2017 SCC OnLine Del 6966 : (2017) 238 DLT 163 : AIR 2018 (NOC 711) 248 : (2017) 162 DRJ 19

In the High Court of Delhi at New Delhi

(BEFORE MANMOHAN, J.)

W.P. (C) 287/2017

Forum for Promotion of Quality Education for All and Ors. ..... Petitioners

Mr. Sunil Gupta, Senior Advocate with Mr. Vedanta Varma, Mr. Vibhor Kush and Mr. Sanat Tokas, Advocates.

Versus

DDA and Ors. ..... Respondents

Mr. Sanjay Jain, ASG and Mr. S. Gurukrishna Kumar, Senior Advocate with Mr. Rahul Mehra, Sr. SC (Civil), Mr. Gautam Narayan, ASC (Civil) and Mr. Santosh Kumar Tripathi, ASC (Civil), Mr. R.A. Iyer, Ms. Rhea Verma, Ms. Adrija Thakur, Ms. R. Sneha, Mr. Tushar Sannu, Mr. Rizwan Nizami, Mr. Shatrajit Banerji, Ms. Shruthi P., Mr. Mohan Raj and Mr. Kartik Rai, Advocates for GNCTD/DoE.

Mr. Dhanesh Relan, Standing Counsel with Ms. Akshita Manocha and Ms. Isha Garg, Advocates for DDA.

Mr. Amit Mahajan, CGSC with Mr. Sumit Misra, Advocate for UOI.

With

W.P. (C) 272/2017

Action Committee Unaided Recognized Private Schools ..... Petitioner

Mr. Amit Sibal, Senior Advocate with Mr. Kamal Gupta and Ms. Tripti Gupta, Advocates

Versus

Delhi Development Authority & Ors. ..... Respondents

Mr. Sanjay Jain, ASG and Mr. S. Gurukrishna Kumar, Senior Advocate with Mr. Rahul Mehra, Sr. SC (Civil), Mr. Gautam Narayan, ASC (Civil) and Mr. Santosh Kumar Tripathi, ASC (Civil), Mr. R.A. Iyer, Ms. Rhea Verma, Ms. Adrija Thakur, Ms. R. Sneha, Mr. Tushar Sannu, Mr. Rizwan Nizami, Mr. Shatrajit Banerji, Ms. Shruthi P., Mr. Mohan Raj and Mr. Kartik Rai, Advocates for GNCTD/DoE.

Mr. Khagesh B. Jha, Advocate for R-4/Justice for All.

Mr. Amit Mahajan, CGSC with Mr. Sumit Misra, Advocate for UOI.

Mr. Dhanesh Relan, Standing Counsel with Ms. Akshita Manocha and Ms. Isha Garg, Advocates for DDA.

With

W.P. (C) 275/2017

Vikram Dev Raj and Ors. ..... Petitioners

Mr. Sandeep Sethi, Senior Advocate with Ms. Manmeet Arora and Ms. Chand Chopra, Mr. Sarad K. Sunny and Ms. Sanam Tripathi, Advocates

Versus

Lt. Governor of Delhi & Anr. ..... Respondents

Mr. Sanjay Jain, ASG and Mr. S. Gurukrishna Kumar, Senior Advocate with Mr. Rahul Mehra, Sr. SC (Civil), Mr. Gautam Narayan, ASC (Civil) and Mr. Santosh Kumar Tripathi, ASC (Civil), Mr. R.A. Iyer, Ms. Rhea Verma, Ms. Adrija Thakur, Ms. R. Sneha, Mr. Tushar Sannu, Mr. Rizwan Nizami, Mr. Shatrajit Banerji, Ms. Shruthi P., Mr. Mohan Raj and Mr. Kartik Rai, Advocates for GNCTD/DoE.

Mr. Dhanesh Relan, Standing Counsel with Ms. Akshita Manocha and Ms. Isha Garg, Advocates for DDA.

Mr. Amit Mahajan, CGSC with Mr. Sumit Misra, Advocate for UOI.

And

W.P. (C) 305/2017

Shaurya Raj Pattnaik ..... Petitioner

Mr. Akhil Sachar, Advocate with Mr. Samarjit G. Pattnaik and Mr. Rahul Tyagi, Advocates

Versus

Government of NCT of Delhi & Ors. ..... Respondents

Mr. Sanjay Jain, ASG and Mr. S. Gurukrishna Kumar, Senior Advocate with Mr. Rahul Mehra, Sr. SC (Civil), Mr. Gautam Narayan, ASC (Civil) and Mr. Santosh Kumar Tripathi, ASC (Civil), Mr. R.A. Iyer, Ms. Rhea Verma, Ms. Adrija Thakur, Ms. R. Sneha, Mr. Tushar Sannu, Mr. Rizwan Nizami, Mr. Shatrajit Banerji, Ms. Shruthi P., Mr. Mohan Raj and Mr. Kartik Rai, Advocates for GNCTD/DoE.

Mr. Dhanesh Relan, Standing Counsel with Ms. Akshita Manocha and Ms. Isha Garg, Advocates for DDA.

Mr. Amit Mahajan, CGSC with Mr. Sumit Misra, Advocate for UOI.

W.P. (C) 287/2017; W.P. (C) 272/2017; W.P. (C) 275/2017; and W.P. (C) 305/2017

Decided on February 14, 2017, [Reserved on : 9th February, 2017]

Constitution of India — Arts. 13, 14, 19(1)(g), 21 and 226 — Circular/Notification issued by Directorate of Education & GNCTD restricting admissions to residents of 'locality or neighbourhood' valid — Delhi School Education Act, 1973 — S. 17(3) — Delhi Development Authority (Disposal of Developed Nazul Land) Rules, 1981 — Held, although State has power to regulate private educational institutions and no institution can claim

absolute and/or unqualified fundamental right under Art. 19(1)(g) especially if it is indulging in maladministration — However, impugned Notification completely takes away from private unaided schools right to admit students and right to lay down a fair, reasonable, transparent and non-exploitative procedure/criteria for admissions leaving them with no say in their admissions whatsoever — Such term or Notification which imposes a restriction that is absolute and prohibitory does not seem prima facie to be a 'reasonable restriction' on fundamental right of petitioners under Art. 19 (1)(g) hence Notification is stayed — Further held, power to define concept/criteria of 'neighbourhood or locality' lay with Delhi Development Authority or land owning agencies on date it allotted land, said concepts cannot be defined unilaterally three to four decades later

(Paras 1, 74, 75, 78, 79, 82, 92, 97, 99 and 107)

The Judgment of the Court was delivered by

MANMOHAN, J.

CM APPL. 1380/2017 in W.P.(C) 287/2017
CM APPL. 1354/2017 in W.P.(C) 272/2017
CM APPL. 1361/2017 in W.P.(C) 275/2017
CM APPL. 1417/2017 in W.P.(C) 305/2017

1. The present applications have been filed by schools, parents and children in the aforesaid batch of writ petitions seeking stay of Clause 14 of Circular dated 19th December, 2016 bearing No. DE15 (172)/PSB/2016/77 issued by respondent-Directorate of Education as well as Notification dated 07th January, 2017 bearing No. F/DE/15/1031/ACT/2016/12668 issued by respondent-GNCTD. Petitioners-schools have also sought stay of the term of allotment in the allotment letters issued to petitioners-schools restricting the admissions to residents of the locality or to the neighbourhood on the grounds that it violated their rights under and protected by Articles 19 (1)(g), 14 and 21 of the Constitution of India and also being ultra vires of Section 17(3) of the Delhi School Education Act, 1973 (hereinafter referred to as "DSE Act") as well as the provision of Delhi Development Authority (Disposal of Developed Nazul Land) Rules, 1981 (for short "Nazul Land Rules"). The relevant portion of the impugned Notification dated 07th January, 2017 is reproduced hereinbelow:—

"2. .....

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

entry level classes on neighbourhood criteria in the following manner.

(a) Criteria for Neighbourhood

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

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

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

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

(b) Process of Admission within Neighbourhood

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

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

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

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

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

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

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

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

(emphasis supplied)

2. Notices were issued in the present batch of writ petitions on 13th January, 2017. However, as the impugned Notification dated 07th January, 2017 had been issued after the admission process had commenced, the stay applications, with consent of parties, were alone taken up for hearing immediately. Since the learned counsel for parties insisted that they would like to argue at considerable length even at the interim stage, the hearing commenced prior to pleadings being completed. In fact, the Union of India filed its counter affidavit when Mr. Sanjay Jain, learned ASG had concluded major part of his arguments for Directorate of Education. As there was race against time, the hearing was a bit truncated; but with the good assistance and full cooperation of the learned counsel, the hearing on the interim applications was concluded in a short time.

MR. SUNIL GUPTA'S ARGUMENTS ON BEHALF OF PETITIONER-FORUM FOR PROMOTION OF QUALITY EDUCATION FOR ALL IN W.P.(C) 287/2017

3. Mr. Sunil Gupta, learned senior counsel for the petitioner-Forum For Promotion Of Quality Education For All in W.P.(C) 287/2017 submitted that the child has a fundamental right to 'free' education under Article 21A of the Constitution and the word 'free' signifies 'without any restraint or barriers'. According to him, the State has a duty to facilitate, not to obstruct, admission of any child in a school of his/her choice when there is no burden put by him/her on the State exchequer.

4. He further submitted that the impugned Delhi Development Authority condition, Directorate of Education orders as well as the impugned Notification are violative of Articles 14 and 19(1)(g) of the Constitution as they are discriminatory and arbitrary inasmuch as neighbourhood condition treated as good only for two hundred ninety eight schools. He stated that under the Fundamental Rights, Directive Principles and the Governing Laws, namely, the DSE Act, the Delhi School Education Rules, 1973 (for short "DSE Rules") and the Right of Children to Free and Compulsory Education Act, 2009 (for short "RTE Act"), from the parents'/child's point of view, all private unaided schools constitute one class, whether they have the neighbourhood condition in the allotment letter from Delhi Development Authority or not. He contended that if the impugned restriction is applied to operate, a neighbourhood child can apply to all the schools, whether they are with or without Delhi Development Authority condition with full

hope of admission; but a child outside the neighbourhood can do so only theoretically with virtually nil hope.

