IN THE HIGH COURT OF JUDICTURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICITON
WRIT PETITION NO.1919 OF 2009

Vibgyor High School,

through its Principal, situate at Motilal Nagar-1, Srirang Sabde Marg, Goregaon (W), Mumbai 400 104 ... Petitioner

V/s.

1. State of Maharashtra, through the Secretary, Department of Education and Employment, Mantralaya Annexe, Mumbai 400 032
2. V.K. Wankhede
   Deputy Director of Education, Mumbai Division, Greater Mumbai, Jawahar Bhavan, Churni Road, Mumbai 400 007
3. Avisha Gopalkrishnan, residing at Shree, 158, Jain Jainalaya Road, Bangur Nagar, Goregaon (W), Mumbai 400 090
4. Prashant Basrur, residing at C-58, Tarapore Garden, New Link Road, Andheri (W), Mumbai 400 053
5. Sanjita Prasad, residing at 703, Samarkhand, Prathamesh Complex, Andheri (W), Mumbai 400 053

6. Vishal Ruia,
   1302, Orchid, Vasant Valley,
   Malad (West), Mumbai 400 097
7. Balchandran Unni, 801,
   Serenity Complex,
   Off Link Road, Oshiwara, ... Respondents
   Mumbai 400 053

WITH

WRIT PETITION NO.1925 OF 2009

Rustom Kerawalla Foundation
a Public Charitable Trust registered under the Bombay Public Trust Act, 1950 having its address at Kerawalla Chambers, Apollo Bunder, Opposite Radio Club, Colaba,
Mumbai 400 001 ... Petitioner

Versus

1. State of Maharashtra,
   through the Secretary,
   Department of Education and
   Employment, Mantralaya
   Annexe, Mumbai 400 032
2. Vithoba K. Wankhede
   Deputy Director of Education,
   Mumbai Division, Greater
   Mumbai, Jawahar Bhavan,
   Churni Road, Mumbai 400 007

3. Avisha Gopalkrishnan,
of Mumbai Indian Inhabitant,
residing at Shree, 158,
Jain Jainalaya Road,
Bangur Nagar, Goregaon
(W), Mumbai 400 090
4. Prashant Basrur,
of Mumbai Indian Inhabitant,
residing at C-58, Tarapore
Garden, New Link Road,
Andheri(W), Mumbai 400 053
5. Sanjita Prasad,
of Mumbai Indian Inhabitant,
residing at 703, Samarkhand,
Prathamesh Complex,
Andheri(W), Mumbai 400 053
6. Vishal Ruia,
of Mumbai Indian Inhabitant,
1302, Orchid, Vasant Valley,
Malad(West), Mumbai 400
097
7. Balchandran Unni,
of Mumbai Indian Inhabitant,
801, Serenity Complex,
Off Link Road, Oshiwara,
Mumbai 400 053

...Respondents

Mr. Aspi Chinoy, Senior Advocate, with Mr.Janak Dwarkadas, Sr.Advocate, Mr. Sanjay Jain, Mr. Ishwar Nankani and Mr. Huzefa Khokhawala i/by M/s. Nankani & Associates for the Petitioner in Writ Petition No. 1919 of 2009

Mr. Navroz Seervai, Senior Advocate, with Mr. Prateek Seksaria i/by M/s. L.J. Law for the Petitioner in Writ Petition No. 1925 of 2009

Ms. I.K. Calcuttawala, A.G.P., for Respondents No. 1 and 2

Captain B.K. Subbarao for Respondent No. 3 in Writ Petition No. 1919 of 2009

Respondent No. 3 Writ Petition No. 1925 of 2009, present

Mr. Darius B. Shroff, Senior Advocate, with Mr. Sagar Talekar for Respondents No. 4 to 7 in Writ Petition No. 1919 of 2009

CORAM : **A.M. KHANWILKAR AND MRS. MRIDULA BHATKAR, JJ.**

DATE : 16th September, 2011.

JUDGMENT (Per A.M. Khanwilkar, J.):-

1. This common judgment will dispose of both the petitions together, as common questions arise for consideration therein. The former petition is filed by Vibgyor High School. The second petition is filed by Rustom Kerawalla Foundation for the same reliefs.

2. By the former petition, viz., Writ Petition No.1919 of 2009, under Article 226 of the Constitution of India, the petitioner-school, which claims to be a minority private unaided school engaged in running a primary and secondary school under affiliation from Council for Indian Certificate of Secondary Examination (ICSE), International General Certificate of Secondary Education, University of Cambridge, U.K. (IGCSE) and offering National Institute of Open

Schooling (NIOS) Curriculum, has taken exception to the orders passed by the Deputy Director of Education, respondent No. 2, dated 3rd July, 2009 and 4th September, 2009. Further, the petitioner-school prays for consequential relief of restraining respondents No. 1 and 2 by themselves and/or through their servants, officers, agents or subordinates from interfering with or preventing the implementation of the petitioner's circulars, which stipulate the school fees payable by students of the ICSE Primary and Secondary Divisions of the petitioner-school in respect of academic year 2009-10.

3. By the impugned decision, respondent No. 2 disallowed the expenses incurred by the petitioner-school towards school building rent in the sum of Rs.2.50 crores per annum. The amount towards other expenses claimed by the petitioner-school, however, was accepted by respondent No. 2 as usual expenditure to entitle the petitioner-school to claim as part of the fee amount from its students. On that finding, respondent No. 2 approved the fees prescribed by the petitioner-school to the extent of Rs. 54,598/- for Primary Section and Rs.61,149/- for Secondary Section from the year 2008-09.

4. By the second petition, viz., Writ Petition No.1925 of 2009, under Article 226 of the Constitution of India, the petitioner – a public charitable trust – prays for similar reliefs as in the former petition.

5. The broad relevant facts leading to the filing of the present petitions, including the events unfolded during the pendency of these petitions, for examining the challenge to the impugned decision of respondent No. 2 referred to above are as follows:-

6. Respondents No. 3 to 7, along with other parents of petitioner-school, vide letter dated 19th July, 2007 complained to the Education Minister of the State about the unlawful Parents Teachers Association elections and other issues regarding the maladministration in the school. The said communication reads thus:-

"From: Aggrieved parents of Vibgyor High
Motilal Nagar, Goregaon (W), Mumbai

19/7/2007

To: Shri Vasant Purkeji,
Education Minister,
Maharashtra State

Respected Shri Purke Saheb,

Sub: **Unlawful PTA elections and other issues**

Vibgyor High (Trustee, R. Kerawalla) used to be Billabong High until Aug 2006 – which was under a franchisee agreement with Lina Asher – of KKEL (Kangaroo Kids Education Ltd., who owns and operates the brand-Billabong High) went thru a very messy public fallout and the two separated.

Most parents chose to stay with the current school – even though KKEL was a better brand name, since the infrastructure belonged to this school and on meeting with the trustee – most were convinced that this school could go onto become one of the best schools in Mumbai. Parents helped the school ride thru court cases and even filed interventions on behalf of the school to ensure stability.

Until end of 2005 – due to the internal bickering between the two partners, and their staffs - the school also did not have a head, no principal lasted more than 3-4 months. Many of these exits were attributed to Ms. Kavita Sahay – who has now been appointed ED of the school. Ms. Sahay, like our current principal, was apparently sacked from two previous schools – is the extra constitutional authority that runs this school. Mr. Shim Mathews, the current principal, was also sacked from his old school Ryan International....

In spite of all this, the school's biggest strength, that of being one of the most child friendly and of allowing 'open door' to parents – was followed, all of last year. The PTA elections for the year 2006-07 were extremely well organised and completely transparent. On hindsight, that was due to the school's need to have a strong and well networked body of parents to stymie the fears and apprehensions of doubting parents on the issue of curriculum (till that point in time, curriculum was being provided by KKEL and was considered to be one of the biggest selling points for the school).

However, to the dismay of the trustee, and the rest of the school management, the PTA consistently took up issues of quality, safety and security, teacher qualification and training, age appropriateness of curriculum and quality of curriculum provided (as they were not following any text books in the junior classes, it was most critical that the people responsible for developing the curriculum were qualified and able to deliver the same).

It was pointed out to the school management repeatedly that

1. Curriculum was faulty, sub-standard and at times even absurd.

2. People responsible for this sub-standard curriculum were not qualified and just did not comprehend either the needs of the students or the eventual objective of tying in with the boards requirement.

3. Teacher selection and Training were still murky as good quality teachers kept leaving school and were being replaced by whatever available.

4. Discipline was very loosely enforced and children of celebrity or favoured parents got away with everything. In fact, there have been instances of the teachers being pulled up for trying to discipline such students.

5. Safety issues not addressed at all. The common area for emergencies like fire etc., has been grilled and locked. There is no fire escape, and the staircase is not broad enough for 2000 students in an emergency situation. A hoarding site has been erected on the basketball court and the iron girders are right behind the hoop (basket) can lead to a very severe injury.

A student came under the wheels of his own school bus and was badly injured. The parent was not allowed to meet the principal or the trustee till the PTA insisted and organised a meeting.

6. The savings from not having to pay franchisee fees should have revered back to the parents (about 12-15%). The original fee structure was inclusive of a premium paid for the KKEL and Billabong brand. The school has coolly pocketed the savings.

7. Even after these savings, the school has been trying to further increase the fees, which the earlier PTA had successfully ensured that the school did not push through.

Due to this constant monitoring of the PTA, the school was made accountable for lapses of omission and commission. Apparently, this was not acceptable.

Out of the blue the PTA elections for the year 2007-08, were announced this week without any consultation with the earlier PTA.

Monday evening (9th July'07) – circular comes out – Tuesday and Wednesday – (both working days) given for filing nominations, and elections scheduled for Friday evening (13th July'07)-

There was No announcement of names of candidates and no interaction permitted between parents to know the new candidates. The biggest mockery of this whole process was that the "so called ballot papers" were sent home with children on Thursday evening – with strict instructions given to children that all of them were to bring back forms duly completed the next morning...

Only problem is that these were blank sheets of paper with a small table with just names of nominees, no name of parent required – no sealed envelopes, just a small 'tick' mark needed in front of one of the names ... (find copy attached)

Further more – Friday when parents showed up for the elections – these 'votes' that were collected by the school in the morning were not reflected in the lists that the 'elections officers' were holding in the evening! On questioning the officers claimed that they knew exactly which parent had sent their votes in the morning and there was no chance of duplication, needless to say many parents happily voted twice for their candidates...

To further this travesty of 'electing' 'the post of CR i.e. class representatives was dropped – so a PTA that should have comprised of about 80 parents or so – was shaved down to 12 in one clean shot. Obviously no parent can hope to look after the interest of 200-250 parents (depending upon number of divisions per grade) so the post that does now exist i.e. GR or grade representative is pretty much toothless.

Finally all the candidates that won, except for the grade V candidate, were those who had been asked to file nominations by the school with a clear commitment that if they stood they would win. These are parents whom the school is sure will meekly listen to them do exactly as the school would want them to do. In fact two of the nominated grade reps have taken signatures from their classes and are challenging their loss – since their parents have given them

in writing that most of them voted in their favour – it would be interesting to see the outcome of this challenge...

