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IN THE HIGH COURT OF ORISSA AT CUTTACK

WRIT PETITION (CIVIL) No. 11299 OF 2020

WRIT PETITION (CIVIL) No. 11514 OF 2020

WRIT PETITION (CIVIL) No. 32259 OF 2020

(Applications under Articles 226 & 227 of the Constitution of India.)

In W.P.(C) No.11299 of 2020

Mohammed Mustaq Ansari Petitioner

Versus

State of Odisha & Another Opposite Parties

In W.P.(C) No.11514 of 2020

Odisha Abhibhabak Mahasangha Petitioner

Versus

Union of India & Othes Opposite Parties

In W.P.(C) No.32259 of 2020

Sai International School Parents Forum Petitioner

Versus

State of Odisha & Others Opposite Parties

Advocate(s) who appeared in these cases by Video Conferencing mode:-

For Petitioner	:	<u>In W.P.(C) No.11299 of 2020</u> Mr. Mohammed Mustaq Ansari (in person)
		<u>In W.P.(C) No.11514 of 2020</u> Mr. V. Narasingh, Adocate
		<u>In W.P.(C) No.32259 of 2020</u> Mr. Goutam Mukherjee, Senior Advocate along with

Mr. B.B. Mohanty

For Opposite Parties : Mr. Ashok Kumar Parija,
Advocate General along with
Mr. M.S. Sahoo,
Additional Government Advocate
*[For State-Opposite Parties in all
the matters)*

Mr. P.K. Parhi,
Assistant Solicitor General
For Opposite Party-Union of India

Mr. Tarananda Pattanayak, Advocate
For Opposite Party-CBSE

Mr. Budhadeb Routray,
*Senior Advocate for Confederation
of Public Schools*

Mr. Asok Mohanty
Senior Advocate
Mr. Patitapaban Panda, Advocate
Mr. Dayananda Mohapatra, Advocate
Mr. Sameer Kumar Das, Advocate
Mr. B.D. Das, Advocate
Mr. Alok Ku. Mohapatra, Advocate
Mr. N.K. Sahu, Advocate
For respective Intervenors

**CORAM : THE CHIEF JUSTICE
DR. JUSTICE B. R. SARANGI**

JUDGMENT

7th January, 2021

Dr. S. Muralidhar, CJ.

1. The central issue in the present batch of writ petitions concerns the charging of fees by private unaided schools in the State of Odisha in the wake of COVID-19 pandemic from March, 2020 onwards.

The petitions

2. The lead petition in the present batch is Writ Petition (Civil) PIL No.11299 of 2020 filed by Mr. Mohammed Mustaq Ansari, who appears in person. The prayer in this petition *inter alia* is for directions to the Government of Odisha to issue necessary orders directing both the private unaided and aided schools not to collect tuition fees for the lockdown period till actual commencement of classes in physical mode; not to increase in fees in the academic session 2020-21; “not to put extra financial burden on the parents or creating any new head of the fees for the academic session 2020-21” and for a direction to strictly enforce the provisions of law against the Managing Committee of those institutions who fail to strictly comply with the directions of the Government. The further prayer of the Petitioner is for a direction to the Government of Odisha to provide funds to all the private schools, who are unable to bear the basic liability of payment of salaries to their staffs both the teaching and the non-teaching staff to meet the situation arising out of the COVID-19 pandemic. In this lead petition, notice was issued by this Court on 24th April, 2020.

3. One of the connected petitions is Writ Petition (Civil) No.11514 of 2020 filed by the Odisha Abhibhabak Mahasangha. The Opposite Parties in this writ petition include the Department of School and Mass Education (DSME), the Central Board of Secondary Education (CBSE), Stuarts School, Cuttack (Opposite Party No.3), the Confederation of Odisha Public Schools (Opposite Party No.7), the Association of Odisha ICSE Schools, the S.K. International School and DAV Public School.