5. Mr. Gupta submitted that a restriction should not only be pure in its means but also in its ends. According to him, the Delhi Development Authority condition is only a means and cannot be enforced for its own sake. In support of his submission, he relied upon a judgment of the Supreme Court in *Cellular Operators Association of India* v. *Telecom Regulatory Authority of India*, (2016) 7 SCC 703 wherein it has been held as under:—

> *"56. We were then told that the impugned Regulation was framed keeping in mind the small consumer, that is, a person who has a pre-paid SIM card with an average balance of Rs. 10 at a time, and that the Regulation goes a long way to compensate such person. The motive for the Regulation may well be what the Attorney General says it is, but that does not make it immune from Article 14 and the twin tests of Article 19(6). The Authority framing the regulation must ensure that its means are as pure as its ends — only then will regulations made by it pass constitutional muster."*

6. He stated that if the 'end' or 'object' of the Delhi Development Authority condition viz. confining admissions in a school to the neighbourhood itself is bad, then the condition itself is also bad.

7. He submitted that the impugned restrictions constituted breach of Article 19(6) of the Constitution as the Delhi Development Authority's neighbourhood condition had been included in the allotment letter without 'intelligent care and deliberation'. He contended that good schools are not available uniformly and congestion in old localities has left no land for new private unaided schools.

8. He submitted that there can be no estoppel against Constitution or waiver of fundamental rights and Delhi Development Authority condition is contrary to 'public policy' and void under Section 23 of the Indian Contract Act, 1872.

9. Mr. Sunil Gupta submitted that under Section 12(1)(c), the 'extent' of 'responsibility' of a private unaided school to make admission from its neighbourhood has been limited to twenty-five per cent and that too, only for the Weaker Section/Disadvantaged Group. He contended that seventy-five per cent of the admissions is free from any such restriction as a matter of the latest Parliamentary scheme and policy which overrides and wipes out all inconsistent and incompatible pre-existing contractual or statutory arrangements under Delhi Development Authority Act/Allotment letter, DSE Act and Rules etc., since the number of seats for children living in the neighbourhood and the number of seats for children living inside or outside the neighbourhood is covered by RTE Act enacted by the Parliament.

According to him, the RTE Act contains the latest balancing act of the Parliament between the rights of a private unaided school and the rights of the children living anywhere in the city. He stated that Section 12(2) second proviso of RTE Act confirms that the Parliament was fully aware while enacting the law that there are schools with certain obligations 'on account of having received land at a concessional rate'; but still the Parliament chose to save and continue the obligation of private unaided schools, if any, only in respect of reimbursement of expenditure and did not extend that saving or continuance to any other obligation such as admission of children from the neighbourhood.

10. He pointed out that the RTE Act has been supplemented by orders under Section 35 dated 23rd November 2010 and 25th July, 2011 whereby both the State and Central Governments have directed to admit students as per policy/criteria/objectives of the school on a rational, reasonable and just basis.

11. He stated that the impugned orders constituted a breach of the law declared by the judgment of this Court in *Forum for Promotion of Quality Education for All* v. *Lt. Governor of Delhi*, (2015) 216 DLT 80. He stated that in the wake of the letter and spirit of the said judgment, the Delhi Development Authority neighbourhood condition stood nullified.

MR. AMIT SIBAL'S ARGUMENTS ON BEHALF OF THE PETITIONER-ACTION COMMITTEE UNAIDED RECOGNIZED PRIVATE SCHOOLS IN W.P.(C) 272/2017

12. Mr. Amit Sibal, learned senior counsel for the petitioner-Action Committee Unaided Recognized Private Schools in W.P.(C) 272/2017 submitted that no contract can be in violation of a Statute, much less fundamental rights. He stated that the impugned term of allotment, restricting admissions to neighbourhood only, is contrary to DSE Act and Rules in particular its Section 16(3) and Rule 145 and thus, cannot be sustained. According to him, the scheme of regulation of admissions to private unaided schools is entirely and completely occupied and there is no room or scope for any filling of gaps or issuance of instructions.

13. He submitted that the parents and children have a fundamental right under Article 19(1)(a) of the Constitution to seek admission in a school of their own choice and the impugned restriction on the face of it falls foul of Article 19(2), inasmuch as the same is admittedly not a restriction placed in the interests of any of the purposes stated in Article 19(2).

14. He also submitted that the impugned term of allotment and consequent orders are without jurisdiction of the Delhi Development Authority and the Directorate of Education. He pointed out that the impugned term of allotment was inserted by the Delhi Development

Authority in the allotment letters, merely on the insistence and at the behest of the Directorate of Education. He contended that in terms of Section 16(3) and Rule 145 of the DSE Act and Rules respectively, the right to regulate admission in a private unaided school is vested in the Head of the school. The Directorate of Education is vested with the power to regulate admissions only in aided schools, as per Rules 131 and 132 of DSE Rules. Thus, he submitted that the Directorate of Education (or even the Lt. Governor) could not have sought to ascribe to or confer upon itself such power, authority or jurisdiction, as is specifically prohibited and excluded from its domain by the DSE Act and Rules.

15. Mr. Amit Sibal submitted that the impugned order seeks to amend the Nursery Admissions Order issued by the Lt. Governor on 24th November, 2007, without the recommendation of the Delhi School Education Advisory Board, constituted under Section 22, which recommendation has been held to be statutory and mandatory by this Court in its detailed final judgment in *Forum for Promotion of Quality Education for All* (supra).

16. He submitted that the impugned Notification dated 7th January, 2017 is barred by res judicata as it is identical in effect and consequence to the earlier Order dated 18th December, 2013 issued by the then Lt. Governor, which Order came to be quashed by this Court by way of its detailed judgment in *Forum for Promotion of Quality Education for All* (supra).

MR. SANDEEP SETHI'S ARGUMENTS ON BEHALF OF PETITIONERS IN W.P.(C) 275/2017

17. Mr. Sandeep Sethi, learned senior counsel for petitioners in W.P. (C) 275/2017 submitted that the impugned Orders directly impinge upon the rights of the petitioner-parents/children to choose a befitting school in exercise of their Fundamental Right under Article 19(1)(a) as well as Article 21A of the Constitution. He submitted that the petitioners have a legitimate expectation of securing admission for their child on account of being eligible as per the cumulative criteria applied for in the previous academic years. According to him, the respondents cannot be permitted to defeat the fundamental rights of the petitioners in such an arbitrary and discriminatory manner. To drive home his point, Mr. Sethi referred to the case of petitioners No. 3 and 4 who are seeking admission of their son to Vasant Valley School as their daughter already studies in the same school. He submitted that as per the Vasant Valley School criteria the said petitioners would be entitled to the following points : (1) neighbourhood : 0-8 kms - 25 points; (2) sibling - 20 points; (3) Proven Track Record - 4 points (petitioner no. 4 played hockey nationals for the State of Rajasthan in 1999 and 2000), total assured points : 49 points. He submitted, in addition to the above,

petitioner no. 4 is a member of the staff in the same school. However, after the implementation of the impugned Notification, the said petitioners would be completely pushed outside the zone of consideration because they do not live within one kilometer. Consequently, according to him any Notification/Order/contractual term which seeks to violate the petitioners fundamental rights is, to the extent of such violation, void, unconstitutional and unenforceable in light of Article 13(2) of the Constitution.

18. He further submitted that a contract between a land allotting agency and the school (allottee) cannot defeat the fundamental rights of the petitioners and the only restrictions permissible under Article 19 (1)(a) are exhaustively laid down in Article 19(2).

19. He contended that the impugned Notification was nothing but an abuse of process as it violated the law declared qua "neighbourhood" by this Court in a similar fact situation applicable to nursery school admissions.

20. According to him, the impugned Notification in practice will operate to grant admission only to the children residing within 0-1 km radius of the school.

21. Mr. Sandeep Sethi objected to the manner in which the impugned Notification had been issued at the nth hour when most of the petitioners had already made plans for the year. He stated that erratic decisions without proper planning such as the impugned Notification had resulted in utter chaos and confusion for the parents leaving them vulnerable and merciless at the whims and fancies of the respondents. He pointed out that the admissions for academic year 2017-2018 were already in progress when the impugned Notification had been issued and the petitioners are gravely affected as they face the threat of being disentitled and made ineligible for admissions to the school of their choice solely on the ground of neighbourhood.

MR. SANJAY JAIN'S ARGUMENTS ON BEHALF OF RESPONDENT-GNCTD

22. On the other hand, Mr. Sanjay Jain, learned ASG appearing for Government of NCT of Delhi (for short "GNCTD") submitted that the impugned statutory Notification and order had been issued in public interest and it did not in any manner, infringe the rights of either the educational institutions and/or parents or their children seeking admission in entry level classes.

23. He stated that the GNCTD is today divided into twenty-nine zones for the purposes of regulation of education and under Rule 44 of the DSE Rules, a Society/Trust proposing to set up a school has to intimate the Lt. Governor of its intent to set up such school, giving particulars inter alia of the location of the proposed school. According to him, the Lt. Governor may either grant or refuse permission to the

society to establish such proposed school depending on whether there are sufficient schools to meet the needs of the zone. He stated that permission to establish the new school under Rule 44 is conditionally granted to a school by the Lt. Governor/Directorate of Education, subject to it obtaining allotment of land from the Delhi Development Authority. He submitted that Rule 50 of the Nazul Land Rules permits allotment of land to schools on payment of institutional rates, which is lesser than the prevailing market rates. He pointed out that Rule 20 of the Nazul Land Rules prohibits allotment to schools unless a department of the GNCTD sponsors such application. He stated that in fact in all cases, the Directorate of Education requested the Delhi Development Authority to grant allotment subject to an express condition that the school shall not refuse admission to the residents of the locality and Delhi Development Authority offered such a conditional allotment subject to usual terms and condition including that the Society shall not refuse admission to the residents of the locality. He stated that in the lease deed executed between Delhi Development Authority and Societies, there is a recital that it is on the faith of the statements and representations made by the lessee that the lease deed is being executed. Consequently, according to him, a school set up after expressly holding out to the respondents that it will comply with the conditions of the conditional allotment and having taken advantage of receiving vast tracts of land in prime locations in the GNCTD, cannot now contend after three decades that it is unwilling to comply with the conditions, a fortiori when it still continues to occupy and function out of the land so conditionally allotted. He submitted that no ground exists under Sections 12 to 23 of the Indian Contract Act, 1872, as would affect the contract.