The obvious reason for this kind of blatant manipulation is that the school needs to have a dummy PTA in place so that

- The school can function just as they want without any interference or monitoring from the parents.
- The school can get away with all dubious activities and not allow anybody to question them upfront.
- Invariably, the school would now take this opportunity to successfully push the 'fee hike' which they have been trying since the last 2 years now.
- The fee hike they know that the current body of parents would have never approved.... for the simple reason that the quality delivered today is way below the standard even for the current level of fees that they are charging.

Sir, herewith we would like to request to look into the matter and set up a proper enquiry regarding all the issues mentioned above for the sake of future of our children. We are sure, Education ministry will not allow any Education institution to run as a business, profit center.

Thanking you,

Yours truly,

Sd/-

On behalf of Aggrieved parents

Contact persons: Prashant 9820073692 Bala: 9819137575
Avisha 9821524455 "

(Emphasis supplied)

7. The said representation was pending on the file of the appropriate Authority. Notwithstanding that, the petitioner-school proceeded to issue circular on 19th March, 2008, increasing school fees as prescribed therein.

The said circular issued by the school reads thus:-

"VH/CIR/FEES/0708/240
March 19, 2008.

Dear Parents,

This is to inform you that the Fees for the 1st Quarter of the new academic year 2008-09 have to be paid between 1st April (Monday) 2008 to 15th April (Tuesday) 2008 for confirmation of seat/continuity. Fee receipt book will be sent with students on or before 31st March 2008.

1. Fee Amount : Please refer to the enclosed Fee Structure details.

2. Mode of Payment : By cheque or DD only (Please note that payment by cash will not be accepted.

3. Please draw a cross Cheque/DD in favour of :
VIBGYOR High – Pre Primary (for Nursery, Jr.KG, Sr.K.G.)
VIBGYOR High – Primary (for Grade I to IV, all courses)
VIBGYOR High – Secondary (for Grade I to XI, all courses)

4. Please write the Name, Grade, Enrolment Number and the Course (ICSE, IGCSE, NIOS) on the reverse of the Cheque.

5. Please ensure that all details in your child's Fee Receipt book are precise and complete.

Important :

* **Parents who intend to transfer or apply for a Leaving Certificate are requested to meet the Front Office Manager and submit a Leaving Certification Application Form on or before Friday, 28th March 2008.**

We wish to inform you that the school management has increased the school fees from academic year 2008-09 due to increase in various administrative and others cost that are beyond our control. Please be assured that the increase in fees has been undertaken after giving a careful consideration to all relevant factors.

Thank you for your understanding and support,

sd/-
Shim Mathew
Principal.

Encl : Fee Structure Details.

FEE STRUCTURE (2008-09)

Type of Fees	1st Quarter payable in April 08	2nd Quarter payable in July 08	3rd Quarter payable in Oct 08	4th Quarter payable in Jan 09
Nursery				
Tuition Fee	20,500	7,100	7,100	7,100
Term Fees	1,250	-	1,250	-
Jr.KG & Sr.KG				
Tuition Fee	20,500	7,100	7,100	7,100
Term Fees	2,250	-	2,250	-
Grade I to IV (ICSE)				
Tuition Fee	22,150	14,400	14,400	14,400
Term Fees	4,000	-	4,000	-
Grade V to X (ICSE)				
Tuition Fee	27,500	14,500	14,500	14,500
Term Fees	5,575	-	5,575	-
Grade I to IV (IGCSE)				
Fees	32,250	20,600	20,600	20,600
Grade V to VII (IGCSE)				
Fees	38,750	23,750	23,750	23,750
Grade VIII (IGCSE)				
Fees	40,000	30,000	30,000	30,000
Grade IX & X (IGCSE)				
Fees	32,500	32,500	32,500	32,500
Grade VI & VII (NIOS)				
Tuition Fees	30,000	23,300	23,300	23,300
Term Fees	5,000		5,000	
Grade VIII to X (NIOS)				
Tuition Fees	36,000	27,960	27,960	27,960
Term Fees	5,000		5,000	

TYPE OF FEES	1ST Quarter payable in April 08	2nd Quarter payable in July 08	3rd Quarter payable in Oct. 08	4th Quarter payable in Jan 09	5th Quarter payable in Apr 09	6th Quarter payable in July 2009
A Levels (18 month programme)						
Fees	70,000	42,000	42,000	42,000	42,000	42,000

8. This has been done on the basis of purported approval granted by the Accounts Officer (Education), in terms of his letter dated 21st February, 2008. The same reads thus:-

"Letter No: 34 – AO/Ed/W

Accounts Officer (Education)
Jogeshwari Mumbai – 60

Dated – 21/02/08

To,

The Education Inspector
West Zone, Jogeshwari (E)
Mumbai – 60

Sub: Audit Inspection Report of Vibgyor High School, Goregaon

Ref: Your letter No. 459-61 dated 04/02/2005

Dear Sir,

In reference to your above mentioned letter we have conducted an Audit between 6/02/08 and 08/02/08 of the Vibgyor High School, Goregaon which is fully Non-Aided school. The report is as per mentioned below:

Vibgyor High School is affiliated to ICSE, New Delhi for the Academic year 2007-08, 2008-09 and 2009-10. The school is Private and fully Un-Aided.

As per the complaint submitted by the PTA, our office has conducted an audit of receipts and payments for the period April 07 to Dec 07. It has been observed that during this period the total expenditure incurred is Rs. 6,96,64,787/- whereas the total receipt is Rs.6,31,86,300/-.

Though it is impossible to implement the revised fee during this year, we are furnishing herewith the Recommended Expenditure for the year 2008-09 as per the GR dated 22/07/1999, 27/05/2005 and also as per the secondary School Code.

A) Recommended Expenditure for 2008-09		10,75,22,351/-
Non-Accepted Exp 1) Professional Fee	60,91,264/-	
2) Building Repairs	6,03,132/-	
3) Staff Welfare	5,00,009/-	(-)71,94,405/-
Sanctioned Expenditure by Education Inspector		10,03,27,946/-
B) Other Income (2007-08) support		(-) 25,31,046/-
		9,77,96,900/-
C) 5% increase as per GR dated 27/05/2005		(+) 48,89,845/-
Approved Salary Exp. + Other Expenses		10,26,86,745/-

Out of the total expenditure during 2007-08, 54.24% is utilized for primary section and 45.76% for Secondary Section. This year the Recommended Expenditure is to be divided in the proportion of 54% for primary and 46% for secondary section. The revised fee structure has been recommended as shown below .

Primary Section	Secondary Section
54% Expenditure	46% Expenditure
5,54,40,842.50	4,72,35,903.00
No. of students - 746	No. of students - 575
Annual Fee – 73,347/-	Annual Fee – 82,149/-
Monthly Fee – 6112.25	Monthly Fee – 6845.75
Approved Monthly Fee – 6112.00	Approved Monthly Fee – 6845.00

Yours truly,
sd/-
Accounts Officer
(Education – West Zone)
Mumbai."

9. Soon after the circular, the parents made representation to the Chief Minister, complaining about the abnormally high rise of school fees, approximately Rs.55,000/- to Rs. 82,500/- by the school, that, too, calling upon the parents to deposit the same within 5 working days. The parents thereafter filed writ petition in this Court, being Writ Petition No. 722 of 2008. Respondents No. 3 to 7 were the petitioners therein, who had filed the said petition in representative capacity, praying for the following substantive reliefs:-

> "a. That this Hon'ble Court be pleased to issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction quashing and setting aside the Circular dated 19th March 2008 (Exhibit B hereto) ;
>
> b. That this Hon'ble Court be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction directing the Respondent Nos. 1 and 2 obtain an

approval from Respondent Nos. 3 and 4 and consult the PTA before proposing a fee hike ;

c. That this Hon'ble Court be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction directing the Respondent Nos. 3 and 4 to inspect the financial records of the Respondent Nos. 1 and 2 to determine the actual costs and profits in running the Respondent school;

..... "

10. It is not necessary to refer to interim orders passed in the said writ petition, including to the order of the Supreme Court at interlocutory stage. The said writ petition was disposed of by Division Bench of this Court on 20th April, 2009 along with companion matters. That order reads thus:-

"1. Both the petitions on motion made by the learned counsel appearing for the petitioners permitted to be withdraw. Interim orders, if any, operating stand vacated. The learned counsel appearing for the Dy. Director states that the Dy. Director will pass a reasoned order on the complaint dated 19.7.2007 made by the petitioners, which is marked as Exh. G at page 138 to the reply filed by the respondent No. 1. Statement accepted. In view of this statement, following order is made.

ORDER

1. The petitioners shall be at liberty to submit any additional submissions/ material they want to rely on, in support of their complaint with a copy to the respondent No.1 within a period of two weeks from today. The respondent No.1 shall be at liberty to make further submissions including response of the respondent No.1 to the additional submissions of the petitioners within a period of two weeks from the date of receipt of the additional submissions from the petitioners. The Dy. Director thereafter shall take the entire material produced before him for consideration and make reasoned order and communicate the same to the parties within a period of six weeks from the receipt of the submissions from both the sides. By consent of the parties, it is directed that, it is not necessary for the Dy. Director to grant oral hearing to the parties. The parties to the

> petitions shall be at liberty to adopt appropriate remedy against the order of the Dy. Director that will be made. It is made clear that, according to the petitioners, the complaint referred to above is the only complaint made and it is to be decided by the Dy. Director and till it is decided by the Dy. Director, the petitioners would not approach to any authority. We make it clear that we have vacated the interim order which was operating and therefore, fees shall be paid as per the revised fee structure. However, recovery of the fees shall be subject to the order of the Dy. Director.
>
> 2. Both the petitions stand dismissed as withdrawn.
>
> 3. In view of the above order, notice of motions are disposed off."

This order is of some significance for examining the matters in issue. We shall deal with that a little later.

11. Pursuant to the abovesaid order, the matter proceeded before respondent No. 2 to pass a reasoned order. After the disposal of the writ petition, however, the school had filed Review Petitions, being Review Petitions No. 19 and 20 of 2009, respectively, on 8th of May, 2009. With reference to the grievance made by the petitioner-school, statement of advocate for the respondent-parents was made and was taken on record. The said order dated 8th May, 2009 reads as follows:-

> "1. Shri. Mihir Desai, the learned Counsel appearing for original petitioners states that all objectionable statements and the statements inconsistent with the order passed by this Court, made in the additional written submission filed before the Deputy Director of Education and all objectionable documents filed before the Deputy Director of Education shall be withdrawn and copy of that

> communication will be given to the respondents during the course of the day. Statement accepted. Put up after vacation."

12. The Review Petitions came to be finally disposed of on 8th June, 2009 on the following basis:-

> "1. The learned counsel appearing for original petitioners states that the Deputy Director of Education, Mumbai 400 007 can examine whether any part of the submissions made by the petitioners before the Deputy Director are contrary to the orders passed by this Court. He also states that the petitioners undertake not to seek any additional reliefs from the Deputy Director and that the enquiry by the Deputy Director will be restricted to the original complaint dated 19th July 2007. The statements are accepted. In view of these statements and the statements recorded in the order dated 8th May 2009, in our opinion, it is not necessary to keep this review petition pending. Review Petition is disposed off."