4. The prayer in Writ Petition (Civil) No.11514 of 2020 which projects the point of view of the students seeking a direction to the Opposite Parties to issue circular/order to the private/public school across the State of Odisha to waive off the school fees /tuition fees/development fees/re-admission fees etc. for two quarters from March-June and July-September, 2020 and for a direction to the schools not to enhance the fees or any other ancillary charges for the academic year 2020-21.

5. The 3rd petition i.e. W.P.(C) No.32259 of 2020 has been filed by Sai International School Parents Forum. It projects the point of view of the parents of the students. The prayers here are again broad and sweeping. They seek a direction to the Opposite Parties to roll back the enhancement of fees for the academic session 2020-21. A direction is sought to the Sai International School to reconsider the matter by adopting the fees structure prevailing in the previous academic year 2019-20 and grant waiver of some portion thereof during the period of the COVID-19 pandemic. A direction is sought to the State to take steps for meticulous compliance of the terms and conditions of the Resolution dated 23rd September, 1996 of the Department of School and Mass Education (S & ME) on the basis of No Objection Certificate (NOC) which was issued in favour of the private unaided schools including Sai International School, Bhubaneswar. In the batch of petitions, some interveners have entered by filing their intervention applications.

6. It may be mentioned at the outset that the pleadings in the lead matter i.e. Writ Petition (Civil) (PIL) No.11299 of 2020 including the counter affidavit and other affidavits filed therein have been relied upon by the parties in all the matters.

Orders of this Court

7. As noted earlier after the initial order passed in the lead petition on 24th April 2020, an interim order was passed by this Court on 26th May, 2020 to the effect that during the pendency of the matter “the students of any private school shall not be deprived of participation in the e-classes and shall be provided with password and ID”. A detailed order was thereafter passed on 1st September, 2020 as under:

“Heard Mr. Mohammed Mustaq Ansari, learned Advocate, who appears in person in W.P.(C) No.11299 of 2020, Mr. Ranjan Kumar Rout, learned counsel for the petitioner in W.P.(C) No.11263 of 2020, Mr. V. Narasingh, learned counsel for the petitioner in W.P.(C) No.11514 of 2020 and Mr. Ashok Kumar Parija, learned Advocate General for the State-opposite parties, Mr. B. Routray, learned Senior Advocate for the opposite party-Confederation of Odisha Public Schools and Sri Asok Mohanty, learned Senior Advocate for the opposite party-Odisha Private Schools Teachers Association, by Video Conferencing mode.

Mr. Ashok Kumar Parija, learned Advocate General was on the earlier date requested to assist this Court in the matter and explore the possibility of the amicable resolution of the dispute by way of mediation between the parties whether the private educational institutions can be persuaded to grant waiver of a portion of fees due to the ongoing pandemic COVID-19 to the W.P.(C) No. 11299 of 2020 students/parents, especially the fee demanded on certain heads, like Development,

Uniform, Conveyance, etc. which the petitioners are terming unreasonable. Learned Advocate General informed the Court that the Secretary, School & Mass Education Department, Odisha, Bhubaneswar is prepared to convene a meeting of the representatives of the Private Un-Aided and Aided Educational Institutions and representatives of the parents and teachers' association. He however submitted that for a meaningful discussion in an orderly manner, not more than five representatives from each of the three grounds, should be allowed to attend such deliberations but they should be required to give their choice to participate in such meeting either physically or by virtual mode.

Having regard to the aforementioned submissions, it is directed that five representatives from Confederation of Odisha Public Schools, five representatives from parents, three of whom shall be the President, the Vice-President and the Secretary respectively of Odisha Abhibhabak Mahasangha, and one parent each as 3 nominated by the petitioner in W.P.(C) No.11299 of 2020 and the petitioner in W.P.(C) No.11263 of 2020 and five representatives of teachers' to be nominated by Odisha Private Schools Teachers Association, shall participate in such deliberations. Their names shall be conveyed to the Secretary, School and Mass Education Department positively by 2.00 P.M. on 03.09.2020, along with their preference whether they would like to attend such meeting physically or by video conferencing.