24. Learned ASG submitted that the Supreme Court in *Modern School* v. *Union of India*, (2004) 5 SCC 583 and a Division Bench of this Court in *Justice for All* v. *Govt. of NCT of Delhi*, 2016 SCC OnLine Del 4114 has held that the terms of the lease deed and letter of allotment have to be complied with. The relevant portion of the said judgments is reproduced hereinbelow:—

A) *Modern School* (supra):—

> *"27. In addition to the directions given by the Director of Education vide Order No. DE.15/Act/Duggal. Com/203/99/23989-24938 dated 15-12-1999, we give further directions as mentioned hereinbelow:*
>
> *a) Every recognised unaided school covered by the Act shall maintain the accounts on the principles of accounting applicable to non-business organisation/not-for-profit organisation.*
>
> *In this connection, we inter alia direct every such school*

to prepare their financial statement consisting of balance sheet, profit-and-loss account, and receipt-and-payment account.

(b) Every school is required to file a statement of fees every year before the ensuing academic session under Section 17 (3) of the said Act with the Director. Such statement will indicate estimated income of the school derived from fees, estimated current operational expenses towards salaries and allowances payable to employees in terms of Rule 177(1). Such estimate will also indicate provision for donation, gratuity, reserve fund and other items under Rule 177(2) and savings thereafter, if any, in terms of the proviso to Rule 177(1).

(c) It shall be the duty of the Director of Education to ascertain whether terms of allotment of land by the Government to the schools have been complied with. We are shown a sample letter of allotment issued by the Delhi Development Authority issued to some of the schools which are recognised unaided schools. We reproduce herein clauses 16 and 17 of the sample letter of allotment:

> *"16. The school shall not increase the rates of tuition fee without the prior sanction of the Directorate of Education, Delhi Administration and shall follow the provisions of the Delhi School Education Act/Rules, 1973 and other instructions issued from time to time.*
>
> *17. The Delhi Public School Society shall ensure that percentage of freeship from the tuition fee, as laid down under the rules by the Delhi Administration, is from time to time strictly complied with. They will ensure admission to the student belonging to weaker sections to the extent of 25% and grant freeship to them.*

28. We are directing the Director of Education to look into letters of allotment issued by the Government and ascertain whether they have been complied with by the schools. This exercise shall be complied with within a period of three months from the date of communication of this judgment to the Director of Education. If in a given case, the Director finds non-compliance with the above terms, the Director shall take appropriate steps in this regard.

(emphasis supplied)

B) *Justice for All* (supra):—

"17. Thus it is clear that the schools cannot indulge in profiteering and commercialization of school education. Quantum of fees to be

charged by unaided schools is subject to regulation by DoE in terms of the power conferred under Section 17(3) of DSE Act, 1973 and he is competent to interfere if hike in fee by a particular school is found to be excessive and perceived as indulging in profiteering. So far as the unaided schools which are allotted land by DDA are concerned, in the light of the decision of the Supreme Court in Modern School *v.* Union of India *(supra), we are clear in our mind that they are bound to comply with the stipulation in the letter of allotment. Para 28 of the majority judgment in* Modern School *v.* Union of India *(supra) upholds the binding nature of the stipulation in the letter of allotment issued by the DDA that the school shall not increase the rate of tuition fees without the prior sanction of DoE."*

(emphasis supplied)

25. He also submitted that the concept of neighbourhood/locality as a reasonable restriction on such fundamental right is statutorily recognised under the DSE Act, the DSE Rules (Rules 44 and 50), the RTE Act (Section 6) and the Right of Children to Free and Compulsory Education Rules, 2010 (for short "RTE Rules") (Rule 6) and a Division Bench of this Court has, in the order dated 31st January, 2012 in W.P. (C) 636/2012, while interpreting the provisions of the RTE Act and RTE Rules, expressly laid down the criteria of 0-1 kms., 1-3 kms and 3-6 kms for admissions to Economically Weaker Sections and Disadvantaged Group.

26. According to him, the impugned Notification is not violative of Articles 14 and 19 of the Constitution as it is based on a reasonable classification, namely, a contractual obligation not to refuse admission to students from the locality. He submitted that this is a classification judicially noticed by the Supreme Court in *Modern School* (supra) and by this Court in *Justice for All* (supra), *Social Jurist, A Lawyers Group* v. *Govt. of NCT of Delhi*, 140 (2007) DLT 698 (DB) and *Moolchand Khairati Ram Trust* v. *Union of India*, (2014) 211 DLT 258 (DB). He submitted that such classification is further statutorily recognized in the second proviso to Section 12(2) of the RTE Act. He contended that the object sought to be achieved by the impugned statutory Notification is to enforce the terms and conditions of statutory allotment made to various societies.

27. He submitted that the need for regulation of the freedom of occupation of private educational institutions under Article 19(1)(g) was recognised and highlighted by the Supreme Court in *Modern Dental College and Research Centre* v. *State of M.P.*, (2016) 7 SCC 353 wherein it held that regulation of admission and fees ought to be imposed at the initial stage.

28. He submitted that the impugned statutory Notification and Order do not bar the schools from admitting any students. They only prohibit

schools from refusing admission to residents of the neighbourhood. Thus, no prejudice is occasioned to the schools, which are under an obligation in terms of the contract to not refuse admission to students residing in the neighbourhood.

29. He submitted that the impugned Notification is statutory in character as it has been issued in exercise of the powers of the Lt. Governor under Sections 3 and 16 of the DSE Act and Rule 43 of the DSE Rules. He pointed out that petitioners have not challenged the 2007 Admission Order, which the impugned statutory Notification only seeks to amend. He submitted that the power and obligation of the Lt. Governor and Directorate of Education to issue the impugned statutory Notification and Order is recognised by the Supreme Court in *Modern School* (supra) and reaffirmed by a Division Bench of this Court in *Justice for All* (supra).

30. Mr. Sanjay Jain contended that no parent/student has a right to gain admission to a particular school; they merely have a right to file an application under the extant rules. According to him, this right is not abridged by the impugned statutory Notification and to the contrary Clauses 14(vii)(a)(iv) and 14(vii)(b)(vii) expressly protect the rights of such parent/children. He submitted that assuming arguendo such a right is abridged, the restriction is reasonable. He stated that there are about seventeen hundred private unaided recognised schools in GNCTD, of which about two hundred ninety eight have and did accept such conditional allotment of land. Thus, the impugned statutory Notification affects less than twenty per cent of the private unaided schools in the GNCTD, leaving over eighty per cent of the schools that a parent/student can apply to without being affected by the impugned statutory Notification.

31. He emphasized that the GNCTD has been and is taking extensive efforts to improve the quality of Government run schools and there is a marked improvement as a result thereof. In any event, according to him, the quality of Government-run schools cannot be a ground for preventing the answering respondents from exercising its power and performing its duty of regulation of admission to schools in the GNCTD.

MR. S. GURUKRISHNA KUMAR'S ARGUMENTS ON BEHALF OF RESPONDENT-GNCTD

32. Mr. S. Gurukrishna Kumar, learned senior counsel who also appeared for GNCTD submitted that private unaided schools cannot claim absolute and/or unqualified fundamental right under Article 19(1)(g) of the Constitution. He submitted that private educational institutions supplement the State functions in the field of education and are constitutionally bound to supplement the State endeavour to provide neighbourhood schools. In support of his submission, he relied upon the judgment of the Supreme Court in *Society for Unaided Private*

Schools of Rajasthan v. *Union of India*, (2012) 6 SCC 1 wherein it has been held as under:

> *"37. Thus, from the scheme of Article 21-A and the 2009 Act, it is clear that the primary obligation is of the State to provide for free and compulsory education to children between the age 6 to 14 years and, particularly, to children who are likely to be prevented from pursuing and completing the elementary education due to inability to afford fees or charges. Correspondingly, every citizen has a right to establish and administer educational institution under Article 19 (1)(g) so long as the activity remains charitable. Such an activity undertaken by the private institutions supplements the primary obligation of the State. Thus, the State can regulate by law the activities of the private institutions by imposing reasonable restrictions under Article 19(6)".*

33. He further submitted that the Supreme Court in *Modern Dental College and Research Centre* (supra) had reiterated that even though education is treated as an occupation and is a fundamental right under Article 19(1)(g), yet at the same time shackles have been put insofar as this particular occupation is concerned which is termed as 'noble'. He stated that even in *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481, the Supreme Court recognised the power of the State to regulate private educational institutions.

34. Mr. Gurukrishna Kumar also stated that the contention that the RTE Act covers the field with respect to restriction on private educational institutions to admit students, i.e., twenty-five per cent for Economically Weaker Section category is untenable. According to him, the RTE Act did not cover the entire field of regulation of private unaided schools' right to admit students to the extent of overriding power of the Regulator under DSE Act. He stated that there can be no prohibition in law for any further and/or additional regulatory measures by the local authority/government in this regard. He stated that there is no conflict between the stipulation under the RTE Act and DSE Act. In support of his submission, he relied upon the judgment of Supreme Court in *Ch. Tika Ramji* v. *The State of Uttar Pradesh*, 1956 SCR 393 wherein it has been held as under:—

> *"It is clear, therefore, that all the Acts and the notifications issued thereunder by the Centre in regard to sugar and sugarcane were enacted in exercise of the concurrent jurisdiction. The exercise of such concurrent jurisdiction would not deprive the Provincial Legislatures of similar powers which they had under the Provincial Legislative List and there would, therefore, be no question of legislative incompetence qua the Provincial Legislatures in regard to similar pieces of legislation enacted by the latter. The Provincial Legislatures as well as the Central Legislature would be competent to*

enact such pieces of legislation and no question of legislative competence would arise. It also follows as a necessary corollary that, even though sugar industry was a controlled industry, none of these Acts enacted by the Centre was in exercise of its jurisdiction under Entry 52 of List I. Industry in the wide sense of the term would be capable of comprising three different aspects : (1) raw materials which are an integral part of the industrial process, (2) the process of manufacture or production, and (3) the distribution of the products of the industry. The raw materials would be goods which would be comprised in Entry 27 of List II……..

xxx xxx xxx

In the instant case, there is no question of any inconsistency in the actual terms of the Acts enacted by Parliament and the impugned Act. The only questions that arise are whether Parliament and the State Legislature sought to exercise their powers over the same subject-matter or whether the laws enacted by Parliament were intended to be a complete exhaustive code or, in other words, expressly or impliedly evinced an intention to cover the whole field……

xxx xxx xxx

Parliament was well within its powers in legislating in regard to sugarcane and the Central Government was also well within its powers in issuing the Sugarcane Control Order, 1955 in the manner it did because all this was in exercise of the concurrent power of legislation under Entry 33 of List III. That, however, did not affect the legislative competence of the U.P. State Legislature to enact the law in regard to sugarcane and the only question which remained to be considered was whether there was any repugnancy between the provisions of the Central legislation and the U.P. State legislation in this behalf. As we have noted above, the U.P. State Government did not at all provide for the fixation of minimum prices for sugarcane nor did it provide for the regulation of movement of sugarcane as was done by the Central Government in clauses (3) and (4) of the Sugarcane Control Order, 1955. ……"

35. Mr. S. Gurukrishna Kumar stated that Ganguly Committee Report of 2006-07 and the counter affidavit of Directorate of Education in Supreme Court proceedings had to be understood in the context of the number of schools that were in place in 2007. He stated that Delhi has since seen exponential growth in population, extension of its geographical limits, growth in traffic volume, pollution and various other factors that are in favour of ensuring children travelling as little as possible to reach school, which is in consonance with Article 39(f) mandating States to secure that children are given opportunities and facilities to develop in a healthy manner.

