Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.3696 OF 2017

RUSTOM KERAWALLA FOUNDATION ……APPELLANT

VERSUS

STATE OF MAHARASHTRA AND ORS. ..…. RESPONDENTS

With

CIVIL APPEAL NO.3698 OF 2017

WITH

TRANSFER PETITION (CIVIL) NO.89/2013

WITH

TRANSFER PETITION (CIVIL) NO.90/2013

JUDGMENT

Uday Umesh Lalit, J.

1. Rustom Kerawalla Foundation (appellant in Civil Appeal No.3696 of 2017 and hereinafter referred to as the Foundation), runs a school named Vibgyor High School (appellant in Civil Appeal No.3698 of 2017 and hereinafter referred to as the School) in Mumbai. These appellants are

questioning correctness of the common Judgment and Order dated 16.09.2011 passed by the High Court of Bombay in Writ Petition Nos.1925 of 2009 and 1919 of 2009 preferred by them. Along with these appeals, two transfer petitions, namely T.P.(C) Nos.89 and 90 of 2013 preferred by the Appellants are also listed before us.

These writ petitions challenged the orders dated 03.07.2009 and 04.09.2009 passed by the Deputy Director of Education, i.e. Respondent No.2 who had disallowed the expenses incurred by the School towards rent in respect of school building in the sum of Rs.2.50 crores per annum. While so disapproving, the amounts towards other expenses claimed by the school were accepted by Respondent No.2 as usual expenditure and the fees prescribed by the school to the extent of Rs.54,598/- for Primary Section and Rs.61,149/- for Secondary Section from the years 2008-2009 were approved.

2. The Maharashtra Educational Institutions (Prohibition of Capitation Fee) Act, 1987 (hereinafter referred to as the Act) prohibits collection of capitation fee for admission of students to, and prosecution of any course of study, or for promotion to a higher standard or class. “Capitation Fee” is defined in the Act as, “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". Sections 3, 4, 6 and 7 of the Act are as under:-

"3 Demand or Collection of capitation fee prohibited-

(1) Notwithstanding anything contained in any law for the time being in force, no capitation fee shall be demanded or collected by or on behalf of any educational institution or by any person who is in charge of or is responsible for, the management of such institution.

(2) Notwithstanding anything contained in sub-section (1), the management may in good faith, demand or, collect or accept donations in cash or kind in prescribed manner, from benevolent persons or organisations or public trusts or any other association of persons, for opening of new educational institution or for development or expansion of educational facilities in the existing educational institutions or for creation of endowment fund for award of scholarships, prizes or the like, but while collecting or accepting such donations the management shall not reserve any seats in any educational institution run by it in consideration of such donations. All money and articles received in donation shall be accounted for in the institution and the money shall be deposited in the name of the institution in any scheduled or co-operative bank and shall be applied or expended for the purpose for which such donations are collected or accepted or shall be applied towards the objects of the institution :

Provided that, where in consideration of accepting such donations any seat is reserved for admission to any student in such institution such acceptance of donation shall be deemed to be collection of capitation fee.

(3) Where the State Government, on receipt of any complaint or otherwise, is satisfied that the management of any institution or any person who is in-charge of or is responsible for the management of such institution, has contravened the provisions of this Act or the rules made thereunder, the State Government may, in addition to any prosecution that may be instituted under

this Act, after giving a reasonable opportunity of being heard, direct such institution or person responsible that the capitation fee collected in contravention of this Act shall be refunded to the person from whom it was collected and on its or his failure to do so, the amount together with interest thereon shall —

(a) in the case of an aided educational institution, be deducted from the grant-in-aid payable by the State Government to such institution; and then the same be paid to the person from whom such capitation fee was collected; and

(b) in the case of an un-aided educational institution, be recovered as arrear of land revenue; and when so recovered be paid to the person from whom such capitation fee was collected.

(4) The management of any educational institution or any person who is in-charge of or who is responsible for the management of such institution demanding, collecting or accepting donations under sub-section (2) in connection with or in relation to any student in consideration of his admission to and prosecution of, any course of study or his promotion to a higher standard or class in institution, shall be deemed to have contravened the provisions of sub-section (1) and shall be liable to be proceeded against and punished accordingly.

4. Regulation of Fees

(1) It shall be competent for the State Government to regulate the tuition fee or any other fee that may be received or collected by any educational institution for admission to, and prosecution of study in any class or standard or course of study of such institution in respect of any or all classes of students.

