2016 SCC OnLine Del 672

(BEFORE MANMOHAN, J.)

W.P. (C) 448/2016 & CM Appls. 3109-3112/2016

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

Mr. Dushyant Dave, Senior Advocate with Mr. Kamal Gupta, Advocate

v.

Directorate of Education ..... Respondent

Mr. Gurukrishna Kumar, Senior Advocate with Mr. Rahul Mehra, Sr. Standing Counsel, Mr. Gautam Narayan, ASC, Mr. Anuj Aggarwal, ASC, Ms. Tishampati Sen, Mr. Sanyog Bhadur and Mr. Shekhar Budakoti, Advocates for GNCTD/DoE.

Mr. Amit Bhargava, Applicant in CM Appl. 3109/2016.

Mr. Khagesh B. Jha, Advocate for Intervener.

With

W.P. (C) 452/2016 & CM Appls. 3147-3148/2016

Forum for Promotion of Quality Education for All ..... Petitioner

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

v.

Government of NCT of Delhi & Anr. ..... Respondents

Mr. Gurukrishna Kumar, Senior Advocate with Mr. Rahul Mehra, Sr. Standing Counsel, Mr. Gautam Narayan, ASC, Mr. Anuj Aggarwal, ASC, Ms. Tishampati Sen, Mr. Sanyog Bhadur and Mr. Shekhar Budakoti, Advocates for GNCTD/DoE.

Mr. Khagesh B. Jha, Advocate for Intervener.

W.P. (C) 448/2016; CM Appls. 3109-3112/2016; W.P. (C) 452/2016; and CM Appls. 3147-3148/2016

Decided on February 4, 2016

JUDGMENT

MANMOHAN, J.

CM Appl. 1778/2016 in W.P. (C) 448/2016 CM Appl. 1831/2016 in W.P. (C) 452/2016

PRIMARY CHALLENGE

1. Present writ petitions have been filed challenging the order dated 06th January, 2016 issued by the Government of NCT of Delhi (for short 'GNCTD') whereby the respondents have directed the private unaided schools of Delhi to open the entire 75 per cent seats, i.e., "*in 75% of the open seats, there would not be any quota*."

ARGUMENTS ON BEHALF OF THE PETITIONERS

2. Mr. Sunil Gupta and Mr. Dushyant Dave, learned senior counsel for the petitioners submitted that the impugned order adversely affects the fundamental right of freedom and autonomy of the petitioners-Committee/Forum of private unaided schools upheld by the Supreme Court in *T.M.A. Pai Foundation* v. *State of Karnataka* (2002) 8 SCC 481 as also by this Court in *Forum for Promotion of Quality Education for All* v. *Lt. Governor of Delhi*, 216 (2015) DLT 80 in two ways inasmuch as it interferes with eleven most healthy, noble and socially and nationally relevant, fair and reasonable criteria and it deprives the petitioners of the long-standing management quota of twenty percent seats. The eleven criteria defended by the petitioners were

item Nos. 1, 3, 5, 10, 16, 31, 32, 45, 47, 48 and 61 of the impugned order.

3. Learned senior counsel for petitioners stated that the previous 2007 Order was issued expressly under Section 3 of the Delhi School Education Act, 1973 [for short "Act, 1973"] read with Rule 43 of the Delhi School Education Rules, 1973 [for short "Rules, 1973"] and it enabled the petitioners to adopt criteria in line with their own philosophy and also provided a management quota of twenty per cent and since the impugned order has not been issued under any specific provision, it does not supersede or amend the 2007 Order and, in fact, it conflicts with the 2007 Order inasmuch as it interferes with various such criteria adopted by the private unaided schools and deprives them of the management quota. They stated that the impugned order also runs contrary to the affidavits filed by the GCNTD in the earlier litigation in defence of the 2007 Order. According to them, in so doing, it betrays non-application of mind and repeats the 2013 folly which had been quashed by this Court in *Forum for Promotion of Quality Education For All* (supra).

4. Learned senior counsel for petitioners submitted that the impugned order is without jurisdiction inasmuch as it cannot be used to contradict or overrule a specific provision like Section 16(3) of the Act, 1973 or Rule 145 of the Rules, 1973 where under the Head of School alone regulates admission in private unaided schools.

5. Learned senior counsel for petitioners further submitted that as regards the ground that schools do not adopt standard procedure, this Court has held that the Government cannot impose a strait-jacket formula of admission upon the schools under the guise of reasonable restriction.

6. As regards the ground that there are 'widespread allegations' of misuse of quota/capitation fee, learned senior counsel for petitioners pointed out that this Court has held that the restriction is not reasonable under Article 19(6) of the Constitution because 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. They stated that greater autonomy leads to more schools and is in public interest.

ARGUMENTS ON BEHALF OF THE RESPONDENTS

7. On the other hand, Mr. Gurukrishna Kumar, learned senior counsel for the respondents submitted that the present writ petition is not maintainable as the petitioner-Committee is an association and it cannot espouse any fundamental right. According to him, only the individual schools can approach the Court.

8. Mr. Gurukrishna Kumar submitted that the impugned order is legal and valid. According to him, the answering respondent was duly empowered under Section 2(e)(ii) of Act, 1973 and Rule 43 of Rules, 1973 to issue the same. He submitted that the Act, 1973 must be interpreted and understood in the light of the subsequent developments, namely, the enactment of the Constitutional 69th Amendment Act, the GNCT Act, 1991 and the framing of the Transaction and Allocation of Business Rules.