The Secretary, School & Mass Education Department shall make an endeavour in the proposed meeting whether the private educational institutions can be persuaded for waiver of a portion of fees payable by the students or accept part of the fees by deferring remaining part or whether any other kind of consensus can be arrived at on such terms that may be agreed upon

between the parties, in view of the ongoing pandemic COVID-19 and also examine whether any unreasonable and excessive fees is being demanded by any of the private educational institutions on unreasonable head such as development 4 fee, uniform charges, conveyance charges, or other charges of the like nature.

The Secretary, S & ME Department may convene the meeting preferably at 12 Noon on 04.09.2020 and if the same remains inconclusive, on any other date and time within a week (next seven days). Report of the deliberations may be produced before the Court on the next date.

The matter to come up on 14.09.2020.

Learned counsel for the parties may in the meantime file their written note of submissions.”

8. At the hearing of the case on 29th September, 2020 the Court took on record the report of the Principal Secretary to Government, S & ME Department which had been prepared pursuant to the order dated 1st September, 2020.

Report of the Principal Secretary, S&ME Dept.

9. At this stage a reference ought to be made to the report of the Principal Secretary, S & ME Department which recorded the MoU. It must be noticed that 14 of the private unaided schools agreed to waiver of fees at a flat rate in different slabs as set out in para 8 of the report, which is Annexure-C/2 to the affidavit dated 1st December, 2020 filed by the Additional Secretary to Government, S & ME Department. The position as set out in a tabular form is as under:

Sl.No.	School Type	School Fees (Per
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		annum) either as tuition fees or Composite Fees Waiver %
1	All Schools fees upto Rs.6,000/-	Nil
2	All Schools fees > Rs.6,001/- to Rs.12,000/- p.a.	7.5%
3	All Schools fees & Rs 12,001/- to Rs.24,000/- p.a.	12%
4	All Schools fees > Rs.24,001/- to 48,000/- p.a.	15%
5	All Schools fees > Rs.48,001/- to Rs.72,000/- p.a.	20%
6	All Schools fees > Rs.72,001/- to Rs.1,00,000/- p.a.	25%
7	All Schools fees above 1,00,000/- p.a.	26%
8	Transport and Food Charges	As per actual
9	i. Transport and Food Charges as per actual	
	ii. Hostel fees : Flat 30% waiver to be given.	
	iii. The Other Optional Fees as per para 3 and 4 of MoU shall not be charged during pandemic period till Schools re-open.	
10	Any School which has not increased School Fees consecutively in the last two years will not be covered in this School Fees Waiver understanding subject to proper certification from SMC (School Management Committee) (2018-19 & 2019-20).	

10. The Report further noted as under:

“From the deliberations, it could be noticed that near unanimity was achieved except one member i.e. Shri Baikuntha Prasad Das, representative of the petitioners in WPC No.11299/2020. All 14

members signed the Memorandum of Understanding and also authenticated their signatures on 10th Sept., 2020 before my authorized representative. It is a fact that due to the unprecedented COVID-19 pandemic situation, all stakeholders in the education system like the Schools, Teachers, Parents as well as the Students have been affected beyond the control of any individual entity despite the best efforts taken by the State, in providing education through online and offline modes as per the extant guidelines of Government of India and State Government issued under COVID-19 pandemic. As directed by the Hon'ble Court, maximum effort has been taken to persuade all the stakeholders present during the discussions to reach a unanimous decision in this unique situation which has occurred for the first time.”

Stand of the State Government

11. A counter affidavit was filed on 21st May, 2020 by the Director of Elementary Education of Odisha mentioning *inter alia* that:

(i) no tuition fees are collected from students in Government Schools or from old Grant-In-Aid (GIA)/Fully Aided schools or even from new GIA Schools that receive partial funding from the Government;

(ii) the other category of schools are the Unaided Private Schools which include English Medium schools as well as Odia Medium schools affiliated to Board of Secondary Education, Odisha.