(2) The fees to be regulated under sub-section (1) shall —

(a) in the case of the aided institutions, be such as may be prescribed by a university under the relevant

University Law for the time being in force in the State or as the case may be, by the State Government; and

(b) in the case of the un-aided institutions, having regard to the usual expenditure excluding any expenditure on lands and buildings or on any such other item as the State Government may notify, be such as the State Government may approve:

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

(3) The fees, to be prescribed or approved under sub-section (2) shall include the following items, namely :—

(a) Tuition fee, 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 any other item, as the State Government may approve.

(4) The fees regulated under the section shall ordinarily remain in force for a period of three years and the State Government shall appoint a Committee of persons who, in the opinion of the State Government, are experts in educational field, for taking the review of the fee structure and may, after

considering the report of the Committee, revise the fees if it considers it expedient to do so.

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

6. **Power to enter and inspect-**

(1) Any Officer not below the rank of Deputy Director of Education specially authorised by the State Government in this behalf, may at any time during the normal working hours of any educational institution enter such 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 there is or has been any contravention of the provisions of this Act or the rules made thereunder and search and inspect any records, accounts, registers or other documents belonging to such institution or of the management in so far as such records, accounts, registers or other documents relate to such institution and seize any such records, accounts, registers or other documents for the purpose of ascertaining whether there is or has been any such contravention.

(2) The provisions of the Code of Criminal Procedure, 1973 relating to searches and seizures shall apply, so far as may be, to searches and seizures under sub-section (1).

7. **Penalties**

Whoever contravenes any provision of this Act or the rules made thereunder, shall, on conviction, be punished with imprisonment for a term which shall not be less than one year but which may extend to three years and with fine which may extend to five thousand rupees :

Provided that, any person who is accused of having committed the offence under sub-section (1) of Section 3 of demanding capitation fee shall, on conviction, be punished with

imprisonment for a term which shall not be less than one year but which may extend to two years and with fine which may extend to five thousand rupees."

3. Respondent Nos.3 to 7 herein, namely parents of children studying in the School along with other parents had complained to the Education Minister of the State vide letter dated 19.07.2007 alleging mal-administration in the School including unlawful elections to Parents-Teachers' Association. This letter suggested that the fee structure of the School was not justified and it was submitted "..we are sure Education Ministry will not allow any educational institution to run as a business, profit center". While this letter was pending consideration, the School proceeded to issue Circular dated 19.03.2008 increasing school fees. This increase was purportedly on the basis of approval granted by the Accounts Officer (Education) vide his letter dated 21.02.2008 which set out the recommended expenditure and consequential increase in fees as under:

"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 Exp. 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- 6,845.75
Approved Monthly Fee-6112.00	Approved Monthly Fee 6,845.00

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

4. Complaining about the rise in school fees from Rs.55,000/- to Rs.82,500/- per annum, Respondent Nos.3 to 7 filed Writ Petition No.722/2008 praying for quashing of Circular dated 19.03.2008 issued by

the School regarding increase in fee structure. Said writ petition was disposed of by the High Court on 20.04.2009 directing that the earlier complaint dated 19.07.2007 which was still pending consideration, be disposed of by Deputy Director and that the writ petitioners would be at liberty to submit any additional submissions/material in support of their complaint. It was directed that the Deputy Director would consider the entire material produced before him and pass a reasoned order. The High Court further directed that the fees would be paid in terms of the revised fees structure but recovery of fees would be subject to the orders to be passed by the Deputy Director.

5. It appears that a Task Force was thereafter assigned the work of scrutiny and audit of accounts of the School which noticed that certain documents necessary for arriving at any decision were not submitted by the School. Accordingly Respondent No.2 by his letter dated 15.06.2009 called upon the school to furnish certain details. It further appears that as the information was not forthcoming from the School, Respondent No.2 issued communication dated 30.06.2009/03.07.2009, relevant portion being:

> "As per the orders given by the Hon'ble High Court on 20.04.2009, a joint decision from the Education Deputy Director regarding Vibgyor High School Goregaon(W), 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 15.06.2009.

1. Income & 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 & 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.

Since the above information was not submitted by the school, a meeting of the Task Force was held on 30.06.2009 under the chairmanship of the Education 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 21.02.2008 of the Accounts Officer(Education) West Zone, has been considered. After considering the same, the following decision has been taken.

1) <u>Formation of the PTA:</u>

As per the GR No. SSN 1099 (27/99) Sec. Edu.-2 dated 22nd 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) Regarding Fees:

A) Proposed Expenses for the year 2008-09 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 22nd July, 1999.