36. He submitted that the impugned Notification had been issued in furtherance to Sections 6, 9 and 38 of the RTE Act and Rule 6 of Delhi RTE Rules.

MR. KHAGESH B. JHA'S ARGUMENTS ON BEHALF OF RESPONDENT NO. 4-JUSTICE FOR ALL

37. Mr. Khagesh B. Jha, learned counsel for the respondent No. 4 stated that both the learned ASG and Mr. S. Gurukrishna Kumar had argued contrary to the official notings in the file of the respondent-Directorate of Education. He stated that he would place on record the entire file received by him under the Right to Information Act, 2005 along with an affidavit.

38. He also stated that there was delay in issuing the impugned Notification as some of the officials of GNCTD wanted to ensure that the concept of neighbourhood is not applied to the Sanskriti School which is being run and managed for the benefit of wards of bureaucrats.

39. Mr. Jha submitted that the legality and validity of a similar letter of allotment had been upheld by the Supreme Court in *Union of India* v. *Jain Sabha, New Delhi*, (1997) 1 SCC 164 wherein it has been held as under:—

> *"7. It is clear from the letter that the Sabha accepted the rate specified in the allotment letter dated 18-7-1990, viz., rate of Rupees thirty-eight lakhs per acre for the additional extent of 0.787 acre and the rate of Rupees five thousand per acre for the initial extent of 1.363 acres — apart from the other conditions of allotment — and deposited a sum of Rupees ten lakhs towards the total consideration payable as per the said allotment letter. It also requested for further time to deposit the balance amount. Within two months, however, the Sabha resiled from this position seeking to take advantage of a decision of the Delhi High Court in* Lala Amar Nath *[(1990) 42 DLT 651]. On 26-10-1990, the Sabha addressed a letter referring to the judgment of the Delhi High Court in* Lala Amar Nath *[(1990) 42 DLT 651] and requesting that as per the said judgment, it should not be charged at a rate of more than Rupees eight lakhs for the additional extent of 0.787 acre, and that the amount already paid by it should be adjusted accordingly and the excess amount refunded to it. Pausing here, we may mention that the said judgment of the Delhi High Court deals with a different situation under the policy said to be in force at the time of allotment in that case. The terms of allotment and all the material facts are wholly different. We do not see any relevance of the said decision to the facts of this case. Be that as it may, when its request was not acceded to, the Sabha filed the writ petition from which this appeal arises.*

8. It is not brought to our notice that allotment of land to a school by the Government of India or by the L&DO is governed by any statute or statutory powers. The Sabha had no right to allotment. It is true that an allotment was made of 1.363 acres in the year 1967 and Sabha had remitted the consideration of Rs. 7185.75p in that year itself. But for one or the other reason, possession of the land could not be delivered and no steps were taken by the Sabha thereafter to enforce its claim. About twenty years later, i.e., on 14-10-1986, 2.15 acres was proposed to be allotted at a uniform rate of Rupees eight lakhs per acre. This offer was later revised in the appellants' letter dated 18-7-1990, as stated above. The Sabha accepted the same and deposited the sum of Rupees ten lakhs towards part consideration. It only changed its stance two months later when it came to know of the judgment of the Delhi High Court in Lala Amar Nath *[(1990) 42 DLT 651] and on that basis demanded that the rate to be charged for the additional land should be @ Rupees eight lakhs per acre only and not @ Rupees thirty-eight lakhs per acre. We have pointed out that the said judgment was in no way relevant to the facts of this case and, therefore, it is clear that the reversal of its stand by the Sabha was neither justified as a fact nor justified in law. Even assuming that the said judgment was relevant in some manner, the Sabha could only request for revision of price but could not claim such revision as a matter of right, in view of its acceptance of the terms of letter of allotment dated 18-7-1990. It is not — and it cannot be — the case of the Sabha that its acceptance aforesaid is vitiated by the later judgment of the High Court between third parties and that it is not bound by the said acceptance. If it takes that stand, the result would be that the very offer contained in the letter dated 18-7-1990 would lapse; there would be no allotment at all in favour of the Sabha. This is the factual position. Now, coming to the legal aspect, it appears highly doubtful whether the writ petition itself was maintainable but we do not wish to pursue this line of enquiry for the reason that no such objection seems to have been raised before or considered by the High Court. The judgment of the High Court does not refer to any such objection nor does it deal with it.*

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11. Before parting with this case, we think it appropriate to observe that it is high time the Government reviews the entire policy relating to allotment of land to schools and other charitable institutions. Where the public property is being given to such institutions practically free, stringent conditions have to be attached with respect to the user of the land and the manner in which schools or other institutions established thereon shall function. The

conditions imposed should be consistent with public interest and should always stipulate that in case of violation of any of those conditions, the land shall be resumed by the Government. Not only such conditions should be stipulated but constant monitoring should be done to ensure that those conditions are being observed in practice. While we cannot say anything about the particular school run by the respondent, it is common knowledge that some of the schools are being run on totally commercial lines. Huge amounts are being charged by way of donations and fees. The question is whether there is any justification for allotting land at throw-away prices to such institutions. The allotment of land belonging to the people at practically no price is meant for serving the public interest, i.e., spread of education or other charitable purposes; it is not meant to enable the allottees to make money or profiteer with the aid of public property. We are sure that the Government would take necessary measures in this behalf in the light of the observations contained herein."

40. He further submitted that the impugned Notification is in compliance with the direction issued by Supreme Court in *Modern School* (supra). He relied upon para 72 of the judgment to contend that the condition of allotment letter is in addition to the RTE Act and independently binding upon the institutions running on government land. He emphasised that in the para 72, Supreme Court held that the terms of allotment letter are binding and any stay of the impugned Notification would amount to stay on the Supreme Court direction. The para 72 of *Modern School* (supra) is reproduced hereinbelow:—

"72. So far as allotment of land by the Delhi Development Authority is concerned, suffice it to point out that the same has no bearing on the enforcement of the provisions of the Act and the Rules framed thereunder but indisputably the institutions are bound by the terms and conditions of allotment. In the event such terms and conditions of allotment have been violated by the allottees, the appropriate statutory authorities would be at liberty to take appropriate step as is permissible in law."

41. Mr. Khagesh Jha also emphasised that some of the schools had converted themselves into elite school for serving elite class of the city, which defeated the entire purpose of allotment of land. He stated that Elite schools like Vasant Valley, DPS Vasant Kunj had devised admission criteria in such a manner that neighbourhood is at the top of admission criteria but not a single non elite from neighbourhood gets admission.

42. He contended that the concept of the neighbourhood school is supported by aim and object of several Statutes namely, Delhi Development Act, 1957 and Nazul Land Rules as well as RTE Act.

43. Mr. Jha submitted that the concept of neighbourhood had been adopted by the Government from a Division Bench judgment in W.P.(C) 3156/2002 wherein the neighbourhood distance of 3 km and 6 km had been stipulated.

MR. AMIT MAHAJAN'S ARGUMENTS ON BEHALF OF UNION OF INDIA

44. Mr. Amit Mahajan, learned counsel for Union of India stated that as the present controversy pertains to a term in the allotment letter read with DSE Act and Rules, the Union of India would not like to state anything other than clarifying its position with regard to RTE Act.

45. He stated that the RTE Act does not restrict the choice of the child to seek admission in a school which may not be in the neighbourhood of the child's residence. According to him, there is no compulsion on the child to seek admission only in a school in his or her neighbourhood.

46. Mr. Mahajan clarified that the RTE Act mandates the appropriate Governments and local authorities to provide for children's access to elementary schools within the defined area or limits of neighbourhood. He submitted that that the RTE Act does not define the limits or area of neighbourhood as a centralised norm, but requires the appropriate Government to notify such limits or area in the RTE Rules. According to him, this is on account of the very diverse geographical, climatic terrain and the varied development requirements of the different States and the conscious decision that States would be better placed to define the 'neighbourhood', keeping the best interests of different children in mind. The portion of the short affidavit relied upon by Mr. Mahajan, is reproduced hereinbelow:—

> *"12. It is submitted that States/UTs need to arrive at a clear picture of current availability of schools within defined area or limits of neighbourhoods. In order to do this, State/UTs need to (i) define the neighbourhood norms keeping in view that all primary and upper primary schools and composite schools (with primary and upper primary sections), established by the State Government and local bodies would be neighbourhood schools for the purpose of Section 3 (1) and (ii) map the neighbourhoods or habitations and link them to specific schools. It is possible that a neighbourhood may be linked to more than one school. Similarly, a school may be linked to more than one neighbourhood. The mapping exercise will help identify gaps and areas where new schools need to be opened to ensure universal access."*

47. Mr. Mahajan stated that the Department of School Education & Literacy, Ministry of Human Resource Development, Government of India had issued Guidelines dated 23rd November, 2010 exercising powers under Section 35(1) of the RTE Act regarding procedure for admission in schools under Section 13(1) and Section 12(1)(c) of the

RTE Act. The relevant portion of the guidelines relied upon by Mr. Mahajan is reproduced hereinbelow:—

> *"(i) With regard to admission in Class I (or Pre-Primary class as case may be) under Section 12(1)(c) of the RTE Act, 2009 in unaided and 'Specified Category' Schools, Schools shall follow a system of random selection out of the applications received from children belonging to disadvantage groups and weaker sections for filing the pre-determined number of seats in that class, which would not be less than 25% of the strength of the class.*
>
> *(ii) For admission to the remaining 75% of the seats (or a lesser percentage depending upon the number of seats fixed by the school for admission under Section 12(1)(c), in respect of unaided schools and specified category schools, and for all the seats in the aided schools, each school should formulate a policy under which admissions are to take place. This policy should include criteria for categorization of applicants in terms of the objectives of the school on a rational, reasonable and just basis. There shall be no profiling of the child based on parental educational qualifications. The policy should be placed by the school in the public domain, given wide publicity and explicitly stated in the school prospectus. There shall be no testing and interviews for any child/parent falling within or outside the categories, and selection would be on a random basis Admissions should be made strictly on this basis.*

48. He stated that guidelines are issued to all States and Union Territories, who are required to adhere to the same.

REJOINDER ARGUMENTS ON BEHALF OF MR. AMIT SIBAL

49. In rejoinder, Mr. Amit Sibal, learned senior counsel stated that the allotments made to private unaided schools at institutional zonal variant rates were in no manner concessional and were in fact made at a multiple of no profit and no loss rates. He emphasized that there was no grant or aid ever by the State to any of the private unaided schools for establishment or running of their schools.