13. As aforesaid, in the earlier order dated 20th April, 2009, as also while disposing of the Review Petitions on 8th June, 2009, the Division Bench of this Court made it amply clear that respondent No. 2 shall restrict the enquiry to the original complaint dated 19th July, 2007. Obviously, on that understanding, the matter was to proceed before respondent No. 2. It appears that a task force was assigned the work of scrutiny of the accounts and audit report of the petitioner-school. It was noticed that documents necessary to take decision were not submitted by the petitioner-school. Accordingly, on 15th June, 2009, respondent No. 2 called upon the principal of the petitioner-school to

furnish the necessary information. The said letter -- original in Marathi with translation provided by the petitioner-school – reads thus:-

"No.DY.DIR/SE-1/Under Trial/08-09/15634-35
Office of the Deputy Director
Jawahar Bal Bhavan, Netaji Subhash Marg,
Churni Road (W), Mumbai-400 004.

Date : 15 June 2009.

To,
The Principal
Vibgyor High School
Goregaon (W)

SUB : Hon.High Court, OOCJ
Writ Petition No. 722/08
Avisha Gopalkrisnan & Others
vs
Vibgyor High School & Others

Ref : 1. order of the Hon.High Court dtd. 20th April 2009.

With reference to the above mentioned subject and as per the order passed by the Hon.High Court dated 20th April 2009, he Deputy Director -Education has to take a decision before 29 Jun 2009. After looking into the points related to the complaint dated 19 Jul, 2007 and to take a decision in the current situation after going through the documents the following details have to be provided to the office on an urgent basis.

1. Income & Expenditure Statement and the Audit Statements of the Financial year 2008-09.
2. Building Rent Certificate provided through a competent authority and the copy of Property Tax paid.
3. List of Teaching & Non-Teaching Staff, & their Salary scale. Has the PTA permitted in case of salary paid is higher than the regular salary structure ?
4. Copy of establishment of the Parent Teacher Association.

Kindly hand deliver the above required documents on an urgent basis before 19th June 2009 considering the urgency of the matter and to avoid contempt of Court.

Sd/-
For Deputy Director
Mumbai Division, Mumbai.

Copy for Information and Proper action :

Education Inspector, West Zone, Jogeshwari (W) – This is to inform you to give an order to the school authority to submit above documents in time and follow up for the same..” (emphasis supplied)

14. However, as the information was not forthcoming from the petitioner-school, respondent No.2 issued communication dated 30th June, 2009 / 3rd July, 2009 and the minutes of his decision -- original in Marathi with translation provided by the petitioner-school – which read thus:-

“Exhibit “C”

No. DY.DIR/SE-1/Under trial/08-09/17423-28
Office of the Deputy Director
Jawahar Bal Bhavan,Netaji Subhash Marg,
Churni Road (W),Mumbai- 400 004
Date: 30 June 2009

To,

1. Smt. Avisha Gopalkrishnan,
   Shri 157, Jain Jinalay Marg,
   Bangur Nagar, Goregaon
   (W) Mumbai- 90
2. Smt. Leena Karia
   D-51, Pranik Garden
   Mahavir Nagar, Kandivali W Mum-69
3. Rustomjee Kerawalla Foundation
   Keralawalla Chambers, Apollo
   Bunder, Opp.Radio Club, Colaba
   Mumbai- 400 001
4. Principal Vibagyor High
   Goregaon W. Mumbai-104

5. Education Inspector
   West Zone Mumbai

SUB: Writ Petition No. 722/2008 submitted at the Hon.High Court
As well as Writ Petition (Lodging) No. 511/2009
As well as Notice of Motion NO. 2809/2008
As well as notice of Motion no. 286/2009 in Writ Petition(Lodging) No. 511/ 2009

REF: Order of the Hon. High court dated 20/04/2009

With regards to the above mentioned subject and through the referred order it has been ordered to inform the concerned about the current issue after taking proper decision. Enclosed is the joint decision taken by this office regarding the above matter.

Sd/-

(Counterfoil signed by the Deputy Director-Education) (Dongre)
Mumbai Division, for Mumbai

Copy for information

1. Govt. Lawyer (Main Branch), High Court, Mumbai-32

SUB: Writ Petition No.722/2008 submitted at the Hon.High Court
As well as Writ Petition (Lodging) No. 511/2009
As well as Notice of Motion NO. 2809/2008
As well as notice of Motion no. 286/2009 in Writ Petition(Lodging) No. 511/ 2009

As per the orders given by the Hon. High Court on 20/04/09, a joint decision from the Education Deputy Director regarding Vibgyor High, Goregaon9W) is expected. As per these orders, a meeting of the Task force was organized at the office of the Education Deputy Director, Mumbai on

12/06/09. In the meeting, with reference to the issues raised in the complaint, documents were checked and the following information was requested from the school through this office letter dated 15/06/09.

1. Income and Expenditure Statement and the Audit Statements of the Financial Year 2008-09(Certified by a Chartered Accountant)
2. Building Rent Certificate provided through a competent authority and the copy of Property Tax paid.
3. List of Teaching and Non-Teaching Staff, and their Salary scale. Has the PTA permitted in case of salary paid is higher than the regular salary structure?
4. Copy of establishment of the Parent Teacher association.

Since the above information was not submitted by the school, a meeting of the Task force was held on 30/06/09 under the chairmanship of the Eduction Deputy Director to take a final decision.

In this meeting, as per the documents available with the office,the Expenses for the year 2008-09 as certified by the Education Inspector (west Zone), the Audit Report dated 21/02/08 of the Accounts Officer (Eduction) West Zone, has been considered. After considering the same, the following decision has been taken.

1) Formation of the PTA:

As per the GR No. SSN 1099(27/99) Sec.Edu.-2 dated 22 May, 2000 issued by the School Education Department, Mantralaya, Mumbai vibgyor High School should immediately form a PTA as per the prescribed procedure set out in the GR.

2) **With regard to expenses of Pre-Primary, Primary and Secondary Sections**

As per the Certificate dated 15/05/2009 of the Chartered Accountant submitted by VIBGYOR High School, the common expenses for Pre-Primary, Primary and Secondary sections have been segregated section-wise. Which means the Income and Expenditure for Pre-primary is separate and Primary/Secondary sections expenses have been reflected proportionately.

3) <u>Regarding Fees:</u>

A. Proposed Expenses for the year 2008-09
Proposed Expenses Rs. 10,75,22,351/-

Expenses disallowed by the Education Inspector in his report as per the GR No. SSN 11197(311/97)/Sec.Edu-3 dated 22 July, 1999

1.Professional Fees - 60,91,264/-
2.Building Repairs - 6,03,132/-
3.Staff Welfare - 5,00,009/-

Total - 71,94,405/- (Less) Rs.71,94,405/-

Expenses earlier approved by the Education Inspector Rs. 10,03,27,946/-

Building's rent expenses disallowed (Task force) (less) Rs.2,50,00,000/-

Permissible Expenses Rs.7,53,27,946/-

B. Other Income (Basis: Report of the year 2007-08) (Less)Rs. 25,31,046/-
Rs. 7,27,96,900/-

C. As per GR dated 27 May 2003 incremental income (Add) Rs.36,39,845/-

Permissible Salary and Other Expenses Rs.7,64,36,745/-

After considering the use of the building during the year 2007-08 as 46% for Secondary

Section and 54% for Primary section, the below mentioned fees is being considered.

Primary Section	**Secondary Section**
Rs. 7,64,36,745/-X 54% Expenses	Rs.7,64,36,745/- X 46% Expenses
Rs.4,12,75,842/-	Rs.3,51,60,903/-
Student Count-756	Student Count-575
Yearly fees Rs. 54,598/- per student	Yearly fees Rs.61,149/- per student
Monthly fees Rs.4,550/- per student	Monthly fees Rs.5,096/- per student

For the Primary section and the Secondary section, Rs.4550/- & Rs.5096/- respectively, such monthly fees seem permissible.

Prima facie it appears that the salaries of the teaching and non-teaching staff is more than the salary prescribed by the Government. As per the GR No. SSN 1197(311/97)/ Sec-ed-3 dated 22 July 1999 at Sr. no.2, it is necessary to take approval from the PTA regarding such high salary.

However, vide GR No. Mis-2009/(108/09) Sec. Ed-3 dated 8th May 2009, order not to increase Education and other fees without the consent of the Free Control Committee has been passed. As per this order, every school has been prohibited to increase their fees without the recommendation of the Fee Control Committee. Accordingly vide GR.No. Mis-2009 (108/09) Sec. Ed-3 dated 11th June, 2009, a committee has been formed to study and make recommendations for the purposes of fixing the fees. For taking a final decision in this regard, it will be appropriate that the further decision is taken in the Fee Fixation committee formed as per the above GR.

Sd/-
(Counterfoil signed by the Deputy Director-Education) (Dongre)
Education Deputy Director
Mumbai Division, for Mumbai

15. According to the petitioner-school, this communication was not received by them for quite some time. Secondly, on plain wording of the said communication, it was obvious that no final decision was taken by respondent No. 2 on the issue of justness of the hike in tuition fees / term fees by the petitioner-school. Thirdly, there was intrinsic evidence to suggest that the record in the office of respondent No. 2 was manipulated. Lastly, that respondent No. 2 was acting under pressure or dictation of parents, which was obvious from his communication dated 4th September, 2009, calling upon the petitioners to give effect to his purported decision dated 3rd July, 2009. The said letter dated 4th September, 2009 -- original in Marathi with translation provided by the petitioner-school – reads thus:-

> "No. Dy.DIR/SE-4/Fee/08-09/23241-45
> Office of the Deputy Director
> Jawahar Bal Bhavan, Netaji Subhash
> Marg, Churni Road (W),
> Mumbai-400 004
>
> Date : 4th Sept. 2009.

To,

1) Rustomjee Kerawalla Foundation
Kerawalla Chambers, Apollo
Bunder, Opp. Radio Club,
Colaba, Mumbai-400 001

2) Principal
Vibgyor High School,
Goregaon W. Mumbai.

SUB : Writ Petition No. 722/2008 submitted at the Hon.High Court As well as Writ petition (Lodging) No. 511/2009 As well as Notice of Motion No. 2809/2008 As well as Notice of Motion No. 286/2009 in Writ Petition (Lodging) No. 511/2009

REF : 1. Order of the Hon.High Court dated 20/04/2009
2. Letter no.DY.DIR/SE-1 Under Trial/08-09/17423-28 dated 03/07/09 from this office
3. Letter from Nankani & Associates dated 14/08/2009.

With regards to the above mentioned letter no. 1, as per decision given by the Hon.High Court, orders from our office have already been issued through our letter 03 Jul. 2009 regarding school fees. Through the said order Annual fees for the Primary section Rs. 54,598/- and for secondary section Rs. 61,149/- has been fixed. We inform as mentioned below regarding the orders dated 03/07/2009 referred in the letter no. 3 from your lawyer.

From the year 2008-09, it is ordered that fees for Primary Section Rs.54,598/- and for secondary section Rs. 61,149/- be charged.

As per the instructions contained in the last paragraph of the referred letter No.2, because the Fee Control committee has not been formed, the fee determined in the decision given by this office in the letter dated 03/07/2009 is final. In this regard, immediate action be taken.

Sd/-
Dy.Director-Education
Mumbai Division, Mumbai.

Cc : For information & for appropriate action.
1. Education Inspector, West Division, Mumbai.
2. Smt. Avisha Gopalkrisnan, Shri 157, Jain Jinalay Marg, Bengur Nagar, Goregaon (W), Mumbai- 60.
3. Nankani & Associates, 114 Yusuf Building, 1st Flr., V.N.Road, Flora Fountain, Fort, Mumbai-400 001."