1. Professional Fees - 60,91,264/-
2. Building Repairs - 6,03,132/-
3. Staff Welfare - 5,00,009/-
4. Total - 71,94,405/- (Less) Rs.71,94,405/-

Expenses earlier approved by 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 27th May 2003

Incremental income (Add) Rs.36,39,845/-

Permissible Salary & 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% Exp.	Rs.7,64,36,745/- x 46% Exp.
Rs. 4,12,75,842/-	Rs.3,51,60,903/-
Students count -756	Student count -575
Yearly Fees Rs. 54,598/- per student.	Yearly Fees Rs. 61,149/- per student.
Monthly Fee Rs. 4,550/- per student.	Monthly Fee 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 22nd 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 Fee 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)
Deputy Director-Education
Mumbai Division, for Mumbai"

6. The communication dated 30.06.2009/03.07.2009 disallowing expenses towards rent and subsequent letter dated 04.09.2009 stating that the fees determined in the decision dated 03.07.2009 were final and be acted upon, were questioned by the Appellants by filing Writ Petitions as stated above. Considering the grievance that no reasons whatsoever were recorded in the decision dated 03.07.2009, the High Court by its order 03.08.2010 directed Respondent No.2 to permit the parties to file their response/submissions on the basis of which said respondent was called upon to record reasons. Pursuant to the aforesaid order, Respondent No.2 passed order on 27.10.2010 recording reasons for disallowing the amount towards school building rent, the translation of relevant portion being:-

> "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."

7. The reasons so recorded in support of the decision dated 03.07.2009 and the direction contained in communication dated 04.09.2009 were challenged before the High Court. It was submitted by the Appellants that; a) In terms of orders of the High Court passed on 20.04.2009 and 08.05.2009, the proceedings were limited to examine the issues raised in the complaint dated 19.07.2007 and as such the subsequent decision to increase the tuition

fee could not have been the subject matter of challenge. b) Respondent No.2 was not competent to fix tuition fees and could not have exercised any power on the basis of procedure prescribed in Government Resolutions. c) Respondent No.2 could not have disallowed the expenses towards building rent on the ground of non production of the building rent certificate and in disregard of the approved/recommended expenditure by the Accounts Officer, Education, West Zone, Mumbai in his letter dated 21.02.2008. d) As held by the High Court in ***ASSOCIATION OF INTERNATIONAL SCHOOLS AND PRINCIPAL FOUNDATION AND ANOTHER*** v. ***STATE OF MAHARASHTRA***[1] the power to approve the fees stood conferred by the Act on the State Government, which power could not be delegated.

In response, it was submitted on behalf of Respondent No.1 that the submissions in the complaint dated 19.07.2007 were also in respect of excessive fees and alleged profiteering and therefore Respondent No.2 was quite competent to examine the grievances and while doing so was justified in disallowing the claim in respect of rent for school building as claimed. Respondent Nos.3 to 7 while contesting the petitions submitted that a device was adopted by the appellant to profiteer and the alleged rent was being paid

[1]W.P. No 1876 of 2010 decided on 1.09.2010 (2010 SCC Online Bombay 1291)

by the Foundation to a Private Limited Company in which, very same trustees were the only Directors.

8. Writ Petition Nos.1925 and 1919 of 2009 were disposed of by the High Court by its judgment and order which are presently under appeal. The High Court rejected the submission that the scope of enquiry was limited and confined to the allegations made in the complaint dated 19.07.2007. According to the High Court, the aspect regarding commercialization and profiteering was put in issue and the authorities were within their rights to consider the matter. It was further observed that even if it were to be accepted that Respondent No.2 had no right to prescribe the fees in respect of unaided institutions, in exercise of his powers under Section 6 of the Act he could certainly find out if any part of fees was in excess of what was prescribed under Section 4(3) of the Act and whether collection was without any approval by the State Government. It was observed by the High Court:-

> "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."

Very same thought was expressed by the High Court in para 53 of the judgment in following terms:

> "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 building 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 respondent Nos.3 to 7) that the amount spent by the school towards buildings rent is a subterfuge and device 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 façade 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."

With this view the High Court disposed of the matters and the operative part of the order reads thus:

> "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."

9. While issuing notice on 14.11.2011, this Court stayed the operation of the aforesaid judgment and order passed by the High Court. During the pendency of these matters Writ Petition Nos.2701 of 2012 and 2542 of 2012 were filed by the Appellants in the High Court of Bombay challenging constitutional validity of Sections 2 and 4 of the Act. The Appellants later filed Transfer Petition Nos.89 and 90 of 2013 in this Court seeking transfer of said Writ Petitions to this Court in which notice was issued by this Court on 01.02.2013. After hearing the learned counsel for the parties, this Court, on 07.10.2015 felt that one of the disputes was about admissibility of expenditure incurred by the appellants towards lease rents. The Court recorded the submission of the counsel appearing for the Appellants that it was not possible to supply a copy of "building rent certificate" provided by a competent authority and that the Appellants could furnish the details about the rent paid and the certificate of the valuer to show that the lease rent paid by the Appellants was reasonable and that the matter could thereafter be verified by Respondent No.2 through concerned Executive Engineer. This Court permitted the Appellants to submit material which would be considered by Respondent No.2 who would then submit a report to this Court. Pursuant to the aforesaid directions, an affidavit was filed by Respondent No.2 on 11.02.2016 stating that the Executive Engineer