50. Mr. Sibal stated that the allotments were made by the Delhi Development Authority on the basis of available and vacant plots and not on any purported assessment of the need of the locality. He further stated that there has never been any assessment of the need of the locality before allotment and no documents whatsoever have been placed on record in support of such a plea, either by Directorate of Education or by the Delhi Development Authority. He pointed out that the zones in the 1970's, 1980's, and 1990's were only about six or seven, with each zone having an area of at least twenty sq. kms. as against twenty nine zones today. He stated that the Government in its own schools does not offer even a single seat for pre-school stage and

the entire responsibility for pre-school (+3) education is left on the private unaided schools.

51. Mr. Sibal contended that the impugned order has not been issued in exercise of any powers under the RTE Act and is only sought to be issued under the DSE Act and Rules.

52. He submitted that the provisions of Rules 44 and 50 cannot be in violation of or overriding the provisions of Section 16(3), Rule 145 and most importantly in derogation of principle of maximum autonomy in *TMA Pai* (supra), which is held to be fundamental right.

53. Mr. Sibal submitted that in law there is no estoppel or waiver or surrender of fundamental rights. He emphasized that the cause of action to challenge any offending provision or clause arises only when the same is implemented in a manner adverse to a petitioner. In support of his submissions he relies upon judgment of Supreme Court in *Olga Tellis* v. *Bombay Municipal Corporation*, (1985) 3 SCC 545.

54. He stated that the reliance of the respondents upon *Modern Dental College and Research Centre* (supra) was misplaced as the petitioners in the said case had staked a claim which was contrary to the law laid down by the Supreme Court in *TMA Pai* (supra) regarding the rights of professional educational institutions and the extent of regulations that can be there for such institutions.

55. He further submitted that the judgment of the Supreme Court in *Jain Sabha* (supra) was rendered in completely different facts as the Society therein refused to even pay the price of land at the institutional allotment rates prevailing on the date of actual allotment in 1990 and that too, only for a portion of the total land as a large portion of the land had been allotted at the institutional rates of 1967 when the allotment was first proposed to be made but possession could not be given.

REJOINDER ARGUMENTS ON BEHALF OF MR. SUNIL GUPTA

56. In rejoinder, Mr. Sunil Gupta, learned senior counsel stated that the ground of public interest is wholly false, hypocritical and fabricated. According to him, it is a slogan and smokescreen being used to cover up and save the impugned order.

57. He also stated that having not urged the plea and defence of neighbourhood qua the two hundred ninety eight schools since its inclusion in LPA 196/2004 and *Forum for Promotion of Quality Education for All* (supra), the respondents are now barred by *res judicata* from using the Delhi Development Authority allotment 'neighbourhood clause' as a ground in public interest to distinguish the case of two hundred ninety eight schools from the remaining fourteen hundred schools.

58. He submitted that the *Social Jurist* judgment (supra) has no

relevance to the present case, for the following reasons:—

(i) The Hospitals had been given land by Delhi Development Authority at a 'concessional rate' arrived at after contractual negotiations. In the present case, the schools were given land not at any concessional rate but at the 'predetermined institutional zonal variant rates', which are hundreds of times more than the cost of acquisition incurred by the Delhi Development Authority, thus entailing phenomenal profits for the Delhi Development Authority in such allotments.

(ii) The Delhi Development Authority condition in the *Hospitals case* was for free treatment being given to a certain number of poor patients in lieu of the concessional rate. The condition in the present case is for the compulsory admission of a certain class of children, namely, children (rich or poor) living in the neighbourhood of a school on payment of fee in the seventy-five per cent open category seats after excluding the twenty-five per cent reserved for children from Economically Weaker Section/Disadvantageous Group living in the neighbourhood.

(iii) The dispute raised was by the hospitals viz. that there should be no free treatment for anyone at all. However, in the present case, the schools are not questioning the admissions on the twenty-five per cent seats reserved for the Economically Weaker Section/Disadvantageous Group living in the neighbourhood. There is, however, severe competition amongst the citizens/parents/children living at different places in Delhi for admission on the remaining seventy-five per cent open category seats. That is the general public interest at stake.

(iv) The dispute in the *Hospitals case* was not brought to the Court by any patient entitled to free beds.

(v) The Delhi Development Authority condition in the *Hospital cases* did not involve the critical restriction of neighbourhood. The poor patients could come from anywhere to avail of the condition. The condition in the present case pre-eminently contains the neighbourhood restriction.

(vi) The competing fundamental right to treatment of any person living outside the neighbourhood of a hospital was not affected by the Delhi Development Authority condition and was not in question in the hospital case. In the present case, the Fundamental Rights under Articles 14, 19(1)(a), 21 and 21A of the Constitution of the parents and children living outside the neighbourhood of a school for admission in that school stand seriously threatened and jeopardized by the impugned condition.

(vii) The Directive Principles in the Constitution were found to require the Delhi Development Authority condition for free

treatment of a certain number of poor patients in the Hospitals to be binding. Not so here. On the contrary, the Directive Principles under Articles 38, 39(c) and (f), 41, 45, 46 etc. require that the children living at long distances from a good school 'and residing in different areas' should still have equal 'facilities and opportunities' of attending the school along with those who are fortunate enough to be residing close to the school.

(viii) In the hospitals case, there was no law or legislation which had subsequent to the Delhi Development Authority condition in the allotment letter, intervened and substituted the Delhi Development Authority condition. In the present case, the RTE Act has been enacted by the Parliament in 2009.

59. Mr. Sunil Gupta submitted that the Supreme Court judgment in *Modern School* (supra) has been wrongly relied upon by the respondents as it does not relate to admissions in a private unaided school and does not adjudicate the several issues of fundamental rights and legal rights of school/parents/children. He contended that the Supreme Court in the said case did not deal with or adjudicate upon the legality, validity and enforceability of any term of allotment.

60. He pointed out that in the Review Petition filed in *Action Committee, Unaided Private Schools* v. *Director of Education, Delhi*, (2009) 10 SCC 1, the Supreme Court has clarified that the *Modern School* (supra) judgment only fills the gaps in legislation and does not attempt judicial legislation.

61. He placed reliance upon the interim stay order passed by this Court on *20th January, 2017* in minority school matters in *W.P.(C) 408/2017* titled *Mount Carmel School* v. *Delhi Development Authority* He pointed out that this Court in *Forum for Promotion of Quality Education for All* (supra) after relying upon paras 125 and 137 of the judgment of the Constitution Bench in *P.A. Inamdar* v. *State of Maharashtra*, (2005) 6 SCC 537 has held that the rights of minority and non-minority unaided schools are absolutely identical especially the right to devise their own procedure for selection of students, subject to the same being fair, reasonable and rational.

REJOINDER ARGUMENTS ON BEHALF OF PARENTS AND CHILDREN IN W.P.(C)275/2017

62. Ms. Manmeet Arora argued on behalf of the parents and children in rejoinder. She stated that the impugned Notification stands in the face of the petitioners' fundamental rights under Article 14, 19(1)(a), 21 and 21A. According to her, the fundamental rights of the petitioners are three-fold, access to education [Article 21A], access to a school of one's choice [Article 19(1)(a)] and of the equality before the law [Article 14]. She submitted that the petitioners most certainly have a

fundamental right to challenge the said contractual term as it directly affects them. She stated that each of the petitioners, parents and children is personally aggrieved by the Notification. She pointed out that before the issuance of the impugned Notification, neighbourhood was one amongst several relevant criteria for impugned Notification. Now it is the sole/dominant criteria. She referred to two separate Charts dated 12th January, 2017 to demonstrate how one or the other relevant criteria applicable to the admission of the children has been wiped out by the impugned Notification. The wiping out of the points that the child would otherwise have been entitled to is the curtailment of the fundamental rights under Article 14, 19(1)(a), 21 and 21A.

63. In support of her submission, she relied upon the judgment of the Supreme Court in *LIC of India* v. *Consumer Education & Research Centre*, (1995) 5 SCC 482 wherein it has been held that even contracts that bear the insignia of public element are open to judicial review and must be tested on the touchstone of Articles 14, 19 and 21.

64. She stated that according to the 2011 Census of Delhi, the density of children between 0-6 years in Delhi is 1,357 per kilometer (i.e. a minimum of 4,261 children between 0-6 years of age reside within radius one kilometer from a given school). The seats in each school are limited to 100-200 at maximum. According to her, all admissions would be exhausted in the first one kilometer itself excluding everyone else who otherwise might be entitled to admission on the basis of other relevant criteria.