(iii) In the private unaided schools, 25% seats are reserved for the weaker sections and disadvantage groups under Section 12-C of the Right to Education Act, 2009 in respect of which

the cost of education was borne by the Government of Odisha at a uniform rate arrived at every year.

12. This was followed by another affidavit dated 4th November, 2020 i.e. after the report submitted by the Principal Secretary to Government, S & ME Department. The stand of the State Government as stated in para 10 of the affidavit was that there is no provision under the Orissa Education Act, 1969 ('OE Act') and the Rules framed thereunder for fixation of fee structure of different unaided schools. A reference has been made to the order dated 22nd March, 2013 of the Supreme Court in Civil Appeal No.4556 of 2014 (***D.A.V. College Managing Committee through Regional Director v. Laxminarayan Mishra***) whereby the DAV School authorities were directed to make an application for fixation of fees structure of the school before the Fee Structure Committee (FSC), Odisha headed by Justice K.P. Mohapatra, a former judge of this Court.

13. It was further stated in the final judgment dated 16th April, 2014 in the aforementioned Civil Appeal No.4556 of 2014, the Supreme Court accepted the recommendations of the of the Committee and directed the concerned educational institutions to revise their fee structure with immediate effect. It is further pointed out in the affidavit that this Court in W.A. No.89 of 2015 (***Buxi Jagabandhu English Medium School Parents Association v. State of Odisha***) by an order dated 8th September, 2016 directed that the fees structure of the concerned schools as per the recommendation of Justice K.P. Mohapatra Committee be effective from the beginning of the financial year 2014-15.

14. As regards the report submitted by the Principal Secretary to Government, S & ME Department pursuant to the direction of this Court in the present batch of writ petitions, the stand of the State Government is that the Court may accept the Memorandum of Understanding (MoU) signed by all the stakeholders, as recorded by the report and pass appropriate directions.

15. In its affidavit dated 1st December, 2020 the S & ME Department stated as under:

“....it is humbly submitted that besides the decision taken by the different stakeholders in the meeting held under the Chairmanship of Principal Secretary as set out in the MOU dated 10.09.2020, there is no policy decision of the Government as regards waiver or reduction of school fees during Lock Down period caused due to COVID-19 pandemic. However, the contents of the MOU is in the knowledge of Government and if the same is given effect to, it will also assuage the difficulties being faced by the parents whose income has been adversely affected during this pandemic.”

16. Mr. Ashok Kumar Parija, learned Advocate General appearing for the State of Odisha, while placing the contents of the aforementioned report, which incorporates MOU, has made a categorical statement that notwithstanding the statements made in para 4 of the affidavit dated 1st December, 2020 of the S & ME Department that there is no provision under the OE Act or the Rules framed thereunder to regulate the fees structure of those private unaided schools affiliated either to the Board of Secondary Education, Odisha or the CBSE and the ICSE, the Government of Odisha would strictly enforce the terms and conditions set out in the

Resolution dated 23rd September, 1996 concerning grant of NOCs to such private unaided schools.

The Resolution dated 23rd September, 1996

17. At this stage, reference be made to the relevant portion of the said resolution. The said resolution was issued by the S & ME Department, Government of Odisha drawing attention to Section 6 (5) of the OE Act and the fact that it had become imperative to prescribe certain guidelines before according NOC/Recognition to the institutions and to withdraw such recognition in the event of violation of any of the instructions issued in the Resolution. The Resolution deals with several matters including ‘Accommodation’, ‘Recruitment and Service Condition of the staff’ ‘Medium of instruction’ and so on. Para 4 of the Resolution deals with fees, and reads as under:

“4.(1) Fees- Fees and charges should be common with the facilities provided by the institution. Fees should normally be charged under the heads prescribed by the Department of School and Mass Education. No capitation fees or voluntary donations for gaining admission in the school or for any other purpose should be charged/collected in the name of the school. In case of such malpractices, the Government may take drastic action leading to withdrawal of No Objection Certificate of the school.