vide his letter dated 07.01.2016 had informed Respondent No.2 that he could not certify or verify whether lease rent paid by a private party was as per the market rate. The affidavit however, stated that in order to ascertain whether the rent paid by the School was reasonable or not, the Appellants had produced reports of valuation prepared by approved valuer. The affidavit annexed copies of the reports of such valuers namely, Cushman and Wakefield, Shrinivas M. Kini and Co. and Santosh Kumar. In his subsequent affidavit filed on 02.03.2016 Respondent No.2 in a tabulated form placed a summary of valuation reports as under:-

Summary of Valuation Reports

Name of Valuer	Year of valuation	Building Area mentioned in Report (including Pool and Sports facility)	Building Area mentioned in the Report (Including Pool and Sports facility)	Rate per sft. per month	Annual Lease rent
Cushman & Wakefield	2008	1,08,202		88	11.4 Cr.
Cushman & Wakefield	2011	1,08,202		94	12.2 Cr.
Cushman & Wakefield	2014	1,08,202		103	13.3Cr.
Shrinivas M. Kini & Co	2008		69,795	81.34	6.8 Cr.
Shrinivas M. Kini & Co	2010		69,795	96.15	8.05 Cr.
Santosh Kumar	2008		81,547	88	8.6 Cr.

Kakode & Associates	2008		89,181	(Mentioned 75 to 80) considered 75	8.02 Cr.
Kakode & Associates	2010		89,181	(Mentioned 100 to 105) considered 100	10.07 Cr.

10. When the matters were taken up for final hearing, Dr. Abhishek Manu Singhvi, Mr. Aspi Chinoy and Mr. Praveen Samdani, learned Senior Advocates appeared on behalf of Appellants and submitted:-
(i) Power under Section 4 of the Act could be exercised only by the State Government and such power could not be delegated. (ii) Respondent No.2 could have exercised power under Section 6 which was in the nature of Search and Seizure but such power could not be utilized to regulate the fees. (iii) Expenses towards lease rent are permissible and not barred under the Act or the Rules or the Regulations; and (iv) There was complete lack of jurisdiction to regulate fees with regard to minority schools, in the absence of any exploitation or profiteering.

It was also submitted that the Appellants would argue the issues regarding constitutional validity of certain provisions in the High Court in pending Writ Petitions and they would not press for transfer of those petitions to this Court.

Mr. Sunil Fernandes, learned Advocate appearing for Respondent No.3 submitted that the land in question was originally given by Maharashtra Housing and Area Development Authority ("MHADA" for short) on behalf of the State Government at a concessional rate to a Trust and part of such land was then sub-leased to a company which in-turn had allowed the Foundation to run the School from the building situated thereon. He further submitted that the trustees of the Foundation themselves were Directors in the company and the payment of lease rent was nothing but a device to siphon substantial sums of money. None appeared for Respondent Nos.1 and 2.

11. After conclusion of submissions, a note was filed on behalf of the appellants on 04.03.2017 annexing documents concerning the allotment and permission to sub-lease. The facts as set out in the note were as under:

> "Maharashtra Housing and Area Development Authority (MHADA) is the owner of a land earmarked under the Development Plan (DP) for a restricted user of only a school and a play ground (PG) and as such the intrinsic value of the same is much lesser than a plot of land which can be used for any purposes including residential or commercial. Under an Agreement of Lease dated 4th December 2002 MHADA granted to Madhya Pradesh Mitra Charitable Trust (MPMCT), lease in respect of land admeasuring 6032.86 sq.mts situated at Goregaon (West), Mumbai for a one time premium of Rs.40,17,151/- and a lease rent of Rs.1/- per year for a tenure of 30 years…….The calculation of one time lease rent by way of premium and other charges including rent are made as per the policy of MHADA and reproduced at Schedule II of the