65. She alleged that there had been no application of mind by the respondents before issuing the impugned Notification and in support of her contention, she referred to the Minutes of Meeting dated 5th December, 2016. The relevant portion of the said Minutes reads as under:—

> *"Dy. CM/MoE further clarified that since at present no definition of prescribing neighbourhood area/locality of the school for admission is available with the department, the present meeting has been called to know the views of the stakeholders which may help to define the locality/neighbourhood criterion so that policy framework may be laid down to ensure the compliance of the condition of allotment letter in case of about 285 schools which have been allotted land by DDA/Land Owning Agency with such condition.*
>
> *Hon'ble MoE also explained to the schools the proposed draft guidelines, being examined in the department, wherein only the minimum distance of one kilometer can be defined as radius for locality/neighbourhood by the school in terms of Delhi RTE Rules, 2011 and it would be open to schools to decide their own neighbourhood/locality limits subject to minimum distance as defined above.*

Director (Education) further clarified that this would be the only criterion on which admissions would be done and in case applicants are more than number of seats, draw of lots would be done. Also, there would be no management quota within this. But 25% EWS provision, being the mandate of RTE Act, 2009, and contractual mandate of land allotment would continue.

In the meeting, following points were emerged:—

On seeking clarification from the representatives of DDA, L&DO and Land & Building regarding defining the locality/neighbourhood of the school at the time of allotment of land, Deputy Director (Institutional Land), informed that DDA has no specific definition of locality, neighbourhood and laid down the said condition in the allotment letter on the basis of sponsorship letter of the Directorate of Education and it is the DoE, GNCTD that has to define it.....

In view of the above discussions, the following decisions were taken:

1. *DoE may circulate a copy of the Writ Petition concerned (WPC 1255/2016) to all the stake holders so that they can give their response preferably on email, within a week, after further consultations with their schools, as well.*
2. *The DoE shall also circulate the purposed guidelines on the definition of locality, neighbourhood to the representative of the schools/associations for their understanding of the subject and comments.*
3. *DoE shall place the proposal before the Hon'ble LG incorporating appropriate views of the representative of the schools/associations."*

(emphasis supplied)

66. She pointed out that the Directorate of Education in its counter in W.P.(C) 287/2017 at paragraph 7.3 has admitted that it had not insisted upon the performance of the said contractual terms for the past three decades or while issuing the 2007 Order.

MR. KHAGESH B. JHA'S SUR-REJOINDER

67. In sur-rejoinder, Mr. Khagesh B. Jha stated that the real reason for issuing the impugned Notification was to curb the malpractice of sale of management quota seats by the Petitioner-Schools in the nursery classes.

68. Mr. Jha submitted that the Division Bench in *Social Jurist* judgment dated 19th February, 2013 had held that no guidelines can be issued by Central Government under Section 35 of the RTE Act. Consequently, according to him, the reliance by the petitioners upon the guidelines dated 23rd November, 2010 and 25th July, 2011 is

untenable in law.

COURT'S REASONING

PETITIONER-SCHOOLS A FEW DECADES LATER CANNOT SEEK INTERIM STAY OF A TERM OF AN ALLOTMENT LETTER

69. Having heard learned counsel for parties, this Court is of the prima facie view that as the schools continue to occupy and operate on allotted lands, they cannot seek interim stay of the terms and conditions stipulated either in the lease deed or allotment letter and that too, a few decades later.

SINCE THE IMPUGNED NOTIFICATION DATED 07TH JANUARY, 2017 FOR THE FIRST TIME DEFINES THE CONCEPT/CRITERIA OF 'NEIGHBOURHOOD/LOCALITY' IN A RESTRICTIVE MANNER, IT IS OPEN TO CHALLENGE BY ALL THE PETITIONERS.

70. But, the term/condition in the allotment letter or lease deed is only a source of power. Admittedly, there is no definition of 'neighbourhood' or 'locality' in either the allotment letter or lease deed. For a few decades either the 'neighbourhood/locality' clause was not insisted upon or the policy of Petitioner-Schools to give preference on the ground of neighbourhood in terms of some extra points was taken as sufficient compliance.

71. In fact, the impugned Notification dated 07th January, 2017 for the first time defines the concept/criteria of 'neighbourhood' and the process of admission within the 'neighbourhood' in a restrictive manner. This Court is of the prima facie view that there is stark difference between giving a preference on the ground of neighbourhood in terms of some extra points and in making fixed/rigid limits of neighbourhood as the sole criteria for admission. It is this recent restrictive definition of the concept/criteria of neighbourhood/locality that is open to challenge by all the petitioners.

IN ENTERTAINING THE PRESENT BATCH OF MATTERS, NO SUPREME COURT JUDGMENT IS VIOLATED AND NO DIRECTION BY ANY COURT IS INTERDICTED

72. This Court is of the prima facie opinion that the Supreme Court judgments in *Union of India* v. *Jain Sabha, New Delhi* (supra), *Modern School* (supra) and *Modern Dental* (supra) as well as Division Bench judgment in *Justice for All* (supra) do not deal with the concept/criteria of neighbourhood/locality. In fact, the judgment in *Modern Dental* (supra) deals with professional educational institutions only and not with schools at all. Also, no direction has been issued by any Court till date to define the concept/criteria of neighbourhood/locality in any particular manner. Consequently, by entertaining the present batch of matters, no direction by the Apex Court under Article 142 of the Constitution would be interdicted.

IN THE PRESENT BATCH OF MATTERS THE TEST OF DIRECT AND INEVITABLE EFFECT OF THE IMPUGNED ACTION ON THE FUNDAMENTAL RIGHTS IS SATISFIED

73. It is settled law that the Court must consider the direct and inevitable effect of the impugned action in adjudging whether it offends the fundamental rights of the individual or the legal entity. [See : *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248].

74. This Court is of the prima facie opinion that keeping in view the limited number of good quality public schools and the high population density of the city, the admissions in the said schools will be exhausted only on the immediate distance criteria of zero to three kilometer. In fact, in the course of rejoinder arguments learned counsel for Petitioner -Schools had stated that the number of applications received from children staying between zero to one kilometer had already exceeded the number of seats in most of the schools.

75. It is pertinent to mention that the issue of the legality and validity of admission in the seventy-five per cent open category seats has been challenged not only by the schools but also by the affected parents and children who are not parties to the allotment letter. According to the parents and children, the Directorate of Education by issuing the impugned Circular and Notification in enforcement of the condition in the allotment letter has diluted their entitlement to admission in the said seventy-five per cent open category seats.

76. Consequently, the right of the Petitioner-Schools to prescribe a fair, reasonable, transparent and non-exploitative procedure/criteria for admissions and the right of the petitioner-children to apply to a school of their choice would be rendered illusory and the application process would be an empty formality if the challenge by the petitioners is not examined by this Court.

THE FORUM JUDGMENT (SUPRA) HOLDS GIVING OVERBEARING WEIGHTAGE TO NEIGHBOURHOOD CRITERIA FOR GENERAL CATEGORY CHILDREN IS ARBITRARY, UNREASONABLE AND AGAINST PUBLIC INTEREST. IT PRIMA FACIE OPERATES AS A CONSTRUCTIVE RESJUDICATA ON THIS ISSUE

77. Vide judgment in *Forum for Promotion of Quality Education for All* (supra), the neighbourhood criteria if given an overbearing weightage in the admission process in private unaided schools has already been held to be arbitrary, unreasonable and against public interest. The conclusion of the aforesaid judgment is reproduced hereinbelow:—

> *"114. From the aforesaid discussion, it is apparent that private unaided recognized school managements have a fundamental right under Article 19(1)(g) of the Constitution to maximum autonomy in the day-to-day administration including the right to admit students.*

This right of private unaided schools has been recognized by an eleven judge Bench of the Supreme Court in T.M.A. Pai Foundation *(supra). Subsequently, a Constitution Bench of the Supreme Court in* P.A. Inamdar *(supra) has held that even non-minority unaided institutions have the unfettered fundamental right to devise the procedure to admit students subject to the said procedure being fair, reasonable and transparent. Even, in 2014, another Constitution Bench of the Supreme Court in* Pramati Educational & Cultural Trust (Registered) *(supra) reiterated that the content of the right under Article 19(1)(g) of the Constitution to establish and administer private educational institutions, as per the judgment of this Court in T.M.A. Pai Foundation, includes the right to admit students of their choice and autonomy of administration.*

115. The concept of autonomy has also been recognized and conferred upon schools by the DSE Act and Rules, 1973. Rule 145 of DSE Rules, 1973 states that the head of every recognised unaided school shall regulate admissions in its school. Consequently, the private unaided schools have maximum autonomy in day-to-day administration including the right to admit students.

116. Undoubtedly, the right to administer is subject to reasonable restrictions under Article 19(6) of the Constitution. It is a settled proposition of law that the right to administer does not include the right to mal-administer. In the present instance, there is no material to show that private unaided schools were indulging in any malpractice or were misusing their right to admit students in pursuance to the 2007 notification.

117. Also, the restrictions cannot be imposed by way of office orders and that too, without any authority of law. In State of Bihar *v.* Project Uchcha Vidya, Sikshak Sangh, *(2006) 2 SCC 545 the Supreme Court has held that the restriction under clause 6 of Article 19 of the Constitution can be imposed only by way of a law enacted by a Legislature and not by issuing a circular or a policy decision. Admittedly, no law or restriction has, in the present instance, been placed upon the petitioners by virtue of Article 21-A and Article 15 (5) of the Constitution. Consequently, the Government cannot impose a strait jacket formula of admission upon the schools under the guise of reasonable restriction and that too, without any authority of law.*

118. The respondents' argument that the impugned office orders have been allegedly issued under Rule 43 is untenable in law. In any event, office orders cannot be contrary to Rule 145 of DSE Rules, 1973 and Guidelines issued by the Central Government under Section 35(1) of RTE Act, 2009.

119. The argument of the respondents that the impugned office orders have been issued by virtue of the power conferred under Sections 6, 8, 11, 13, 35 and 38 of RTE Act, 2009 is contrary to the Division Bench judgment in Social Jurist, A Civil Rights Group *(supra) wherein it has been held that except for the Proviso to Section 12(1)(c), none of the other provisions of the RTE Act, 2009 apply to nursery admission.*

120. Further, children below six years have a fundamental right to education and health as also a right to choose a school under Article 19(1)(a) of the Constitution in which they wish to study. RTE Act, 2009 prescribes duty upon the State to ensure availability of neighbourhood schools. It nowhere stipulates that children would have to take admission only in a neighbourhood school or that children cannot take admissions in schools situated beyond their neighbourhood.

121. The power to choose a school has to primarily vest with the parents and not in the administration. In fact, the impugned office orders fail to consider the vitality as well as quality of the school and the specific needs of the individual families and students. School choice gives families freedom to choose any school that meets their needs regardless of its location. This Court is of the opinion that by increasing parental choice and by granting schools the autonomy to admit students, the accountability of private schools can be ensured.