16. In this backdrop, the petitioners rushed to this Court by way of present writ petitions challenging the abovesaid two

communications received from the office of respondent No. 2 for the reliefs already referred to above.

17. Here, we do not think it necessary to advert to several orders passed in these pending writ petitions from time to time, except to refer to order dated 3rd August, 2010. On that day, these writ petitions were heard in part. Considering the grievance of the petitioners that no reason whatsoever was recorded in the decision of respondent No. 2 dated 3rd July, 2009, insofar as disallowance of the petitioner's claim for buildings rent, it was thought appropriate to first ask respondent No. 2 to record reasons for the said disallowance, so that all other issues raised by the respective parties in the present petitions could be answered together upon receipt of the said reasons. The Court, therefore, instead of disposing of the petitions, directed respondent No. 2 to permit the parties to file their response / submissions / documents, and on the basis of which, he was called upon to record reasons regarding the permissibility or otherwise of amount towards school buildings rent to be recovered from the students. Pursuant to the said direction, respondent No. 2 has passed order dated 27th October, 2010 -- original in Marathi with translation provided by the petitioner-school – purported to be reasons for

disallowance of the amount towards school building rent. The same reads thus:-

"No. DDE/Sec-4/Fee/2010/25194/96
Office of Dy. Director of Education Mumbai Division
Jawahar Bal Bhavan,
Netaji Subhash Road,
Charni Road (West),
Mumbai 400 004

Dt. : 27th October 2010.

To :
1. Rustomjee Kerawalla Foundation
Kerawalla Chambers, Apollo
Bunder, Opp. Radio Club,
Colaba, Mumbai-400 001.

2. Principal
Vibgyor High
School, Goregaon
(West), Mumbai.

Sub : Fixation of rent of the Bldg. occupied by Vibgyor school.

Ref : 1. Order of the Hon'ble High Court dated 3rd August 2010 and 18th August 2010 passed in Writ Petition No. 1919/2009- Notice of Motion No. 2/2010 and Writ Petition No. 1925/2009.
2. Representation submitted through Advocate Nankani & Associates dated 30th August 2010.

On the subject noted above you are hereby informed that as per order of the Hon'ble High Court decision was given on the proposal for fee fixation submitted by you vide this office letter No. DDE/Sec-1/SJ/08-09/17423-28 Dt. 3/07/09 and 04/09/2009.

You have filed Writ Petition No. 1919/09 in the Hon'ble High Court against the order passed by this Office. The Petition was heard alongwith Notice of Motion No. 2 of 2010 and Writ Petition

No. 1925 of 2009 and the Hon'ble High Court has passed orders dated 3rd August 2010 and 18th August 2010.

As per the above order of the Hon'ble High Court you have submitted a proposal dated 30th August 2010 for fixation of fees after taking in to account the disallowed expenses of building rent.

Government has issued a detailed order vide Government Resolution dated 22nd July 1999 in respect of fixation of fees of unaided schools.

While taking into account the expenses at the time of the fixing the fees the above Government Resolution has been considered.

The proposal submitted by you to this office for fixation of fees in pursuance of the order passed by the Hon'ble High Court in Writ Petition No. 722 of 2008 and other Writ Petitions has been received and such received proposal was scrutinized. As per the criteria laid down by the Government from time to time and by the Task Force constituted under GR dated 3rd July 1999 and the final decision dated 3rd July 2009 was communicated.

Your attention was drawn to schedule "A" of Secondary School Code in relation to provisions of fixation of building rent and further the directions given by respected Education Director, Maharashtra State Pune, vide letter dated 19th July 1996 about documents to be submitted with the proposal for fixation of fees of unaided schools.

In your proposal you have not submitted rent certificate, certified by Executive Engineer PWD, for allowing building rent, required under above both the provisions. However instead of submitting certified normal rent certificate you have submitted rent certificate prepared on the basis of market value prepared by the valuer (Shrinivas S. Kini & Co.). As per prescribed provisions you have not submitted reasonable rent certificate of the Competent Authority. Therefore while fixation of fees the cost of rent of the building proposed by you cannot be taken into account.

Sd/-
Sunil Chowhan
Dy. Dir. of Education
Mumbai Div. Mumbai.

Copy of intimation and necessary action.

1. Education Inspector, West Ward, Greater Mumbai."

18. The reasons so recorded are justification given for the order issued by respondent No. 2 purportedly on 3rd July, 2009, and the direction contained in communication dated 4th September, 2009, which are impugned in these petitions.

19. The first contention of the petitioners is that respondent No. 2 has exceeded his authority in deciding on question regarding hike in tuition / term fees introduced by the petitioner-school. In that the subsequent proceedings in terms of the orders of this Court dated 20th April, 2009 and 8th June, 2009 were limited to examining the issues raised in complaint made by respondents No. 3 to 7 and other parents, dated 19th July, 2007. No other issue could have or ought to have been examined by respondent No. 2, whereas the decision of the petitioner-school to increase the tuition / term fees was taken much later, on 19th March, 2008, which, therefore, could not have been the subject-matter of challenge in complaint dated 19th July, 2007. According to the petitioners, the question whether respondent No. 2 was competent to fix the tuition / term fees specified by the petitioners for their students in the garb of regulating the fee structure of the school itself was the core issue. Respondent No. 2 could not have exercised power on the basis of procedure prescribed in the Government Resolution, even if

the same was to be considered as issued in exercise of powers under Article 162 of the Constitution by the State Government. The next contention of the petitioners is about the scope of the purported complaint sent by the parents dated 19th July, 2007. Further, respondent No. 2 could not have disallowed the expenses incurred by the petitioners towards building rent paid by the petitioners to the lessor merely on the ground of non-production of a Building Rent Certificate from the Executive Engineer and also in disregard of the approved / recommended expenditure by the Accounts Officer, Education, West Zone, Mumbai, dated 21st February, 2008 for the year 2008-09. Moreover, the insistence of respondent No. 2 to produce the certificate of the Executive Engineer was based on procedure prescribed in Government Resolution dated 22nd July, 1999, which Resolution has already been quashed and set aside by this Court in Writ Petition (Lodging) No. 1876 of 2010 decided on September 1, 2010, being *ultra vires*. It is next contended that respondent No. 2 had no power to review his own order. Besides, the decision of respondent No. 2, by no standard, can be said to be reasoned order. In spite of the specific direction by this Court to do so, respondent No. 2 has not analysed the stand taken by the petitioners before him, including about his authority to regulate the fees of unaided private minority school. Lastly, the

petitioners have also challenged the impugned decisions of respondent No. 2 on the ground that they suffer from the vice of *malafides* in fact and in law, tantamounting to abuse or colourable exercise of power.

20. Respondent No. 1 has resisted the above contentions on the arguments that the complaint made by the parents dated 19th July, 2007 was also in respect of excessive fees and allegation of profiteering by the Management. In the context of the said complaint, respondent No. 2 was obliged to examine the grievance of the parents in that behalf, and, while doing so, was justified in disallowing the claim of the petitioners in respect of buildings rent charges, which, according to him, was unsubstantiated. In the first place, respondent No. 2 referred to the recommendation of the task force and on the second occasion, in proceedings for recording reasons, in spite of opportunity given to the petitioners, no documentary evidence was produced by the petitioners to accept their stand that the expenses so incurred were justified to the extent of the said claim of the petitioners, being in the sum of Rs. 2.5 crores per annum. Thus, respondent No. 2 disallowed the claim under that head. Respondents No. 1 and 2 further contended that respondent No. 2 was competent to examine the issue in respect of the petitioners' claim towards school building rent expenses and whether in the facts

and circumstances of the case, that claim can be accepted as usual and permissible expenditure or results in indirectly transferring the expenditure towards lands and buildings on the students tantamounting to Capitation Fee. Respondent No. 2 was competent to examine those matters on the basis of procedure specified in the Government Resolution dated 22nd July, 1999 and 15th July, 2010, as also Government Resolution dated 19th July, 1996, and more particularly, the provisions of the Secondary Schools Code - 2002, including Rules 49.3, 50.6 and 89.1 read with Schedules 'A' and 'B' thereof. According to respondents No. 1 and 2, the petitioners did not co-operate with respondent No. 2. Instead of furnishing the desired information, untenable issues were raised by the petitioners, as a result of which, respondent No.2 was driven to decide the issue against the petitioners as they failed to substantiate the claim towards the building rent. Respondents No. 1 and 2 have also refuted the allegation of manipulation of office records of respondent No. 2 or that his decision was *mala fide* in fact or in law. These respondents have also relied upon the Task Force Report. These respondents supported the conclusion reached in the impugned decisions of respondent No. 2 disallowing the petitioners' claim towards building rent to the extent of Rs. 2.5 crores per annum.

21. Respondents No. 3 to 7 have also contested these petitions. According to respondent No. 3, three core issues would arise for consideration. The first core issue, which is in three parts, is:

(i) Whether the devise adopted by the petitioners was to profit from tuition / term fees? Moreover, the petitioners themselves should be blamed for not furnishing necessary information demanded by respondents No. 2, and were responsible for preventing respondent No. 2 from passing a comprehensive, reasoned order to unravel the maladministration and profiteering by the school management. (ii) Whether fraud has been committed by the petitioners on the Charity Commissioner while obtaining sanction for alienation of immovable property of a public charitable trust (which runs the petitioner-school) to a private limited company to facilitate the commercialisation of education to siphon off funds to the private company in which the very same persons are the only three trustees in control of the affairs of the Trust and were the only Directors in the private limited company? The circuitous transaction effected was in violation of law. (iii) The next shade of the first core issue, according to respondent No. 3, is that, it is indisputable that the State Government has authority to regulate tuition / term fees in private unaided schools, including unaided

minority schools, if the same were resorting to commercialisation and profiteering by virtue of provisions of the Maharashtra Educational Institutions (Prohibition of Capitation Fee) Act, 1987 (hereinafter referred to as "the Capitation Fee Act").

22. The second core issue is: Whether the regulations by the State should be at the stage of admission to the school or at the post-audit stage? The third issue, according to respondent No. 3, is: Whether the two Government Resolutions dated 22nd July, 1999 and 15th July, 2010 could be taken into account, and are valid and mandatory? Further, the opinion expressed by the Division Bench of this Court in Writ Petition (Lodging) No. 1876 of 2010 decided on September 1, 2010 is *per incuriam*, and in any case, whether the present petitions can be proceeded, irrespective thereof?

23. Besides the above three core issues, respondent No. 3 has countered the contentions raised by the petitioners. We may add that, to buttress the allegation that the petitioners were indulging in profiteering and commercialisation, respondent No. 3 has referred to the salaries of the school staff, which, according to the petitioners, are higher than approved norms. As is noticed earlier, none of the parents

have chosen to challenge the decision of respondent No. 2, who has accepted the other expenses claimed by the petitioner-school. It is the petitioners who have approached this Court to challenge the opinion of respondent No. 2 disallowing their claim in respect of buildings rent. In these petitions, the parents cannot be permitted to enlarge the scope of proceedings relying upon other expenses claimed by the petitioners which have already received approval of the Authority.

24. Respondent No. 3 has also raised issues about the manner in which the petitioners have advisedly prevented respondent No.2 from recording reasons regarding the maladministration of the school, in particular, in the context of the claim of buildings rent. Further, the petitioners hastened the hearing of Writ Petition (Lodging) No. 1876 of 2010 filed by the Association of International School and Peace Foundation, an association of private unaided schools, of which the petitioner-school is also a member, so as to pre-empt the present proceedings by getting declaration that the Government Resolutions dated 22nd July, 1999 and 15th July, 2010 were *ultra vires*; and could not be made the basis to regulate the fee structure of the petitioner-school. Respondent No. 3 was represented by her advocate in one matter, and she appeared in person in the companion petition.