> lease deed dated 4th December 2002…….By a tripartite agreement dated 21st December 2004 entered into between MHADA, MPMCT and KARE Educational Institute (India) Limited (now known as KARE Edumin Pvt. Limited) the said KARE was granted a sub-lease in respect of a plot of land admeasuring 3016.44 sq. mtrs. out of the total of 6032.86 sq mtrs. for the residual term of the original lease. Though MPMCT had paid 40 lakhs to MHADA for the entire 6032.86 sq. mtrs. of land, KARE paid to MHADA over and above the said sum a premium of Rs. 5, 02,144/-. Kare also paid to MPMCT sum of Rs. 30,00,000/- for acquiring the leasehold rights in respect of 3016.44 sq. mtrs. (50% of the original land leased to MPMCT). Pertinently, 1508.22 sq. mtrs out of 3016.44 sq. mtrs (50%) is reserved under the Development Plan (DP Plan) as a play ground (PG)……..KARE using its own resources and /or amounts borrowed from banks and financial institutions constructed thereon a building comprising of Ground +12 upper floors and fully furnished the said building with central air conditioning, high speed elevators and other state of the art amenities such as swimming pools, etc……By and under a registered Deed of Lease dated 31st July 2006, Kare assigned to RKF[2] the leasehold right alongwith right to use, occupy and enjoy, the finished building with all the infrastructure and amenities therein for a term of 26years at a fixed rent of Rs. 2,50,00,000/- per annum (without any clause for escalation). Pertinently, the said lease agreement is only in respect of the building along with the infrastructure and facilities and/or amenities thereon and no right, title or interest and /or any assignment of leasehold right in respect of the land is given by virtue of the said agreement by KARE to RKF."

12. Along with the note, the Appellants produced certain documents including Agreement of Lease dated 04.12.2002, the relevant recitals of which are:-

> "WHEREAS the Authority is possessed of or otherwise well and sufficiently entitled to a piece or parcel of land

[2] RKF is abbreviation for the Foundation

admeasuring 6032.86 sq. mt. situated at S.No. 16(pt) corresponding C.T.S. 223 & 224, village Pahadi Goregaon, Goregaon (west), Mumbai-400104, in the registration Sub-District of Andheri Mumbai Suburban District and more particularly described in the Schedule I hereinunder written and shown by red coloured boundary line on the plan hereto appended (hereinafter referred to as "the said land").

AND WHEREAS the lessee requested to the government vide its application dated 14.02.1999 to grant the plot of land on lease situated at Mouje Pahadi, Goregaon (W) Motilal Nagar-I for the purpose of constructing, maintaining and locating building for School.

AND WHEREAS on the request of the lessee, the Govt. of Maharashtra as per the provisions, Regulation 16(2) of the MHADA (Disposal of Land) Regulations 1982, decided to lease out the plot of land under 2% discretionary quota of the State Government, for plots developed by the Authority to Lessee and the Government in Housing and Special Assistance Department vide its letter No.ADL-7799/Case No.3746/Desk-1 dated 15.05.1999 directed the Mumbai Housing and Area Development Board, a regional board of the Authority established under Section 18 of the said Act (hereinafter referred to as "the said board") to allot the said plot of land to the lessee on the terms and conditions hereinafter appearing and contained;

AND WHEREAS in response to the Government directions it has been proposed by the Authority vide its letter No.Motilal Nagar-1/File-45/L-Br/5228 dated 24/10/2001 and letter No.CO/MB/ALM/(B)/Madhya Pradesh/4828/2002 dated 2/11/2002 to allot the said plot of land on lease admeasuring 6032 sq. mts. in S.No. 16(pt) corresponding C.T.S. No. 223 and 224 at village Pahadi Goregaon, Goregaon (West) Mumbai-400104 to the lessee for the purpose of constructing maintaining and locating School & P.G. (Hereinafter refereed to as "the said purpose") for a period of 30 years lease with effect from the date of taking over the possession of the said land by

the lessee, for the said purpose on the terms and conditions rent and covenants herein after appearing and contained.

AND WHEREAS in pursuance of the said decision, the said Board vide No.Motilal Nagar-I/File-45/L-Br./5228 dated 24/10/2001 and letter No.CO/MB/ALM/(B)/Madhya Pradesh/4828/2002 dated 02.11.2002 for Rs.40,17,151/- (Rupees Forty Lakhs Seventeen Thousand One Hundred and Fifty One Only) towards lease premium, 1% annual lease rent, 8% capitalized lease rent and nominal lease rent Rs. 1/- per year for 30 years and legal charges for school and for playground Lease Premium, annual lease rent and nominal lease rent Rs.1/- per year for 30 years (as per Schedule II affixed herewith) on terms and conditions hereinafter appearing contended.

