that purpose. The Act confers power on the State Government to approve the fees fixed and there is no provision in the Act which empower the State Government to delegate its power of approving fees. Therefore, the provisions of 2010 G.R. in so far as it constitutes committee for approving the fees is concerned it is clearly contrary to the provisions of the Act and therefore, in our opinion, the State Government could not have issued G.R. constituting committee for approving the fees. The Supreme Court in the Judgment in T.M.A. Pai Foundation Case has clearly held that the right to establish educational institution is a fundamental right guaranteed by Article 19(1)(g) of the Constitution of India. The observations of the Supreme Court made in Paragraphs 48, 50, 53, 54, 56 and 61 in our opinion are relevant which reads as under :

“48. Private education is one of the most

dynamic and fastest growing segments of post-secondary education at the turn of the twenty-first century. A combination of unprecedented demand for access to higher education and the inability or unwillingness of government to provide the necessary support has brought private higher education to the forefront. Private institutions, with a long history in many countries, are expanding in scope and number, and are becoming increasingly important in parts of the world that relied almost entirely on the public sector.

.....

50. The right to establish and administer broadly comprises of the following rights:-

- (a) to admit students;
- (b) to set up a reasonable fee structure;
- (c) to constitute a governing body;
- (d) to appoint staff (teaching and non-teaching); and
- (e) to take action if there is dereliction of duty on the part of any employees.

.....

53. With regard to the core components of the rights under Article 19 and 26(a), it must be held that while the state has the right to prescribe qualifications necessary for admission, private unaided colleges have the right to admit students of their choice, subject to an objective and rational procedure of selection and the compliance of conditions, if any, requiring admission of a small percentage of students belonging to weaker sections of the society by granting them freeships or scholarships, if not granted by the Government. Furthermore, in setting up a reasonable fee structure, the element of profiteering is not as

yet accepted in Indian conditions. The fee structure must take into consideration the need to generate funds to be utilized for the betterment and growth of the educational institution, the betterment of education in that institution and to provide facilities necessary for the benefit of the students. In any event, a private institution will have the right to constitute its own governing body, for which qualifications may be prescribed by the state or the concerned university. It will, however, be objectionable if the state retains the power to nominate specific individuals on governing bodies. Nomination by the state, which could be on a political basis, will be an inhibiting factor for private enterprise to embark upon the occupation of establishing and administering educational institutions. For the same reasons, nomination of teachers either directly by the department or through a service commission will be an unreasonable inroad and an unreasonable restriction on the autonomy of the private unaided educational institution.

.....

54. The right to establish an educational institution can be regulated; but such regulatory measures must, in general, be to ensure the maintenance of proper academic standards, atmosphere and infrastructure (including qualified staff) and the prevention of mal-administration by those in charge of management. The fixing of a rigid fee structure, dictating the formation and composition of a governing body, compulsory nomination of teachers and staff for appointment or nominating students for admissions would be unacceptable restrictions.

.....

56. An educational institution is established for the purpose of imparting education of the type made available by the institution. Different courses of study are usually taught by teachers who have to be recruited as per qualifications that may be prescribed. It is no secret that better working conditions will attract better teachers. More amenities will ensure that better students seek admission to that institution. One cannot lose sight of the fact that providing good amenities to the students in the form of competent teaching faculty and other infrastructure costs money. It has, therefore, to be left to the institution, if it chooses not to seek any aid from the government, to determine the scale of fee that it can charge from the students. One also cannot lose sight of the fact that we live in a competitive world today, where professional education is in demand. We have been given to understand that a large number of professional and other institutions have been started by private parties who do not seek any governmental aid. In a sense a prospective students has various options open to him/her where, therefore, normally economic forces have a role to play. The decision on the fee to be charged must necessarily be left to the private educational institution that does not seek or is not dependent upon any funds from the government. (emphasis supplied)

.....

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 admission 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 curtaining 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)

Perusal of the above quoted paragraphs show that the Supreme Court has in terms held that the decision on the fees to be charged must necessarily be left to the private educational institution that does not seek or is not dependent upon any funds from the Government. Thus according to Supreme Court final decision as to what should be the amount of fees to be charged by the institutions has to be left to the educational institution. The Supreme Court has held that the right to establish educational institution is heart of the right to carry on occupation. Article 19(6) however, permits placing of reasonable restrictions by law on the right guaranteed by Article 19(1)(g). Article 19(6) reads as under :

“19 (1) All citizens shall have the right-
(a) to freedom of speech and expression; regarding freedom
(b) to assemble peaceably and without arms; of speech, etc.
(c) to form associations or unions;
(d) to move freely throughout the territory of India;
(e) to reside and settle in any part of the territory of India; 1[and]
(g) to practise any profession, or to carry

on any
occupation, trade or business.

.....

(6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, 2[nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to.....”

The provisions of Article 19(6) have been considered by the Supreme Court in its judgment in the case of Project Uchcha Vidya Sikshak Sangh (supra) referred to above in relation to the right to establish educational institutions. What is observed by the Supreme Court in Para 69 of that judgment in our opinion is relevant for our purpose :

“The right to manage an institution is also a right to property. In view of a decision of an eleven-Judge Bench of this Court in T.M.A. Pai Foundation & Others v. State of Karnataka [(2002) 8 SCC 481] establishment and management of an educational institution has been held to be a part of fundamental right being a right of occupation as envisaged under Article 19(1)(g) of the Constitution of India. A

citizen cannot be deprived of the said right except in accordance with law. The requirement of law for the purpose of clause (6) of Article 19 of the Constitution of India can by no stretch of imagination be achieved by issuing a circular or a policy decision in terms of Article 162 of the Constitution of India or otherwise. Such a law, it is trite, must be one enacted by legislature.”

(emphasis supplied)

The Supreme Court in the above quoted paragraph has clearly held that reasonable restrictions on the right guaranteed by Article 19(1) (g) can be placed only by law enacted by the Legislature and not by a circular or resolution issued under Article 162 of the Constitution of India. We have already held that two Government Resolutions are not referable to any provisions of the Act. Then the only provision to which it can probably be referred to is Article 162 of the Constitution. In view of the above observations of the Supreme Court in its judgment in the case of Project Uchcha Vidya Sikshak Sangh, in our opinion, the G.R.s cannot be held to be valid because undoubtedly they place restrictions on the right of the Petitioners to charge fees in their educational institution. In our opinion, therefore, two G.R.s which are challenged in the petition will have to be set aside. Rule in this petition is therefore, made absolute in terms of Prayer Clause (b) and (c).

We make it clear that we have not considered the relief claimed by Prayer Clause (a) in the petition. That question is left open to be raised at appropriate stage.

Rule made absolute accordingly.

No order as to costs.

(N.D. DESHPANDE,J.)

(D.K. DESHMUKH,J.)