25. Respondents No. 4 to 7 are represented by separate advocate, who has supported the argument of the other respondents and, in addition, contends that the main issue in the present cases is: Whether the petitioner-school has indulged in profiteering by raising the tuition / term fees to abnormally high level on the pretext of having incurred expenses towards building rent to the extent of Rs. 2.5 crores per annum. According to these respondents, respondent No. 2 has merely disallowed the expenses towards the building rent, and on that basis, proportionately reduced the fee structure. It is the case of these respondents that the Trust has indulged in profiteering by fraudulently leasing the property to a private limited company, whose only Directors are the trustees of the school Trust, which private limited company, in turn, has purportedly leased the constructed building to the Trust and has charged building rent therefor at the market rate. According to these respondents, although the impugned decision of respondent No. 2 does not specifically advert to this aspect, considering the fact that respondents No. 4 to 7 had raised that argument before respondent No. 2, it could be inferred that the conclusion of respondent No. 2 is founded on the said objection. According to this respondent, the petitioner-school has resorted to such ingenuity, so as to pass off the

capital expenditure as a revenue expenditure, by recovering the same in the name of buildings rent from the students in short time, and to later on make huge profits at the expense of the school, the children and the parents, more so contrary to the undertaking given to the local Authorities, which had allotted the land to the original allottee at virtually no cost for running an educational institution in the interests of charity and for the benefit of the public at large. Even these respondents contend that the State Authorities relied on Government Resolutions, including G.R. dated 27th May, 2003, which has been justly introduced after the decision of the Apex Court in ***T.M.A. Pai***'s case (**AIR 2003 SC 355)**. That G.R. has not been set aside by any Court of competent jurisdiction nor has been challenged in these petitions. These respondents further contend that the withdrawal of earlier Writ Petition by them, being Writ Petition No. 722 of 2008, cannot come in their way to challenge the action of the petitioners of fixing high fees on the ground that the petitioner-school is engaging in profiteering and commercialisation while resisting these petitions. It is further contended that the petitioner-school is adopting double standards. In that, the petitioners are relying on audit report to contend that the expenses referred to therein have been recommended by the Accounts Officer, Education, West Zone, which recommendation was

based on Government Resolutions dated 22nd July, 1999 and 27th May, 2003. On the other hand, the order of respondent No. 2 is criticised by the petitioners, because it refers to the Guidelines provided in Government Resolution dated 22nd July, 1999, which has now been set aside by the Court. It is further contended that the Accounts Officer was not the competent Authority to grant approval to the fee structure prescribed by the petitioners. That has to be done by respondent No. 2, being the statutory Authority in that behalf.

26. These respondents have then highlighted the circuitous transaction effected between Madhya Pradesh Mitra Charitable Trust (M.P.M.C.T.), the original allottee of the land in question from MHADA and the Rustomjee Kerawalla Foundation (R.K.F.) Trust and the private limited company – Kare Edumin Pvt. Ltd. (K.E.) and another charitable trust called “Rajasthan Vidhya Nidhi” (R.V.N.). We shall advert to those details a little later. The sum and substance of the stand taken by respondents No. 4 to 7 is that the petitioners have succeeded in playing fraud on the Charity Commissioner as well as MHADA, the local authority. In the circumstances, this Court must uphold the conclusion reached by respondent No. 2 of disallowing the petitioners’ claim towards building rent by lifting the corporate veil and

disregard the permission granted by the Charity Commissioner or MHADA, the local authority, as the case may be, as the said transactions have been effected only to create subterfuge so as to siphon off the amount to the extent of Rs.2.5 crores per annum in the garb of building rent / lease rent, which would eventually be enjoyed by the same three persons, who are trustees in the Trust as well as the only Directors in the private limited company. The said Directors would eventually reap profit, whereas the school will bear the loss towards building rent and that loss will be passed on to the students to justify high tuition fees / term fees.

27. Having considered the rival submissions, at the outset, we will first consider the sweep of order passed by the Division Bench of this Court dated 20th April, 2009 in Writ Petition No. 722 of 2008 and connected petitions. The order records the concession of the Deputy Director that he will pass a reasoned order on the complaint dated 19th July, 2007 made by the parents. On the basis of the said statement, the Court proceeded to dispose of the petition as withdrawn, with liberty to the parents – petitioners in the said petition – to submit additional submissions / material on which they intended to rely in support of their complaint dated 19th July, 2007; and the Management of the

school was given opportunity to make further submissions, including response to the additional submissions / material to be relied by the parents. The Deputy Director was then expected to consider the entire material produced before him by the respective parties afresh and pass a reasoned order and communicate the same to the parties within the specified time. The Court reiterated that the issues raised in the complaint made by the parents dated 19th July, 2007 alone were to be decided by the Deputy Director; and, till the said decision, the parents would not approach any other authority. The Court, further, vacated the interim order, which was operating in favour of the students / parents, with clarification that the amount recovered from them as per the revised fee structure shall be subject to the order of the Deputy Director. On perusal of the said order dated 20th April, 2009, the stand taken by the petitioners in these petitions that the Deputy Director was called upon to only consider the issues raised in the said complaint dated 19th July, 2007 deserves acceptance. As a matter of fact, that position is reinforced from the subsequent order passed by the same Division Bench dated 8th June, 2009 in Review Petition No. 19 of 2009.

28. Having said this, we will now turn to the complaint dated 19th July, 2007. On perusal of the said complaint, it is noticed that,

amongst other grievances, the parents of students studying in the petitioner-school had raised the issue about the unjust enrichment by the petitioner-school by not reverting back amount from the savings under the head “Franchisee Fees” to the parents (about 12 – 15%). Besides, in Point No. 6, specific grievance has been made that the original fee structure was inclusive of a premium paid for the KKEL Billabong Brand, which amount has been pocketed by the school. Not only that, apprehension was placed on record by the parents in the form of Point No. 7 that the school was likely to further increase the fees, which the earlier P.T.A. had successfully prevented the school from introducing the same. In the penultimate paragraph of the communication, the principal grievance about blatant manipulation resorted to by the school to install a dummy P.T.A. with purpose is highlighted. Besides, the apprehension was that, taking advantage of the situation, the petitioner-school will successfully push the fee hike, which it has been trying to do for the last two years. It is further noted that the present body of parents would not have approved any fee hike, as the quality of education delivered in the school was way below the standard even for the current level of fees presently charged. In the summation, it is alleged that the petitioner was running the school as a business profit centre. In other words, the complaint, amongst others,

was also in relation to the excessive fees charged by the school and allegation against the Management of indulging in commercialisation and profiteering. It is, therefore, not possible to countenance the argument of the petitioners / Management that the scope of enquiry before the Deputy Director in terms of order dated 20th April, 2009 passed in Writ Petition No. 722 of 2008 was not in respect of matters regarding excessive fees charged or likely to be charged by the school, resulting in commercialisation and profiteering. It is true that the petitioners / Management revised the fees on 19th March, 2008 - much after the complaint was sent by the parents on 19th July, 2007. In that sense, the justness of the matter specified in the circular dated 19th March, 2008 issued by the petitioner / Management of the school was not the subject-matter of complaint dated 19th July, 2007 as such. However, the complaint dated 19th July, 2007 made by the parents, indisputably, makes reference to the issue of likelihood of hike in school fees and illegitimate demand by the School Management in the form of fees, which was to indulge in commercialisation and profiteering. For, the said complaint specifically asserts that the parents / complainants apprehend that the Management of the school was likely to enhance the fees to unreasonable and unacceptable level. It is, therefore, not possible to countenance the stand of the petitioners

that the issues raised by the parents in the complaint dated 19.7.2007 were limited to unlawful PTA elections, quality issues, and levy of fees only for Assessment Year 2007-2008, being not commensurate with the quality of education being imparted. One cannot be oblivious of the fact that the said complaint sent by the parents was in the nature of representation and not a Petition or plaint filed before the Court which requires articulation of material facts and particulars. Representation of this nature is bound to be loosely worded and will have to be understood in its totality and not deciphered with mathematical exactitude as is sought to be done by the petitioners. The fact that specific prayer was asked in the Writ Petition filed by the parents to challenge the circulars issued by the School regarding fee revision dated 19th March, 2008 and no specific order was passed by the Court thereon cannot militate against the parents nor can come in the way of respondent No.2 to exercise his statutory duty. It can be said that respondent No.2 in the impugned communication not only examined the matter in the context of the order of this Court dated 20.4.2009, but, also in discharge of his statutory duty to ascertain whether there has been any contravention of mandate of the Capitation Fee Act.

29. To put it differently, the complaint dated 19.7.2007 included issue regarding excessive fees being charged by the school. The Deputy Director of Education was competent to examine that grievance so as to ascertain whether there is or has been contravention of the provisions of the Capitation Fee Act. In this view of the matter, reliance placed by the petitioners on the decisions of the Apex Court in the case of ***Direct Recruit Class II Engineering Officers' Association Vs. State of Maharashtra & Ors. [(1990) 2 SCC 715 para-35 at page-740],*** and in the case of ***M. Nagabhushana Vs. State of Karnataka [(2011) 3 SCC 408 paras 12, 13, 17, 18, 20, 21 & 22 thereof]*** to contend that the respondents, in particular respondent No.2, could not have traversed the issue of approval of the fees fixed by the school, will be of no avail. In other words, the issue of profiteering and commercialization by the school was very much open to enquiry by respondent No.2 and more so the apprehension of the parents that the school was likely to introduce revision of the fees which would result in commercialization and profiteering. Assuming for the sake of

argument that the opinion of respondent No.2 was in relation to the fee revision circular issued by the school dated 19th March, 2008, even that would not come in the way of respondent No.2 to ascertain whether the demand made therein contravenes the mandate of the Capitation Fee Act.

30. Understood thus, merely because the circular regarding revision of fees was introduced at a subsequent point of time for academic year 2008-09, vide circular dated 19th March, 2008, that would not preclude the parents to pursue the grievance regarding excessive fees, being in the nature of capitation fee, during the enquiry before the Deputy Director in connection with the grievance made in the complaint dated 19th July, 2007, nor is it possible to suggest that the Deputy Director was incompetent to examine the said matter at all. If the law authorises the Deputy Director to enquire into the question of justness of the revised fees to be demanded by the school, and whether it partakes the colour of capitation fee, it may not be possible for the Court to accept the extreme argument of the petitioners / Management that the impugned decision of the Deputy Director be completely disregarded. To say otherwise would mean that the Deputy Director,

even though competent to enquire into the fact whether the revised fees demanded by the school results in capitation fee, could not have done so because of the order of the Court dated 20th April, 2009. Taking such a view would be a pedantic approach. On the other hand, what we need to enquire is: Whether the conclusion reached by the Deputy Director that the revised fee structure proposed and notified by the Management of the School, which includes the amount spent by the Management towards buildings rent, results in comercialisation and profiteering by the Management? That, however, will be subject to holding that the Deputy Director is competent to examine the said matter. We shall refer to that aspect a little later.