122. Consequently, in the opinion of this Court, children should have the option to go to a neighbourhood school, but their choice cannot be restricted to a school situated in their locality. This Court is unable to appreciate that a student's educational fate can be relegated to his position on a map!

123. This Court is of the view that the neighbourhood concept was better taken care of by private unaided schools, both in terms of the guidelines laid down in the Ganguli Committee Report as well as under the earlier Admissions Order, 2007 inasmuch as graded/slab system was followed in all schools wherein the person living closest to the school was given the maximum marks and yet the right of every child living anywhere in Delhi to seek admission in a reputed school was not foreclosed."

78. Keeping in view the aforesaid conclusions, it is reiterated that a student's educational fate can't be relegated to only his/her position on a map!

PRIMA FACIE THE CONCEPT OF NEIGHBOURHOOD FOR ECONOMICALLY WEAKER SECTION/DISADVANTAGEOUS GROUP CATEGORY CANNOT BE MADE APPLICABLE AND THAT TOO AS A SOLE CRITERIA FOR ADMISSION FOR GENERAL CATEGORY CHILDREN

79. This Court is of the prima facie opinion that the concept of

neighbourhood envisaged in Section 12(1)(c) of RTE Act has its genesis and basis in the problem of dropouts in children from Economically Weaker Section/Disadvantageous Group category, if they are made to travel long distance for schooling. No such concept of dropouts is applicable to general category fee paying students in private unaided schools. Thus, the concept of neighbourhood meant primarily for lowering dropout rates in Economically Weaker Section children, cannot prima facie be made applicable, that too as a sole criteria, for admissions of general category students. Consequently, observations of the Division Bench either in W.P.(C) 636/2012 or in W.P.(C) 3156/2002 do not offer any assistance to the respondents.

DSE RULES AND RTE ACT OFFER NO ASSISTANCE TO THE RESPONDENTS

80. The argument that the concept of neighbourhood/locality is ingrained in Rules 44 and 50 of DSE Rules has already been dealt with and rejected by this Court in its judgment in *Forum for Promotion of Quality Education for All* (supra).

81. Further, a Division Bench of this Court in para 30 of its judgment in *Social Jurist* (supra) has already held that except the proviso to Section 12(1)(c), nothing in the RTE Act applies to private unaided schools.

DIRECTORATE OF EDUCATION CANNOT UNILATERALLY DEFINE THE TERM IN THE LETTER OF ALLOTMENT EXECUTED BY LAND OWNING AGENCIES THREE TO FOUR DECADES LATER

82. This Court is prima facie of the view that the power to define the concept/criteria of neighbourhood or locality lay with Delhi Development Authority or land owning agencies on the date it allotted the land. Prima facie the said concepts cannot be defined unilaterally three to four decades later.

83. Further, the concept of locality/zone under the DSE Rules prima facie has no connection or link with neighbourhood admission. As pointed out by the petitioners, the number of localities/zones under DSE Rules upto 1992 was much less and accordingly, the area of each locality/zone was much larger than what it is now.

DIRECTORATE OF EDUCATION CANNOT DO INDIRECTLY WHAT IT CANNOT DO DIRECTLY

84. Moreover, this Court is also of the opinion that what the Directorate of Education or the Lt. Governor cannot do directly in contravention of Section 16(3) of the DSE Act and Rule 145 of the DSE Rules, they cannot do indirectly, by way of definition of a term in a letter of allotment.

SECTION 12(1)(C) OF RTE ACT FIXES THE EXTENT OF RESPONSIBILITY OF A PRIVATE UNAIDED SCHOOL FOR ADMISSION FROM THE

NEIGHBOURHOOD TO ONLY TWENTY-FIVE PER CENT AND THAT TOO FOR THE WEAKER SECTIONS

85. This Court is of the prima facie view that Section 12(1)(c) of RTE Act fixes the extent of responsibility of a private unaided school for admission from the neighbourhood to only twenty-five per cent and that too, for the weaker sections, leaving free the remaining seventy-five per cent seats to be filled up by the school with children living within or outside its neighbourhood. This seems to be an incentive to entrepreneurs to establish more and more private unaided schools. The relevant portion of Section 12(1)(c) of RTE Act reads as under:—

> *"12. Extent of school's responsibility for free and compulsory education.-(1) For the purposes of this Act, a school,-*
>
> *xxxx xxxx xxxx xxxx*
>
> (c) specified in sub-clauses (iii) and (iv) of clause (n) of section 2 shall admit in class I, to the extent of at least twenty-five per cent. of the strength of that class, children belonging to weaker section and disadvantaged group in the neighbourhood and provide free and compulsory elementary education till its completion.
>
> *Provided further that where a school specified in clause (n) of section 2 imparts pre-school education, the provisions of clauses (a) to (c) shall apply for admission to such pre-school education."*
>
> (emphasis supplied)

86. In *Pramati Educational and Cultural Trust (Registered)* v. *Union of India*, (2014) 8 SCC 1, the Supreme Court upheld the validity of the RTE Act only on the ground that the twenty-five per cent reservation of seats for the Economically Weaker Section/Disadvantageous Group category is minimal and reasonable. The observations in the said judgment, upholding the limited reservation in a private unaided schools are as under:—

> *"27. ....Clause (5) in Article 15 of the Constitution, thus, vests a power on the State..... and we have to examine whether this new power vested in the State which enables the State to force the charitable element on a private educational institutions destroys the right under Article 19(1)(g).....*
>
> *28. .....In our view, all freedoms....., including the freedom under Article 19(1)(g), have a voluntary element..... As this Court has held in* T.M.A. Pai Foundation [T.M.A. Pai Foundation *v.* State of Karnataka, *(2002) 8 SCC 481] and* P.A. Inamdar [P.A. Inamdar *v.* State of Maharashtra, *(2005) 6 SCC 537] the State can under clause (6) of Article 19 make regulatory provisions..... However, as this Court held in the aforesaid two judgments that nominating students for admissions would be an unacceptable restriction in clause (6) of Article 19 of the Constitution, Parliament has stepped in and in*

exercise of its amending power under Article 368 of the Constitution inserted clause (5) in Article 15 to enable the State to make a law making special provisions for admission of socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes for their advancement and to a very limited extent affected the voluntary element of this right under Article 19(1)(g) ……

29. ……A plain reading of clause (5) of Article 15 would show that the power of a State to make a law can only be exercised where it is necessary for advancement of socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes and not for any other purpose. Thus, if a law is made by the State only to appease a class of citizens which is not socially or educationally backward or which is not a Scheduled Caste or Scheduled Tribe, such a law will be beyond the powers of the State under clause (5) of Article 15……(and) ultra vires Article 19(1)(g) ……

xxxx xxxx xxxx xxxx

43. Mr. Nariman submitted…… Section 12(1)(c) of the 2009 Act…… is violative of the right of private unaided schools under Article 19(1)(g) ……

xxxx xxxx xxxx xxxx

49. ……Article 21-A has to be harmoniously construed with Article 19(1)(g) ……We do not find anything in Article 21-A which conflicts with (it)…… but the law made under Article 21-A may affect these rights …… The law made by the State…… should not, therefore, be such as to abrogate the right of unaided private educational schools under Article 19(1)(g)……

50. …… admission of a small percentage of students belonging to weaker sections ……would not be inconsistent with the rights under Article 19(1)(g) of the Constitution. ……

xxxx xxxx xxxx xxxx

51. In our considered opinion, ……a new power was made available to the State under Article 21-A of the Constitution to make a law ……so long as such law forces admission of children of poorer, weaker and backward sections of the society to a small percentage of the seats in private educational institutions to achieve the constitutional goals of equality of opportunity and social justice set out in the Preamble of the Constitution, such a law would not be destructive of the right of the private unaided educational institutions under Article 19(1)(g)……

xxx xxx xxx xxx

53. When we examine the 2009 Act, we find that under Section 12(1)(c) read with Section 2(n)(iv) of the Act, an unaided school ……

is required to admit in …… at least twenty-five per cent of the strength of that class, children belonging to weaker section and disadvantaged group in the neighbourhood……These provisions…… are meant to achieve the constitutional goals of equality of opportunity in elementary education to children of weaker sections and disadvantaged groups in our society. We, therefore, do not find any merit in the submissions made on behalf of the non-minority private schools that Article 21-A of the Constitution and the 2009 Act violate their right under Article 19(1)(g) of the Constitution."

(emphasis supplied)

87. Further, the prima facie view that neighbourhood intake is limited to twenty-five per cent of the students is in consonance with the Government of India, Ministry of Human Resource Development, Department of School Education and Literacy's guidelines dated 25th July, 2011 wherein it is stated as under:—

"Guidelines dated 25th July, 2011

xxxx xxxx xxxx xxxx

(c) all unaided and 'specified category' schools, namely Kendriya Vidyalaya, Navodaya Vidyalaya, Sainik schools or any other school having a distinct character as specified by notification by the State Government/UT, shall admit and provide free and compulsory education to at least 25% of the annual class I intake (or pre-primary section as the case may be) children belonging to weaker sections and disadvantaged groups in the neighbourhood. Such schools will be the neighbourhood school only to the extent of admission of 25% of the class I intake (or pre-primary section as the case may be) annually in respect of children from disadvantaged groups and weaker sections in the neighbourhood of the school. For the remaining children in aided, unaided and specified category schools the neighbourhood criterion does not apply. Such schools shall be reimbursed expenditure in accordance with section 12(2).

(emphasis supplied)

88. Consequently, prima facie, the RTE Act legislatively substitutes the condition of hundred per cent or seventy-five per cent neighbourhood admissions in the school.

UNDER SECTION 35 OF THE RTE ACT, THE CENTRAL GOVERNMENT IS EMPOWERED TO ISSUE GUIDELINES

89. The argument of Mr. Khagesh Jha that the Division Bench in its judgment in *Social Jurist* (supra) dated 19th February, 2013 has held that no guidelines can be issued to private unaided schools under Section 35 of the RTE Act and that hence the guidelines dated 23rd November, 2010 and 25th July, 2011 issued by the Central Government are of no consequence, is prima facie untenable in law.