(ii) In case a student leaves the school for such compulsion as transfer of parents or for health reason or in case of death of the student before completion of the session, pro rata return of quarterly/term/annual fees should be made.

(iii) The schools should consult parents through parents, representatives before revising the fees. The fee should not be revised during the mid-session.”

18. Further paras 9 and 10 of the resolution read as under:

“9. The N.O.C. issue in favour of any school shall always be subject to the terms and conditions prescribed in this Resolution.

10. All Schools who have been issued N.O.C. shall fulfill the terms and conditions provided herein before and satisfy the requirements prescribed in this Resolution within a period of she months from the date of issue of this Resolution failing which proceedings for withdrawal of N.O.C./Recognition shall be notified by the Government.”

19. That the Government of Odisha is prepared to implement the
aforementioned resolution is clear from the categorical stand of the
learned Advocate General, as taken on record by this Court, that
notwithstanding what may have been stated in the affidavit filed in
these matters, appropriate action would be taken against the schools
who do not fulfill the terms and conditions set out in the
aforementioned Resolution. This stand is consistent with Section 6
(5) of the OE Act read with Sections 6-A and 6-B thereof. In this
context, a reference may also be made to Section 5 of the OE Act
which sets out the requirement for establishment of an educational
institution.

Imp.

20. This should allay the apprehension expressed by Mr. Goutam Mukherjee, learned Senior Advocate appearing for Sai International School Parents Forum that the State Government may not strictly enforce the above Resolution against the defaulting private unaided institutions.

21. The Court now turns to the submission of the learned counsel appearing for some of the intervenors like the Association of Orissa ICSE and the DAV School Association and the Odisha Abhibhaka Mahasangha, who have expressed reservations as regards some of the terms of the MoU. There are also certain apprehensions expressed on behalf of minority institutions.

Scope of judicial review

22. In the context of the above submissions, it might be useful to recapitulate the legal position on the scope of the powers of judicial review in of this Court in matters of the present nature, with particular reference to the issue of fixation of fees chargeable by private unaided educational institutions.

23. In ***T.M.A. Pai Foundation v. State of Karnataka (2002) 8 SCC 481***, the Constitution Bench of the Supreme Court explained that with regard to core components of the rights under Articles 19 and 26 (a) of the Constitution of India, while the State has the right to prescribe qualifications necessary for admission, private unaided colleges have the right to admit students of their choice, subject to an objective and rational procedure of selection and the compliance with conditions, if any, requiring admission of a small percentage of students belonging to weaker sections of the society by granting them freeships or scholarships, if not granted by the Government. It was further observed that in setting up a reasonable fee structure, the element of profiteering is not as yet accepted in Indian conditions. The fee structure must take into consideration the need to generate funds to be utilized for the betterment and growth of the educational institution, the betterment of education in that institution and to

provide facilities necessary for the benefit of the students. In the same decision it was noted that the fixing of a rigid fee structure, dictating the formation and composition of a government body, compulsory nomination of teachers and staff for appointment or nominating students for admissions would be unacceptable restrictions.

24. Specific to the issue of fixation of fees, the Supreme Court in *T.M.A. Pai Foundation* (*supra*) observed as under:

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

25. The Supreme Court however pointed out that Government could make regulations to ensure excellence in education while forbidding the charging of capitation fee and profiteering by the institution. It was observed in this context that in the establishment of an educational institution, the object should not be to make a profit, inasmuch as education is essentially charitable in nature. There can, however, be a reasonable revenue surplus, which may be generated by the educational institution for the purpose of development of education and expansion of the institution.