31. We shall, therefore, now turn to the question: Whether the Deputy Director was competent to authoritatively hold that the revised fee structure unilaterally notified by the school could not be given effect to *in toto*, as it results in recovering expenses other than usual expenditure such as the expenditure on land and buildings in the name of buildings rent, which are not permissible expenses? We have no difficulty in accepting the stand taken by the petitioner / Management that the petitioner, being unaided minority institution, is free to fix its own fee structure. The said right, however, is

circumscribed to the extent that the fee structure so fixed by the private unaided minority school should not result in profiteering and commercialisation. The petitioners relying on the decisions in ***TMA Pai's case*** and in the case of ***Kochi University of Science and Technology and another Vs. T.P.J. and others [(2008) 8 SCC 82 para-16]*** would contend that an educational institution is entitled to chalk out its own fees structure year-wise on the basis of the projected receipts and expenditure, and it is not open to the State Authorities to interfere with those matters which are purely administrative in nature. Further, the educational institution must be left with its own devises to explain the receipts and expenses as before the Chartered Accountant and to call upon to furnish the basis for fixation of higher fee would be laying down onus on the educational institution which it cannot discharge with accuracy. It was argued that the demand by respondent No.2 Deputy Director of calling upon the petitioner to justify the reasonableness of the amount of the expenses incurred towards the lease rent by furnishing building rent certificate was bad in law and contrary to the decisions of the Apex Court. The broad proposition canvassed by the petitioners that the private unaided schools can fix their fees by themselves is not open to debate at all. As aforesaid, that right is not an absolute right, but, subject to the assessment by the State

Authorities of whether the fees so fixed and demanded by the private unaided schools does or does not result in commercialization or profiteering. To that extent, it is open to the State Authorities to regulate the fee structure determined by the school. That regulation should be at what stage need not detain us, for the time being. The question will have to be examined in two ways. The first is as to: Whether the State Authorities have power, under the existing law, to regulate the school fees fixed by the Management of the unaided minority school? The second facet of the said issue is: Whether the revised fee structure proposed or notified by the school would result in infraction of the provisions of the Act of 1987 and implicitly tantamount to indulging in commercialisation and profiteering. In a given case, if adverse finding is to be recorded in that behalf, it matters not at what stage the State Authorities must intervene to regulate the revised fee structure determined by the private school.

32. We shall first advert to the provisions contained in the Secondary Schools Code. Here, we may notice that the question whether the provisions of the Secondary Schools Code acquire statutory force or are merely in the nature of administrative instructions is already referred to the Full Bench of our High Court in the case of

Shikshan Mandal & Ors. *v. State of Maharashtra & Ors*. in Writ Petition No. 6727 of 2010 and other connected matters vide order dated 26th October, 2010. In the said decision, the Division Bench has noted that the provisions of the Secondary Schools Code ought to be construed as having statutory force. Nevertheless, we would proceed to examine as to whether the provisions of the Secondary Schools Code can be the basis to hold that the Deputy Director was competent to examine the question of justness of the fee structure proposed or notified by the School Management.

33. At the outset, the provisions in the Secondary Schools Code-2002 can govern only secondary or higher secondary schools. The grievance regarding fee structure of primary school cannot be the subject-matter before the Authority under the Secondary Schools Code. Chapter II of this Code deals with matters of Recognition, Organisation and Management of schools. Section VI thereof deals with matters concerning Fees and Free-studentships. Rule 49.1 envisages that school shall charge only standard rates of “tuition fees”. The standard rates of tuition fees are prescribed in different stages / areas of the State, as referred to in Rule 49.2. Rule 49.3, which is relevant for us, envisages that the unaided schools may be allowed to charge tuition

fees at rates higher than the standard rates, with the previous approval of the Director. Rule 50.6 prescribes items on which term fees can be expended. None of the items referred to therein provide for expenses towards buildings rent. The other relevant provisions in the Secondary Schools Code in respect of school fees and term fees can be found in Chapter IV, in Section I. This chapter deals with matters pertaining to Grant-in-aid. In that sense, the provisions contained in this chapter may not be directly attracted to unaided private minority school. Rule 89.1 contained in Section I of this chapter provides for items of expenditure held admissible for grant-in-aid as listed in Schedule A, and those held inadmissible for grant-in-aid as listed in Schedule B. Insofar as the item of expenses towards rent, taxes and insurance, which is part of Schedule A framed under Rule 89.1, being expenditure admissible for grant-in-aid to aided and recognised non-Government Secondary Schools. Clause 2 of Schedule A provides for the amount spent towards rent, which can be granted to the aided school as grants. The said provision reads thus:-

> "**2. Rent, taxes and Insurance :**
>
> (a) *Rent :*
>
> *(i) Reasonable rent for the school building provided the rent is actually paid and a certificate regarding reasonableness is obtained from the Executive Engineer.*

(ii) *In the case of schools accommodated in rent tenements of the Maharashtra Housing Board the rent charged by the Board of such tenements should be considered as reasonable and such school should not be required to produce in addition any certificate regarding reasonableness of rent in respect of such tenements from the concerned, Executive Engineer (Public Works and Housing Department) of Government.*
(G.R.E.S. and S.W.D. No. GAC. 1072/11986/E of 8th February 1972)

(iii) The portion of the school building not covered by the building grant (already paid) means the portion, the cost of which, is arrived at after deducting the actual amount of building grant paid by government from the total cost of the building.
Example : The total cost of a school building is Rupees one lakh. It is assumed that a building grant of Rs.20,000/-was paid by Government to the school for construction of the school building and the remaining amount of Rs.80,000/-was collected from donations and/or their own fund and/or loans from Government and/or from any other source the portion worth Rs. 80,000 will thus be not covered by the building grant and 71/2 percent of this cost (Rs.80,000) would be admissible as rent for maintenance grant, provided the Executive Engineer of the area concerned certifies that the amount of rent so charged is reasonable.

(iv) In the case of building owned by a school, a reasonable nominal rent to be calculated on the following basis namely.
(a) 7 ½ of the capital value of the building plus Municipal taxes :
(b) Six percent of the cost of the site on which the building is constructed; plus ;
(c) 10 ½ percent of the cost of sanitary fittings and water supply fittings of the building.

Provided the Executive Engineer, Zilla Parishad/ Executive Engineer Public Works Department in Greater Bombay having jurisdiction certifies that the amount of rent charged is reasonable. Where site of construction of school building was granted by government to a management free of charge, that is without any occupancy price, the question of any rent on the cost of the site would obviously not arise.
(G.R. No. GAC – 1079/425/30-37 Dt. 19/5/1979)

(v) Where a school is located in a building owned by the management and the building was built from donations, its

> own funds or from loans, whether from Government or others and Government has not paid any grant towards the cost of construction, an amount not exceeding 7 ½ percent of the cost incurred as is certified by the Executive Engineer as reasonable rent.
>
> (vi) Expenditure on account of the rent of school building for which loan has been advanced by Government according to the usual rates in that behalf during the repayment of loan and also thereafter." (emphasis supplied)

34. As per this provision, the school is obliged to furnish certificate regarding reasonableness of rent for the school building to be obtained from the Executive Engineer so as to become entitled for reimbursement by way of grants. To the extent of the certificate so given by the Executive Engineer, the school would become entitled for grants, provided the school has actually paid that amount as rent. Schedule B vide Rule 89.1 regarding list of items of expenditure inadmissible for grant-in-aid also makes provision in respect of the amount spent by the school towards building rent of the school. Clause 2(a) thereof reads thus:-

> "**Rent, taxes and Insurance:**
>
> (a) Rent
>
> (i) The rent charged for portion of a school building for which a building grant was paid by Government.
>
> (ii) Charges on account of rent for any part or parts of the building or buildings used for residential purposes for hostels."

35. On perusal of these provisions, there can be no doubt that the norm prescribed therein is to determine the reasonableness of the amount towards rent of the school building, so as to reckon the same for grant or non-grant of Grant to the aided school. There is nothing wrong in applying the principle underlying the above guidelines for determining the reasonableness of the fee structure proposed or notified by private unaided school in larger public interests. If the amount spent by the private unaided school towards school buildings rent appears to be exorbitant or unacceptable, to that extent, the State Authorities would be competent to exclude the excess amount and approve the fee structure proposed or notified by the private unaided school by excluding the excess amount towards buildings rent as unjust. The effect of such finding would be that the excess amount claimed in cash or kind to recover the expenses incurred under the head “Buildings Rent” by the school from the students as part of fees, even if actually incurred by the school, will have to be treated as unusual expenditure incurred by the school. In that case, the school cannot recover such unusual expenditure incurred by the school from the students in the name of fees. Such declaration and direction can be issued by the State Authorities. The Authority referred to in Rule 49.3,

therefore, would be competent to disapprove the fee structure proposed or notified by the Management of the unaided School on the same analogy of admissible and inadmissible Building Rent of the aided School provided for in the Schedules referred to above.

36. The petitioners / Management, however, relying on the decision in the case of **State of Maharashtra v. Lok Shikshan Sanstha, AIR 1973 SC 588, para 10,** would contend that reliance cannot be placed on the provisions of the Secondary Schools Code-2002, as the same have no statutory force. Assuming that this argument is correct, the question under consideration can be conveniently answered with reference to the provisions of the Capitation Fee Act of 1987. The provisions of the said Act are not subject-matter of challenge in the present petitions. As a mater of fact, the Apex Court in ***T.M.A. Pai***'s case had occasion to consider the question which arose before it also with reference to the provisions of the said Act. We would proceed on the assumption that the Management of the School need not take prior approval of the State Government or any other Authority of the State before introducing the fee structure determined by it. But such fee structure must adhere to the mandate of the Capitation Fee Act of 1987. We say so because the

Preamble of the Act expresses the legislative intent behind enactment of the Act of 1987. It is an Act to prohibit collection of capitation fee for admission of students to, and their promotion to a higher standard or class in, the educational institutions in the State of Maharashtra and to provide for matters connected therewith. This Act was enacted because of the past experience of undesirable practice followed by the private educational institutions to large-scale commercialisation of education which was not conducive to the maintenance of educational standards. The Act intends to effectively curb the evil practices, and prohibit collection of capital fee in the public interest. The term "capitation fee" has been defined in Section 2(a) which reads thus:-

> **"2. Definitions-**
>
> In this Act, unless the context requires otherwise,-
>
> (a) "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;" (emphasis supplied)

37. Thus, any amount, by whatever name called, collected by the unaided institutions in cash or kind in excess of the "approved rates of fees" regulated under Section 4 is impermissible. We may note that the legislature has used two expressions in Section 2(a), i.e., "prescribed"

and "approved." The expression "prescribed" is ascribable to aided institutions, and, on the other hand, term "approved" governs the unaided institutions. We shall elaborate this while considering the purport of Section 4 in particular sub-section (2) thereof. Section 2(aa) defines term "Deputy Director" and means the Deputy Director of Education or any officer so designated as such by the State Government working under the specified Authority. Section 2(b) defines the term "Educational institution". There can be no dispute that the petitioner-school will be covered by this expansive definition. Section 2(c) defines the term "Local Authority". Section 2(d) defines the term "Management". In the present case, clause (iv) of the said provision will be applicable, as the petitioner-school is neither managed by the State Government or a local authority or by a university. The term "Minority education institution" is defined in Section 2(e). Section 2(f) defines the term "Prescribed" and means prescribed by rules made under this Act. Section 2(g) defines the term "Rules" and means the Rules made under this Act. Section 2(h) defines the term "University".