AND WHEREAS the lessee has agreed to take the said land admeasuring 6032.86 square metres on lease for the said terms of thirty years with effect from the date of taking over the possession of the said land i.e. the _____by the lessee for the said purpose on the terms and conditions rent and covenants hereinafter contained;

AND WHEREAS the lessee Charitable Trust, at present to discharge their objective effectively constituted to affiliated trust namely 'Rajashtan Vidya Nidhi' duly registered vide No. E-20322, Mumbai dated 18th July, 2002 and Rustamji Kerawalla Foundation' duly registered vide no. E 19386, Mumbai dated 3rd May 2001 and by letter dated 4th June 2002, accordingly requested to incorporate these affiliated trust along with the main trust and the lessee itself or through its affiliated trust (which will not amount subletting requested to execute lease deed in view of compliance of the terms and conditions of allotment.)

AND WHEREAS it is expedient and necessary to execute this indenture to lease in favour of the lessee in pursuance of the above mentioned decision of the Authority agreed to by the lessee. ''

13. These recitals show that the allotment was made by MHADA pursuant to the decision of the State Government to lease out a plot of land under 2% discretionary quota of the State Government, in terms of Regulation 16(2) of MHADA (Disposal of Land) Regulations 1982 ("the Regulations", for short). The Regulations deal with modes of disposal of land vested in MHADA by Government or acquired by MHADA. Regulation 3 speaks of normal modalities of disposal such as inviting tenders by public advertisement, offers through public advertisement, public auction, etc., to which Regulation 16 is an exception.

Secondly, the consideration paid by the Lessee under this Deed was one time payment of Rs.40.17 lakhs with Rs.1/- as nominal lease rent to be paid annually for an extent of 6032 sq. mtrs. The recitals also show that the Foundation was very much in picture on the day the Deed was executed and was shown as affiliated trust. The Deed further shows that all three trustees of the Foundation are also trustees of Madhya Pradesh Mitra Charitable Trust (MPMCT).

14. The present matters are required to be considered in the aforementioned factual scenario. At this stage, we may quote Para 195 from the majority decision authored by Justice B.P. Jeevan Reddy in

UNNI KRISHNAN J. P. AND OTHERS v. ***STATE OF ANDHRA PRADESH AND OTHERS***[3]**:**

> "195. Private educational institutions may be aided as well as un-aided, Aid given by the Government may be cent per cent or partial. So far as aided institutions are concerned, it is evident, they have to abide by all the rules and regulations as may be framed by the Government and/or recognising /affiliating authorities in the matter of recruitment of teachers and staff, their conditions of service, syllabus, standard of teaching and so on. In particular, in the matter of admission of students, they have to follow the rule of merit and merit alone- subject to any reservations made under Article 15. They shall not be entitled to charge any fees higher than what is charged in Governmental institutions for similar courses. These are and shall be understood to be the conditions of grant of aid. The reason is simple public funds, when given as grant- and not as loan- carry the public character wherever they go, Public funds cannot be donated for private purposes. The element of public character necessarily means a fair conduct in all respects consistent with the constitutional mandate of Articles 14 and 15. All the Governments and other authorities in charge of granting aid to educational institutions shall expressly provide for such conditions (among others), if not already provided, and shall ensure compliance with the same. Again aid may take several forms. For example, a medical college does necessarily require a hospital. We are told that for a 100-seat medical college, there must be a fully equipped 700 bed hospital. Then alone, the medical college can be allowed to function. A Private Medical College may not have or may not establish a hospital of its own. It may request the Government and the Government may permit it to avail of the services of a Government hospital for the purpose of the college free of charge. This would also be a form of aid and the conditions aforesaid have to be imposed- may be with some relaxation in the matter of fees chargeable- as observed. The Governments (Central and State) and all other authorities granting aid shall impose such conditions forthwith,

[3](1993)1 SCC 645

> if not already imposed. These conditions shall apply to existing as well as proposed private educational institutions."

15. It is true that while answering Question No.9, larger bench of this Hon'ble Court in ***T.M.A. PAI FOUNDATION*** v. ***STATE OF KARNATAKA***[4] held the Scheme framed in ***Unni Krishnan*** to be unconstitutional. The aforesaid observations in Para 195 are, however, completely distinct from the Scheme formulated in the decision of ***Unni Krishnan*** and those observations, still hold good. As a matter of fact, in ***MODERN SCHOOL*** v. ***UNION OF INDIA & OTHERS***[5] the very next paragraph namely Para 196 from the decision of this Court in ***Unni Krishnan*** was quoted by Justice S.H. Kapadia, as the learned Chief Justice of India then was, while speaking for majority.