26. In *Islamic Academy of Education v. State of Karnataka (2003) 6 SCC 697* directions were issued to the respective State Government/Public Authorities to set up a Committee headed by a retired High Court Judge nominated by the Chief Justice of the concerned State. This was in the nature of a follow up on the directions issued in *T.M.A. Pai Foundation (supra)* to ensure that the institutions are not profiteering or charging capitation fee. In the considered view of the Court the spirit of Resolution dated 23rd September, 1996 issued by the S & ME Department is consistent with these decisions of the Supreme Court.

27. In *Modern School v. Union of India (2004) 5 SCC 583*, the above observations of the Supreme Court in *T.M.A. Pai Foundation (supra)* were reiterated. Likewise, in *PA Inamdar v. State of Maharashtra (2005) 6 SCC 537* on the aspect of fee regulation, the Supreme Court concluded thus:

“140. To set up a reasonable fee structure is also a component of "the right to establish and administer an institution" within the meaning of Article 30(1) of the Constitution, as per the law declared in *Pai Foundation*. Every institution is free to devise its own fee structure subject to the limitation that there can be no profiteering and no capitation fee can be charged directly or indirectly, or in any form (Paras 56 to 58 and 161 [Answer to Q.5(c)] of *Pai Foundation* are relevant in this regard)”.

28. Given the limited scope of interference in the matters of this nature, consistent with the legal position explained in the above decisions, this Court is not persuaded to further issue directions in the matter in light of the MOU arrived at between 14 educational institutions in Odisha on the question of fee waiver during the period of the Covid-19 pandemic. The problems faced by any of the parties in relation to any of the terms of the MOU will have to be agitated in other separate proceedings and examined on a case by case basis. No omnibus directions in that regard can possibly be issued at this stage.

Decisions of the High Courts

29. Counsel for the parties have referred to certain decisions of other High Courts which dealt with the issues faced by the students, parents, teachers and the educational institutions themselves arising out of the COVID-19 pandemic. These included the decision dated 20th April, 2020 of the learned Single Judge of Delhi High Court in *W.P.(C) No.2977/2020 & C.M. No.10327-28/2020 (Rajat Vats v. Govt. of NCT of Delhi)*; the judgment dated 13th October, 2020 of the High Court of Calcutta in WPA 5890 of 2020 (*Vineet Ruia v. Principal Secretary, Department of School Education,*

Government of West Bengal), the decision dated 30th June, 2020 of the learned Single Judge of the High Court of Punjab and Haryana in CWP 7409 of 2020 (*Independent Schools Association Chandigarh (Regd.) v. State of Punjab*), and the decision dated 12th May, 2020 of the Division Bench of Uttarakhand High Court in WP (PIL) No.59 of 2020 (*Japinder Singh v. Union of India*).

30. The Court does not propose to discuss these decisions at length because of the peculiar situation obtaining in each of the aforementioned States, which may not be comparable with the situation present here. For instance, there is no indication in any of the above decisions that there was any MOU arrived at between the private institutions, with the mediation of the State, agreeing to waiver of fees in a graded manner. Nevertheless, it must be clarified that while this Court has recorded the fact of the MOU having been entered into, this will not preclude individual institutions or parties, who may be aggrieved or who may have a different point of view than that recorded in the MOU, or seek strict enforcement of the terms and conditions of recognition or grant of NOC as set out in the Resolution dated 23rd September 1996, from seeking appropriate reliefs in separate proceedings as are permissible to them in accordance with law.

Conclusions

31. In the result the writ petitions and all pending applications are disposed of in the above terms. The interim orders are vacated. However, there shall be no order as to costs.

32. As the restrictions due to the COVID-19 situation are continuing, learned counsel for the parties may utilize a soft copy of this order/judgment available in the High Court's website or print out thereof at par with certified copy in the manner prescribed, vide Court's Notice No.4587 dated 25th March, 2020.

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S. Muralidhar
Chief Justice

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B.R. Sarangi
Judge

7th January, 2021
//S.K. Jena, P.A.//