38. Section 3 stipulates that demand or collection of capitation fee is prohibited.

39. The relevant provision to examine the controversy on hand is Section 4 of the Act. It postulates that the State Government is competent 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 any standard or course of study of such institution in respect of any class of students. Thus, there can be no doubt that the State Government has the power to regulate the fees of even unaided private minority institution to the extent of the fees received or collected by educational institution which partakes the character of capitation fee. Sub-section (2) of Section 4 deals with the fees to be regulated by the State Government under sub-section (1). There is a marked distinction between the language used in clauses (a) and (b) of sub-section (2) of Section 4 of the Act. While dealing with the case of aided institutions, the expression used is “prescribed” by a University or State Government, as the case may be. On the other hand, in the case of unaided institutions, with which we are concerned, the expression used is “the State Government may approve”. Clause (a) thereof is not applicable to our case, as it deals with the case of the aided institutions. Clause (b) of sub-section (2) is of some significance, and reads thus:-

> "(b) in the case of the un-aided institutions, having regard to the usual expenditure excluding any expenditure of 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 course of studies or different areas." (emphasis supplied)

40. On perusal of this provision, it is evident that the unaided institutions can receive or collect fees, to compensate the "usual expenditure" incurred by it as approved by the State Government. No more and no less. The expenditure on lands and buildings or any such other items as the State Government may notify is plainly excluded from being charged in the form of fees – not being usual expenditure. Further, the expression "on any such other items as the State Government may notify" will have to be read *ejusdem generis* with the expression "excluding any expenditure of lands and buildings". What is significant to note is that the State Government has the power and authority to approve the fees fixed by the private unaided institutions. The term "approve" will have to be construed as enabling the State Government to regulate the fees, by disallowing the components of expenses incurred by the school on items other than usual expenditure. Proviso below clause (b) in Section 4(2) is an indication that the approval

of fees fixed by the school should be accorded on case to case basis by the State Government.

41. Although the expression "usual expenditure" has not been defined in the Act of 1987, the purport of the said expression can be culled out from sub-section (3) of Section 4 of the Act. The said provision postulates that the fees to be prescribed or approved under sub-section (2) shall include the items referred to therein. Notably, the expenditure incurred by the school towards buildings rent is not mentioned as one of the items in sub-section (3). Sub-section (3) of Section 4 reads thus:-

"**4. Regulation of fees.-**
(1) .....
(2) .....
(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."

42. Sub-section (4) stipulates that 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 a 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.

43. Sub-section (5) of Section 4 obligates the educational institution or management to issue an official receipt for the fees or deposits or any other amounts collected for any purpose, which shall be specified in such receipt.

44. On conjoint reading of definition of "capitation fee" in Section 2(a) read with Section 4 of the Act, it is obvious that the fees to be fixed by the school must consist of only usual expenditure and of items referred to in sub-section (3) of Section 4 of the Act. Any other

amount received or collected by the school / Management, by whatever name called, would tantamount to receiving capitation fee. As aforesaid, expression “usual expenditure” occurring in Section 4(2)(b) is not defined in the Act. Term “usual” would mean ordinary or customary. The term “ordinary” would mean normal and expected, and “necessary” means appropriate and helpful. Thus, the ordinary and necessary expenses or operating expenses incurred by an organisation engaged in “trade or business” would be on items such as rent, wages, utilities and similar day-to-day expenses as well as taxes, insurance and a reserve for depreciation. Education, whether for charity or for profit, is an occupation. It cannot be equated to a trade or business. A priori, the school management cannot claim whole amount spent by it towards buildings rent from its students, unless so approved by the State Government. The State Government, while considering the proposal for approval of the said expenditure incurred by the school management for the relevant period, may approve such amount which, in its opinion, would be “reasonable” and “appropriate” amount to be recovered by the management from its students. It is one thing to say that the management may spend amount towards buildings rent as per the prevailing market rate therefor, if the building in which the school is situate is not owned by the school. Since the State Government is

competent to approve the amount of usual expenditure, which the school can be permitted to recover from its students by way of fees, the concomitant is that the State Government is competent to approve the entire amount spent by the management / school towards buildings rent as it is or only portion thereof as reasonable and appropriate amount to be recovered from the students. While examining the said question, the State Government would be free to take into account the grievance of the parents that the devise adopted by the management and the school was to make profit by paying huge amount of Rs.2.5 Crores in the name of building rent, even though the Trust, which is running the school, is managed by the same three persons who are the only directors and shareholders of the private limited company. In other words, the payer and the receiver would be the same by using the cloak of the Trust and the Company. Those are matters which will have to be enquired into by the State Government. Moreover, the State Government, while approving the claim of the petitioner-school to allow them to recover the amount spent by the school towards buildings rent, is free to apply the principle underlying the guidelines specified in Schedules A and B framed under Rule 89.1 of the Secondary Schools Code to ascertain as to what could be the reasonable amount allowed to be recovered by the school from its students. According to the petitioners in view of the

exposition in the case of ***Modern School Vs. Union of India*** reported in ***(2004) 5 SCC 583 paras – 20 & 21***, the school cannot be denuded of its entitlement to recover the expenditure incurred by it towards the buildings rent. Moreover, the State of Maharashtra has never exercised the power nor acted in exercise of the option conferred under Section 4 of the Capitation Fee Act as can be discerned from the dictum of the Apex Court in the case of ***Father Thomas Shingare And Ors. vs State Of Maharashtra And Ors. [(2002) 1 SCC 758 para – 9, 10, 16 & 20 thereof]***. As aforesaid, whether the petitioners would be entitled to claim reimbursement of the amount spent by them towards the buildings rent in toto or only portion thereof is a matter which has to be considered by the State Government in exercise of power under Section 4 while granting approval to the petitioner school in that behalf. That power is bestowed in the State Government by virtue of Section 4 of the said Act. The validity of the said Section has not been challenged before us. The fact that the State Government has so far not exercised that power can be no impediment to do so hereafter. It is too elementary to state that there can be no estoppel against the law. The decisions pressed into service by the petitioners therefore will be of no avail.

45. Concededly, going by the plain language of Section 4 of the Act, the power to approve or regulate fees of unaided institutions vests in

the State Government alone. That power cannot be exercised by the Deputy Director, unless the law permits delegation of that authority in his favour. At the same time, however, by virtue of Section 6 of the Act, the Deputy Director of Education and officer not below that rank specially authorised by the State Government in that behalf has the power to enter upon the premises of the educational institution or any premises thereof or any premises belonging to the Management of such institution in relation to such institution, if he has reason to believe that some contravention of the provision of the Act of 1987 or the Rules made thereunder has been committed by the institution. To unravel that position, the said officer is entitled to examine any record, account or register or documents belonging to such institution or of the Management. By virtue of Section 10 of the Act of 1987, the provisions of the Act have been given overriding effect to the provisions contained in any other law for the time being in force or in any instrument having effect by virtue of such law. The Deputy Director, in exercise of his powers under Section 6 of the Act, therefore, would be competent to enquire into the acts of commission and omission of the educational institution or its Management, resulting in contravention of the provisions of the Act. In that process, he is competent to examine the records of the school and its Management to ascertain whether the fees

collected by the school from its students were as per the norms prescribed under the Act of 1987. The Act has come into force. The powers bestowed on the specified State Authorities by virtue of the provisions of the Act can be given effect to. To consummate the avowed intention of the Capitation Fee Act, 1987, the authorities referred to in the Act are obliged to discharge their duties specified therein.

46. To put it differently, the directions issued by the Deputy Director can be upheld on the reasoning that the same could be and ought to have been issued by the Deputy Director in exercise of powers under Section 6 of the Act. In the present case, all that the Deputy Director has done is to call upon the petitioners to produce the certificate of reasonableness of buildings rent issued by the Executive Engineer, as is required in terms of guidelines specified in Schedules A and B framed under Rule 89.1 of the Secondary Schools Code. Indeed, until the question as to whether the provisions of the Secondary Schools Code has the statutory force is answered by the Full Bench of this Court, which issue has been referred by the Division Bench in terms of order dated 26th October, 2010 in Writ Petition No. 6727 of 2010, we may proceed on the basis that the said provisions are administrative instructions. The same have not been challenged by the petitioners. For that reason, the

insistence of the Deputy Director, respondent No.2, to produce the reasonableness certificate issued by the Executive Engineer cannot be faulted. Since the petitioners failed to do so, respondent No. 2 proceeded on the basis that the petitioners have failed to substantiate the claim towards expenditure incurred on buildings rent during the relevant period. If the order passed by the Deputy Director is so understood, there is no reason to overturn the same. Indeed, it would be a different matter if the petitioners were to obtain certificate of reasonableness of buildings rent from the Executive Engineer, on the basis of which, respondent No. 2 could have examined the matter in the context of the provisions of Capitation Fee Act - that the demand of the school does or does not result in commercialisation and profiteering. The other option available to the petitioners was to immediately approach the State Government for approval of its revised fee structure fixed by it, which included the entire amount spent by the school towards buildings rent. That proposal could have been examined by the State Government on its own merits. None of the above options found favour with the petitioners. The petitioners, instead, took the extreme position before respondent No. 2 that the petitioners had complete authority in fixing their own fee structure, which could include the entire amount spent by the school towards buildings rent.

47. In the context of sub-section (4) of Section 4 of the Act, it was then argued that, once the approval to the fee structure since notified by the school was already granted by the Accounts Officer, the same could not be revised by another Authority under the Act. For that, the State Government is expected to constitute a Committee of persons, who are experts in educational field, for taking the review of the fee structure. In the first place, the fact that the Accounts Officer had verified the accounts of the school and accepted the same as it is or otherwise would make no difference, nor that would enure to the benefit of the petitioners. For, as per the provisions of the Capitation Fee Act, the State Government alone has the power to approve the fee structure of the private unaided school. Notably, the fee structure prescribed by the petitioner-school has not been doubted by the Deputy Director in respect of all other items, except the expenses claimed by the Management towards buildings rent in the sum of Rs. 2.5 crores.

48. The petitioners have placed strong reliance on the decision of the Division Bench of this Court in the case of ***Association of International Centres and Members Foundation v. State of Maharashtra,*** Writ Petition decided on September 1, 2010. In the said

matter, the Court was called upon to examine the validity of Government Resolutions dated 16th July, 2010 and 22nd July, 1997, respectively. The subject-matter of the said Government Resolutions is regulation of fees that are charged by unaided secondary schools. The Court upheld the challenge on the sole finding that the said Government Resolutions were not issued under Article 162 of the Constitution of India, even though the same were affecting the right guaranteed under Article 19(1)(g) of the Constitution to the private educational institutions. The Court held that the said two Government Resolutions were not issued under any provisions of the Act, nor can be ascribed to exercise of power under Article 162 of the Constitution by the State. Indeed, in the said decision, reference is made to Section 4 of the Capitation Fee Act, 1987. With reference to the said provision, the Court went on to observe as follows:-

> "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."
>
> (emphasis supplied)

49. Suffice it to observe that the abovesaid decision pressed into service is of no avail to the controversy raised in the present petitions. In the present matters, the points in issue are whether the Deputy Director was competent to dwell upon the question regarding the fee structure prescribed by the petitioner-Management in terms of Circular dated 19th March, 2008 and further, whether the provisions of the Capitation Fee Act of 1987 would be attracted if the private school was allowed to include the entire expenditure incurred by it towards buildings rent as component of fees to be recovered from its students during the relevant period. As a matter of fact even the above quoted observations in this decision lend support to our finding that the State Government has power to approve and resultantly regulate the fees fixed

by the unaided schools. Similarly, the fact that the two Government Resolutions dated 22nd July 1999 and 15th July, 2010 have been set aside and declared as *ultra vires* also does not take the matter any further for the petitioners.