16. In the instant case, the plot of land came to be allotted not through normal competitive channels but purely under discretionary quota. The consideration payable for the plot was also not guided by market conditions, and public property was made over purely for sub-serving public interest. Going by the test laid down that aid may take several forms and that when public property or funds are given as grant, they carry public character

[4] (2002) 8 SCC 481

[5] (2004) 5 SCC 583

wherever they go, the allotment made by MHADA at the instance of the Government in favour of a lessee can certainly be termed as "aid". As laid down in said para 195, among others, the condition that the institution shall not be entitled to charge any fees higher than what is charged in Government Institutions for similar courses, shall be understood to be the condition of grant of aid. Will not such "aid" mean that the institution is in theory and practice, an aided institution; in which case the fee structure has to be one which has been prescribed in terms of Section 4(2)(a) of the Act? We may hasten to add that this part has not been dealt with at any juncture in the present proceedings and before a decision in that behalf is taken, the parties must have an opportunity to contest the position, if they so wish. Our observations must, therefore, be taken as purely tentative. The fact however remains that the lessee spent Rs.40.17 lakhs only for allotment of 6032 Sq. mtrs. through non-competitive mode.

17. We will now deal with the question whether the Appellants are entitled to take the entirety of lease rent into account while having the fee structure approved in terms of provisions of the Act and if not, what should be the correct approach and for the present purposes, we proceed on the footing that the School is an unaided institution.

18. Section 3(1) of the Act prohibits demand or collection of any capitation fee from any student in consideration of his admission to, and prosecution of any course of study, or promotion to a higher standard or class in any educational institution. The definition of educational institution under Section 2(b) means a school including kindergarten, pre-primary, balwadi or nursery, college or any institution by whatever name called whether managed by Government, Local authority, a University or a Private Management. Thus the extent of prohibition contemplated by Section 3(1) squarely applies to and covers the School run by the Foundation. The definition of "capitation fee" under Section 2(a) means any amount in excess of the prescribed fee or as the case may be approved rates of fee regulated under Section 4. The regulatory mechanism under Section 4 has two facets; a) in case of aided institution, the fees to be regulated shall be such as may be prescribed by the University or the State Government and b) in respect of unaided institution it shall be such as the State Government may approve. Under the first category the fees are "prescribed" either by the University or by the State Government while in respect of unaided institution the fees have to be "approved" by the State Government. Sub clause (4) of Section 4 speaks of constitution of a committee of experts in education field whose reports can be the basis for revision of fees. Said

sub-section further provides that the fees regulated under Section 4 shall ordinarily remain in force for a period of three years.

19. Reading sub-clause (b) of Section 4(2) along with Section 4(3) of the Act, three elements ought to be considered while approving the fees in respect of unaided institutions, namely; (i) regard must be had to the usual expenditure; (ii) excluding any expenditure on lands and buildings or on such other items as the State Government may notify; and (iii) the fees shall include the items specified in sub-clause (3) of Section 4.

The expression "excluding any expenditure on lands and buildings or on such other items as the State Government may notify" is very crucial. Important to note that expenditure on lands and buildings or for that matter any expenses towards rents do not form part of any of the items under sub-section (3) of Section 4. While considering the ambit of the aforesaid crucial expression in Sub-clause (b) of Section 4(2), two constructions are possible:

(i) The qualification, "as the State Government may notify" covers only the second part, i.e., that part of the expression occurring after "or" namely "on any such other items". Thus, the power entrusted with the State Government applies to and is restricted to "any such other items". In other words, the earlier part

namely, "any expenditure on lands and buildings" is a stand-alone part and must always be excluded. If this construction is accepted, expenditure on lands and buildings must always be kept out of consideration while arriving at the decision with regard to the fees to be approved in respect of an unaided institutions. The power of the Government to notify will only be with respect to "other items" and not with respect to expenditure on lands and buildings. The fact that rent for building does not find any place in Section 4(3) of the Act, is an indicia in favour of such construction. Logical extension of this thought would be that in all matters, no expenditure on lands and buildings can or ought to be taken into account.

(ii) The other possible construction is that the expression "as the State Government may notify" must apply to the entirety of the clause including "any expenditure on lands and buildings" in which event, the State Government may, either as a matter of policy come out with any general notification or may decide in the context of any individual facts and circumstances. Since all the authorities have gone on the latter construction in the present matter, we refrain from carrying the discussion further

and adopt the latter construction as the basis for our assessment in the instant case.

20. Assuming that the expenditure on lands and buildings can be reckoned while considering the case under sub-clause (b), the State Government is empowered to exclude certain expenditure. What then is the extent of power and under what circumstances and in what manner such discretion is to be guided? The exercise on part of the State Government must be guided to arrive at a just balance between two essentials, one - interest of the unaided institution to have a just and reasonable fee structure and the other - the very purpose of the legislation namely to curb capitation fee. While discharging this duty and undertaking such exercise, the State Government must naturally be alive to and take all possible facets of the matter into account. In a given case, claim for payment of rent in respect of buildings may be just and reasonable while in other cases it may not be so. The exercise must and ought to be undertaken keeping the basic idea of the legislation in mind.