90. The Division Bench in its judgment in *Social Jurist* (supra) dated 19th February, 2013 has only held that Central Government cannot issue guidelines to private unaided schools directly. This is because under Section 35 of the RTE Act, the Central Government is empowered to issue guidelines only to the 'appropriate government or to the local authority', for the purposes of implementation of the RTE Act and also for the purposes of any clarifications. In fact, the Supreme Court in the case of *Society for Unaided Private Schools of Rajasthan* (supra) has already approved similar guidelines dated 23rd November, 2010 issued by the Central Government, which have been reproduced hereinabove. [See : Paras 279, 291 and 292].

91. This Court finds that sale of management seats is not one of the grounds on which the impugned Notification has been issued. In any event, this Court last year in W.P.(C) 448/2016 had directed that all allegations of sale of seats are actionable and should be investigated in accordance with law.

THE IMPUGNED NOTIFICATION IS PRIMA FACIE ARBITRARY AND DISCRIMINATORY AS IT ENURES TO THE BENEFIT OF CERTAIN PARENTS AND CHILDREN

92. This Court is of the prima facie opinion that the impugned Notification dated 07th January, 2017 is arbitrary and discriminatory as it enures to the benefit of parents and children who stay in the immediate vicinity of good private unaided schools to whom the Notification applies inasmuch as such parents and children would have the benefit of both the category of schools i.e., those in their immediate neighbourhood and those schools which do not have the neighbourhood clause.

THERE IS POTENTIAL OF ABUSE OF THE DEFINITION OF 'NEIGHBOURHOOD' IN THE IMPUGNED NOTIFICATION AND NO MECHANISM TO CHECK IT

93. This Court is of the prima facie view that there is potential of abuse of the definition of 'neighbourhood' as many rich parents would either shift to areas which are close to the school that they want their children to study or would get sham rent receipts/documents from owners or relatives and friends to show that they reside in such areas when they do not. There is no mechanism stipulated in the impugned Notification to curb or examine the allegation of abuse.

PUBLIC INTEREST CANNOT BE CONFINED TO CHILDREN GOING TO TWO HUNDRED NINETY EIGHT SCHOOLS

94. If the State has not found the reason of public interest i.e. traffic congestion, pollution or health of child to be good and compelling reason for imposing the impugned neighbourhood restriction on the fourteen hundred other private unaided schools who are not governed by the Delhi Development Authority condition, then how does the State

claim to serve or achieve the said public interest only in the case of two hundred ninety eight private unaided schools saddled with the Delhi Development Authority condition!

95. After all, children are uniformly affected by alleged factors of public interest and it cannot be said that public interest is to be served only in the case of children going to two hundred ninety eight schools and not to the other fourteen hundred odd schools.

IMPUGNED NOTIFICATION IMPOSES A RESTRICTION THAT IS ABSOLUTE AND PROHIBITORY. PRIMA FACIE DOES NOT SEEM TO BE A 'REASONABLE RESTRICTION' UNDER ARTICLE 19(1)(g)

96. In the prima facie opinion of this Court just because schools cannot hold admission tests does not mean that Rule 145 of DSE Rules has been deleted or rendered otiose or that the schools do not have the autonomy or flexibility to determine a fair, reasonable, transparent and non-exploitative procedure/criteria for admissions.

97. Undoubtedly, the State has the power to regulate private educational institutions and no institution can claim absolute and/or unqualified fundamental right under Article 19(1)(g), especially if it is indulging in maladministration. However, the impugned Notification dated 7th January, 2017 completely takes away from the private unaided schools, the right to admit students and the right to lay down a fair, reasonable, transparent and non-exploitative procedure/criteria for admissions, leaving them with no say in their admissions whatsoever. Such term or Notification which imposes a restriction that is absolute and prohibitory does not seem prima facie to be a 'reasonable restriction' on the fundamental right of petitioners under Article 19(1)(g). The Supreme Court in *Cellular Operators Association of India* (supra) has held that any restriction on the fundamental right under Article 19(1)(g) in order to be saved by Article 19(6), has to satisfy the twin test of being in general public interest and in addition thereto being a reasonable restriction. [See para 46].

98. Consequently, this Court is of the prima facie view that any attempt to regulate the admission of the remaining seventy-five per cent general category seats, would be an unreasonable restriction and a violation of Article 19(1)(g) of the Constitution.

CHILDREN AND PARENTS UNDER ARTICLES 19(1)(a) AND 21 AS WELL AS UNDER ARTICLE 26(3) OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS HAVE A FUNDAMENTAL RIGHT TO BE CONSIDERED FOR ADMISSION IN A SCHOOL OF THEIR CHOICE

99. The children through their parents have a fundamental right under Article 19(1)(a) to be considered for admission in a school of their choice. Even Article 26(3) of the Universal Declaration of Human Rights, to which India is a signatory, states that *"parents have a prior*

right to choose the kind of education that shall be given to their children". No material has been placed on record to show that the parents have an interest adverse to their children or that circumstances exist to exercise *parens patriae* principle.

100. This Court in *Forum for Promotion of Quality Education for All* (supra) has held that children and parents have fundamental rights under Articles 19(1)(a) and 21 to be considered for admission to a school of their choice. The fundamental right of choice of school under Article 19(1)(a) of children is not limited to applying to such a school but includes the right to be considered in a school of choice where the petitioners have a real chance of getting admission based on the existing criteria laid down by such schools. In view of the neighbourhood being virtually the sole criteria under the impugned orders, petitioners' right to apply to a school of their choice would be an empty formality. The right to apply inheres in it a reasonable chance of securing admission and not a mere illusory/theoretic/miniscule chance.

STATE CANNOT IMPOSE RESTRICTION ON CHOICE JUST BECAUSE IT THINKS IT WILL BE MORE BENEFICIAL FOR THE CHILD

101. The Supreme Court in *State of Karnataka* v. *Associated Management of English Medium Primary and Secondary Schools*, (2014) 9 SCC 485 has held that the State cannot impose controls on choice just because it thinks it will be more beneficial for the child. The relevant portion of the said judgment is reproduced hereinbelow:—

> *"40. In line with the earlier decisions of this Court, we are of the view that the right to freedom of speech and expression under Article 19(1)(a) of the Constitution includes the freedom of a child to be educated at the primary stage of school in a language of the choice of the child and the State cannot impose controls on such choice just because it thinks that it will be more beneficial for the child if he is taught in the primary stage of school in his mother tongue. We, therefore, hold that a child or on his behalf his parent or guardian, has a right to freedom of choice with regard to the medium of instruction in which he would like to be educated at the primary stage in school. We cannot accept the submission of the learned Advocate General that the right to freedom of speech and expression in Article 19(1)(a) of the Constitution does not include the right of a child or on his behalf his parent or guardian, to choose the medium of instruction at the stage of primary school."*
>
> (emphasis supplied)

NONE OF THE RESTRICTIONS CITED BY THE RESPONDENTS FIND MENTION IN ARTICLE 19(2)s

102. Petitioners' fundamental rights under Article 19(1)(a) can only be curtailed by way of reasonable restrictions and that too on the grounds laid down in Article 19(2). It is pertinent to mention that it is

not the case of the respondents that the impugned notification is saved on any of the grounds mentioned in Article 19(2). The argument that restricting access to education to a neighbourhood school is in public interest as well as best interest of a child and constitutes a reasonable restriction on the fundamental right under Article 19(1)(a), is untenable in law. In fact, none of the restrictions cited by the respondents, find mention in Article 19(2). Further, the argument that the public interest is best served by the neighbourhood criteria has been rejected by this Court in *Forum for Promotion of Quality Education for All* (supra).

RESERVATION OF SEATS FOR CHILDREN STAYING IN NEIGHBOURHOOD WITHOUT ANY OTHER SOCIO-ECONOMIC CONSIDERATION IS PRIMA FACIE UNCONSTITUTIONAL AND NOT A REASONABLE CLASSIFICATION

103. Prima facie, the effect of the impugned Notification seems to be to reserve seats for a certain section of children that stay in the immediate neighbourhood without taking into account their socio-economic or cultural status. Under the impugned notification, the affluent persons living close to good schools stand to benefit with less competition. Reservation for a section of society that is neither socially nor economically or educationally backward or Scheduled Castes/Scheduled Tribes/Minorities is prima facie impressible and unconstitutional.

104. This Court is further of the prima facie view that restricting admissions to immediate neighbourhood of the school may result in restricting the growth and vision of the students. If students from all faiths, communities and different parts of Delhi are admitted in a school, it would promote diversity, openness, liberalism and greater understanding of the city and its culture.

PRIMARY CAUSE OF THE NURSERY ADMISSION CHAOS IS LACK OF ADEQUATE NUMBER OF GOOD QUALITY PUBLIC SCHOOLS

105. Unfortunately, the impugned Notification does not deal with the problem of dearth of seats in any manner whatsoever and only seeks to replace one child with the other. This Court in its judgment in *Forum for Promotion of Quality Education for All* (supra) had held that the primary cause of the nursery admission chaos is lack of adequate number of good quality public schools and uneven distribution of good private unaided schools in Delhi.

106. Till the quality of all public schools improves, the disparity between demand and supply will remain. Mr. Sanjay Jain, learned Additional Solicitor General had stated during the hearing that the present Government has taken a number of steps to improve the quality of Government run schools and as a consequence there is a

marked improvement in the said schools. This Court has no reason to doubt the said statement made by learned Additional Solicitor General, but surely a lot more needs to be done before the public schools come at par with good private unaided schools in public perception.

BALANCE OF CONVENIENCE IS IN FAVOUR OF PETITIONERS AS NOTIFICATION IS BASED ON THE ALLOTMENT LETTER WHICH HAS EXISTED FOR SEVERAL DECADES.

107. Keeping in view the aforesaid findings, this Court is of the view that there is prima facie case in favour of the petitioners. The balance of convenience is also in their favour as the impugned Notification is based on a single term in the allotment letter which has existed for several decades, but has either not been enforced till date or the respondents were satisfied with the petitioners' policy of giving some extra points on the ground of neighbourhood. This Court is also of the view that as the admission process has already commenced, irreparable harm would be caused to the petitioners if the interim stay of the impugned Notification is not granted.

108. Consequently, only the impugned Notification dated 07th January, 2017 is stayed till the disposal of writ petitions. Accordingly, present applications stand disposed of.

109. At the cost of repetition, it is clarified that the aforesaid observations are prima facie in nature arrived at to put in place an interim arrangement pending disposal of the writ petitions.

110. List the writ petitions along with W.P.(C) 408/2017 on 21st March, 2017 for disposal.

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