50. Notably, the petitioners have neither challenged the provisions of the Act of 1987 nor the subsequent Government Resolutions issued by the State Government pursuant to the decision of the Apex Court in ***T.M.A. Pai***'s case.

51. Be that as it may, even if we are in agreement with the submission of the petitioners that the Deputy Director has had no authority to regulate the fees of private unaided institutions, by virtue of express provision contained in Section 4 of the Capitation Fee Act; or even going by the provisions of the Secondary Schools Code, viz., Rule 49.3, that power could be exercised only by the Director and not the Deputy Director; coupled with the fact that the Apex Court has expounded that the private unaided institutions have right to prescribe their school fees, that does not mean that the fees prescribed by the private unaided institutions cannot be made subject-matter of scrutiny by the Deputy Director in exercise of his powers under Section 6 of the

Act for the limited purpose of finding out as to whether any part of the fees is in excess of the usual expenditure and of items referred to in Section 4(3) of the Act and collection of such amount would attract the mischief of capitation fee, *sans* approval thereto by the State Government. In view of the legislative mandate of the Capitation Fee Act of 1987, any amount received or collected by the school from the students, by whatever name called, in excess of the expenses on usual expenditure or permissible items referred to in Section 4(3) and as approved by the State Government, will be deemed to be resorting to commercialisation and profiteering and collection of capitation fee by the school, for the purposes of the said Act. The petitioners, therefore, cannot succeed on the technicalities that the two G.Rs. dated 22nd July, 1999 and 15th July, 2000 have been set aside or on the contention that the Deputy Director has had no authority to regulate the fees as such. The fact that the Deputy Director has adverted to those G.Rs does not take the matter any further for the petitioners. The petitioners besides assailing the impugned communications have also assailed the order recording reasons passed by respondent No.2 dated 3rd August, 2010 on the ground that the same is merely pretense of having recorded reasons which are neither cogent nor clear as required by law. Such an order cannot be countenanced in the light of exposition in ***Kranti Associates***

Private Ltd., and another vs. Masood Ahmed Khan and others,

[***(2010) 9 SCC 496]***. This argument overlooks the underlying principal reason recorded by respondent No.2 Deputy Director to hold against the petitioners/school. He has observed that the petitioners, having failed to produce the certificate of reasonableness of buildings rent issued by the Executive Engineer, were not entitled to claim reimbursement of the amount paid by them towards the buildings rent from its students by way of fees. Similarly the argument of the petitioners that the reasons have been supplemented by fresh reasons in the shape of affidavits or otherwise cannot be taken into account considering the dictum of the Apex Court in the case of ***Commissioner Of Police, Bombay vs Gordhandas Bhanji [(1952) SCC 16 para 11],*** and in the case of ***Mohinder Singh Gill v. Chief Election Commissioner [(1978) 1 SCC 405 para 8].*** *E*ven this grievance of the petitioners will have to be discarded as we are inclined to take the view that the order of the Deputy Director will have to be understood as one passed in exercise of powers under Section 6 of the Act to ascertain whether there has been any contravention of the provisions of the Capitation Fee Act. The opinion of the Deputy Director can be ascribed to Section 6 of the Act of 1987 which, for all practical purposes, has taken the view that the petitioner-educational institution

cannot claim reimbursement of the expenses incurred by it towards buildings rent in the sum of Rs. 2.5 cores, having failed to substantiate that claim by producing certificate of reasonableness of rent issued by the Executive Engineer. He has, therefore, re-worked the fee structure by excluding the amount towards buildings rent incurred by the petitioner-school, as not capable of being recovered from its students – lest attract the provisions of the Capitation Fee Act. Implicit in the reason recorded by respondent No.2 for reworking the fee structure of the petitioner school is that if the petitioner school is likely to or was to demand and accept the amount from its students to recompensate itself, the entire buildings rent expenditure incurred by the school and paid to the private limited company, *sans* approval in that behalf of the State Government. That would result in commercialization and profiteering. As aforesaid, we may not construe the said order of the Deputy Director as strictly regulating the fees or one of approval thereof. Even so, the conclusion reached by the Deputy Director, will have to be upheld for the reasons mentioned hitherto. In that case, the petitioners cannot recover any amount in excess of the amount reworked by respondent No. 2, unless approved by the State Government.

52. The petitioners had argued that there is intrinsic material to suggest that the impugned communication dated 3.7.2009 sent by

respondent No.2 – Deputy Director was nothing but tentative view expressed by him subject to finalization. However, the respondent No. 2 Deputy Director unilaterally proceeded on the basis that the said communication was his final decision due to pressure brought by the parents. To legitimize the said fallacy, the respondent No.2 issued another communication dated 4.9.2009 that the fees determined in his earlier communication dated 3.7.2009 has been treated as final for the reason stated therein. In this context, it was argued that respondent No. 2 exercised the power of review which he did not have in law. Reliance has been placed on the decision in the case of ***Dr. (Smt.) Kuntesh Gupta Vs. Management of Hindu Kanya Mahavidyalaya, Sitapur (UP) and others [(1987) 4 SCC 525 para-11],*** and in the case of ***Kalabharati Advertising Vs. Hemant Vimalnath Narichania and others [(2010) 9 SCC 437 paras-12 to 14].*** In the first place, if the Court were to accept the former contention of the petitioners that the impugned communication dated 3.7.2009 was only a tentative opinion expressed by respondent No.2, the argument that the effect of communication dated 4.9.2009 issued by him was resorting to review becomes unavailable. Further, it is not necessary to dwell upon the disputed factual assertion that the opinion expressed by respondent No. 2 Deputy Director in his impugned communications was issued under

dictation or influence of the parents. On perusal of the impugned communication dated 3.7.2009, it is noticed that insofar as respondent No.2 – Deputy Director is concerned, he has expressed his opinion regarding the claim of the petitioner's school in respect of buildings rent. He further observed that the said opinion was to be given effect subject to the decision of the committee constituted by the State. In the communication dated 4.9.2009 respondent No.2 has noted that no committee has been constituted by the State and for which reason the views expressed by him in his communication dated 3.7.2009 be given effect to. Understood thus, the grievance of the petitioners under consideration is devoid of merits.

53. Going by Section 4 of the Capitation Fee Act, the State Government alone is competent to approve the amount claimed by the unaided school as usual expenditure so as to permit the school to recover commensurate amount from the students by way of fees. If the petitioners are keen that they should be allowed to recover the entire amount spent by them towards buildings rent for the relevant period from their students, they may have to pursue the matter before the State Government for its approval. As aforesaid, the State Government would be free to examine all aspects before taking final decision on the

said proposal, including the grievance of the parents (such as respondents No. 3 to 7) that the amount spent by the school towards buildings rent is a subterfuge and devise to siphon off that amount, which would eventually be received in the hands of three persons, who are the only directors and shareholders of the private limited company and also the only trustees of the Trust, which claims to have incurred such expenditure. In other words, the payer and the receiver of the stated expenses are the same persons under the facade or cloak of two juristic persons. All contentions available to the respective parties may have to be examined by the State Government on its own merits. We are not expressing any opinion as to whether the petitioners are entitled to claim recovery of entire amount spent by them towards buildings rent from their students during the relevant period or otherwise.

54. The private respondents were at pains to persuade us to enquire into the validity of the permission granted by MHADA to transfer the proprietary rights in the plot in favour of a private limited company on which the building has been constructed, so as to reap profit by recovering amount towards buildings rent from the petitioner-school run by a public charitable Trust; as also the decision of the

Charity Commissioner, which has enabled the public Trust to spend such exorbitant amount towards school buildings rent in the sum of Rs. 2.5 crores, on the argument that the said transfer as well as decision of the Charity Commissioner were the outcome of misrepresentation and fraud played by the petitioners. It is not necessary for us to examine that contention in these petitions, for the view that we have already taken. As and when the petitioner-school applies to the State Government for approval to recover the actual expenses incurred by it towards buildings rent from its students during the relevant period, that plea will be available to the parents / students or otherwise can be gone into by the State Authorities on their own and answered appropriately in accordance with law. We, therefore, do not express any opinion in that regard.

55. The petitioners had assailed the decision of the Deputy Director on the ground that it is product of *mala fide* exercise of power in fact and in law. Even this grievance, in our opinion, need not be dealt with, considering the view already expressed by us hitherto. Assuming that the impugned decisions of the Deputy Director were to be treated as *non est* on this ground, that, by itself, would not permit the petitioners to recover the entire amount spent by them towards

buildings rent from their students during the relevant period, unless approved by the State Government.

56. For the view that we have taken, the petitioners will have to refund the portion of fees constituting expenses towards buildings rent and, if the petitioners continue to receive or collect any amount towards that head, by whatever name called, so as to recompense themselves for the expenses incurred towards school buildings rent, it would clearly attract the provisions of the Capital Fee Act, for which, the school and its Management my have to face the legal consequences.

57. As a result, the petitioners may have to abide by the opinion expressed by the Deputy Director in his impugned decision, which means that the petitioner-school may be well-advised to recover fees by excluding the expenses towards buildings rent for the relevant period. Failure to abide by that opinion may invite suitable action under the Capitation Fee Act of 1987 against the school and its Management. We, however, express no opinion as to whether in the fact situation of the present case, the State Government should approve the expenses claimed by the petitioners towards buildings rent either as a whole or only part thereof, in the context of the provisions of the

Capitation Fee Act of 1987. All questions in that behalf are left open. While parting, we would like to place on record that other incidental issues were raised by the Counsel appearing for the respective parties during the course of argument, as also reliance was placed on the decisions in support of their contentions. However, in our opinion, it is not necessary to burden this judgment with all those issues. Hence, we have not elaborated on those issues or other reported decisions.

58. Suffice it to observe that the sum and substance of our decision is that even though the private unaided school has discretion to fix its own fee structure, it is open to the State Government to regulate the same insofar as unusual expenditure within the meaning of Section 2(a) read with Section 4 of the Capitation of Fee Act. As and when the issue of recovery of any unusual expenses such as exorbitant expenditure on buildings rent, is raised either by the parents or it comes to the notice of the State Authorities and in spite of that, the school continues to recover the disputed amount without taking approval of the State Government, the Management of such school would run the risk of legal action provided for in the Capitation Fee Act. When such occasion arises, the Management of the school may have only two options – first is to obtain approval of the State

Government at the earliest opportunity for allowing it to recover the disputed amount by way of fees from its students. The second is to continue to recover the disputed amount stipulated by it as fees from its students unabated and in which case the Management of the School may run the risk of facing appropriate legal action under the provisions of the Capitation Fee Act and other enabling enactments.

59. In view of the above, we proceed to pass the following order:-

ORDER

Both the petitions are disposed of on the above terms with costs to be paid by the petitioners. Resultantly, in absence of approval of the State Government permitting the School to recover the expenditure from its students incurred on buildings rent during the relevant period, the petitioners are obliged to comply with the Court's order dated 20th April, 2009. Ordered accordingly.

MRS. MRIDULA BHATKAR, J. **A.M. KHANWILKAR, J.**