21. If the State Government, while making over public assets or funds, has rendered a helping hand to an institution, the resultant benefit flowing in favour of the institution must always be taken into account in order to arrive at a just and fair decision while approving the fees as claimed by that

institution. The least that is expected is that the institution would not seek to profiteer from the public assets or public funds but must be made to let the benefit flow in favour of those, for whose ultimate benefit the public assets or funds were made over to it in the first instance. At this juncture, we may refer to the following passage from the majority judgment of this Court in ***ISLAMIC ACADEMY OF EDUCATION & ANR.*** v. ***STATE OF KARNATAKA & ORS.***[6]***:***

> "7. …...The fee structure for each institute must be fixed keeping in mind the infrastructure and facilities available, the investments made, salaries paid to the teachers and staff, future plans for expansion and/or betterment of the institution etc. Of course there can be no profiteering and capitation fees cannot be charged. It thus needs to be emphasized that as per the majority judgment imparting of education is essentially charitable in nature. Thus the surplus/profit that can be generated must be only for the benefit/use of that educational institution. Profits/surplus cannot be diverted for any other use or purpose and cannot be used for personal gain or for any other business or enterprise. ……"

22. In the present case, the Foundation was always in the picture right since the beginning and was named as affiliated trust in the deed in question. It was only later that KARE Edumin Pvt. Limited came to be inducted as a sub-lessee to which the Foundation is presently paying rupees two and a half crores every year towards rent. Respondent No.3 is therefore not off the mark in her contention that in the process substantial sums of money are

[6](2003) 6 SCC 697 Para 7

being made over to KARE Edumin Pvt. Limited in which company the trustees of the Foundation are the only Directors. In any event of the matter, all that the sub-lessee had expended towards acquisition of interest in the land was Rs.30 Lakhs, which was paid to MPMCT and Rs.5.02 Lakhs that was paid by it to MHADA towards premium. All the evaluation reports relied upon and placed on record have computed the rent payable on the basis of what was payable in market to similar premises in the locality in question. Evaluation reports have gone on the basis of the locational advantages of the land, which are nothing but elements depending upon the market value of the locality in question. Since the lease deed and subsequent sub-lease in the present case was on non-competitive basis and purely under the discretionary quota of the State Government, the locational advantages of the land ought to be completely severed and segregated and what should be the basis for computation must be purely that what was expended "on land and buildings". The expenditure on lands being to the tune of Rs.35.02 lakhs, what the Foundation and the School are entitled to is only that, which represents reasonable return on such investment and the facilities therein, or the rent as claimed, whichever is lower.

23. With this view, we remand the matter to the State Government for fresh consideration. The High Court in Para 53 of its judgment had

observed that the State Government would be free to examine all aspects before arriving at a final decision. While reiterating that, we further direct the State Government to consider the matter in the light of the observations made herein. Since we are making over the matter to the State Government, all those submissions advanced on behalf of the appellants that Respondent No.2 was incompetent to deal with the matter need not be gone into. We direct the State Government to consider the matter and pass appropriate orders within three months from the date of this Judgment and the status quo as prevailing today shall continue to be in operation till such time. It goes without saying that in case the fees as proposed by the Appellants are not approved, consequential orders for refund in terms of Section 3(3) of the Act shall be made.

24. Before we conclude, we must advert to one part which struck us as incongruent. When the matter was taken up on 21.02.2017, the State Government was duly represented by its counsel. The matter was thereafter adjourned and taken up on subsequent date when none appeared for the State Government. On our enquiries, the learned counsel appearing for Respondent No.3 told that the counsel who was earlier appearing for the State Government would no longer appear as his instructions were withdrawn. We had no way to confirm that as even the learned advocate on

record for the State chose not to appear. The matter, therefore, went completely by neglect and default on part of the State Government and we were deprived of any assistance on behalf of the State Government. This must be brought to the notice of the concerned authorities and we direct that a copy of this Judgment and Order be sent to the Law Secretary for the State as well as to the learned Advocate General for the State.

25. Lastly, since Transfer Petitions were not heard on merits, we discharge the notice issued in Transfer Petitions and request the High Court to deal with the pending Writ Petitions. With these observations, the present appeals and transfer petitions stand disposed of, with no order as to costs.

…….J.
(Adarsh Kumar Goel)

…….J.
(Uday Umesh Lalit)

New Delhi
August 3, 2017