9. Mr. Gurukrishna Kumar stated that in a Cabinet system of Government, the Governor/Lieutenant Governor is the Constitutional head and the administration of the State is performed by the Council of Ministers. According to him, since it is not possible for the Council to deal with each and every issue, the Head of the Government is authorised to make rules for the convenient transaction of business and for the allocation amongst the Ministers and also to allocate functions to particular officials. In the case of GNCTD, this has been done by framing the Transaction of Business Rules and the Allocation of Business Rules. In accordance therewith, the task of administration has been distributed amongst various Departments mentioned in the Schedule to the Allocation of Business Rules and the civil servants, who are experts, take decisions on behalf of the Government. In support of his submission, he relied upon the judgment of the Supreme Court in *A. Sanjeevi Naidu* v. *State of Madras*,

(1970) 1 SCC 443.

10. Without prejudice to the above, Mr. Gurukrishna Kumar submitted that the fact that the said orders had not been issued in name of the Lieutenant Governor was not fatal and did not invalidate the same. He relied upon the judgment of the Supreme Court in *R. Chitralekha* v. *State of Mysore* (1964) 6 SCR 368.

11. Mr. Gurukrishna Kumar further submitted that the objective behind issuing the impugned order was not to deprive private unaided educational schools of autonomy. He stated that the objective was only to ensure that admissions to entry level classes were made in a fair, reasonable, rational, transparent and non-exploitive manner. He submitted that the answering respondent was statutorily bound to ensure that schools are managed and run in the best interests of education of children and for the better organization and development of school education [Sections 3(1), 4(6), 16(3), 28(2)(a), (b), (q) of Act, 1973 and Rules 50(iv), (v), (vi), 145 and 181 of Rules, 1973]. He pointed out that amongst the 2,500 criteria uploaded by the schools, only 62 had been identified and directed to be eschewed by the answering respondent.

12. Mr. Gurukrishna Kumar submitted that the practice of granting admissions under the garb of "management quotas" which are wholly nontransparent and opaque cannot be countenanced. According to him, the attempt of respondent was to ensure that schools do not become '*teaching shops*'.

13. Mr. Gurukrishna Kumar urged that the interference by Court in academic and educational matters should be minimal. He submitted that courts interfere only in the rarest of cases and only when the said order/decision is in derogation of the relevant statute or is patently arbitrary or illegal.

14. Mr. Gurukrishna Kumar lastly submitted that the judgment in *Forum for Promotion of Quality Education For All* (supra) recognizes the right of the respondent to regulate but did not deal with the management quota. According to him, the impugned order was issued in pursuance and in accordance with the judgment of this Court in *Forum for Promotion of Quality Education For All* (supra).

SAY OF THE DEPUTY CHIEF MINISTER

15. The Deputy Chief Minister, who appeared in person, submitted that the private unaided schools were like contractors who had been given a contract to construct some portion of a road. He stated that just like a contractor, the private unaided schools could not construct a road on their own terms and conditions. He also stated that private unaided schools in the Capital were running an admission racket. He stated that he had received a number of complaints last year with regard to demand for donation in lieu of seats allocated under the management quota. He also wanted to hand over certain documents in a sealed cover to this Court.

16. This Court asked the Deputy Chief Minister to take action on the complaints received by him in accordance with law. This Court clarified that by its previous judgment, only autonomy had been given to private unaided schools and not a licence to misuse the same or sell the seats. It was pointed out that as all Courts in India hold hearings in the open, the documents would be accepted in a sealed cover only if privilege was claimed in accordance with law.

ARGUMENTS ON BEHALF OF THE INTERVENORS

17. Mr. Khagesh B. Jha, learned counsel for intervener/applicant stated that most of the private schools are situated on the DDA land and under contractual obligation to admit students from the neighbourhood. He stated that the allotment letter mentions that at least 75% children shall be from the locality where school is situated. He stated that in the present petitions, petitioners not only seek stay of the policy decision but also the direction issued by the Supreme Court under Article 142 of the Constitution in *Modern School* v. *Union of India*, (2004) 5 SCC 583.

18. Mr. Jha referred to the letter addressed by the President of the petitioners

which mentions that the seats are given to the politicians, bureaucrats and social worker which itself reflects corruption.

19. An intervention application was also filed by Mahavir Senior Model School stating that being a minority institution, the impugned order would not apply to it. Learned counsel for the said school relied upon Article 30 of the Constitution. However, learned senior counsel for the respondents stated that as the averments with regard to minority institutions did not find mention in the writ petitions, they were taken by surprise. However, learned senior counsel for the respondents clarified that the impugned order dated 06th January, 2016 while requiring that the status of the parents will not be a justifiable criteria, would not bar a Minority Educational Institution from taking note of the religion/religious affiliation of the concerned ward/child. It was further clarified by learned counsel for respondents that the impugned order dated 06th January, 2016 will otherwise apply to Minority Educational Institutions.

20. This Court finds merit in the contention of learned senior counsel for the respondents that the averments with regard to minority institutions do not find mention in the writ petitions. Consequently, the argument with regard to applicability of the impugned order to minority institutions is left open.

REJOINDER ARGUMENTS ON BEHALF OF THE PETITIONERS

21. In rejoinder, learned senior counsel for the petitioners stated that the reliance of the respondents on the judgment and order of this Court in *Forum for Promotion of Quality Education For All* (supra) was a case of "*devil reading the scriptures*".

22. Learned senior counsel for the petitioners stated that the analogy of private-public participation in construction of roads in the context of private unaided schools in education was wholly inappropriate and spoke of a legally untrained and purely political mindset. They stated that in the former case, Government gives contractual rights to a concessionaire or contract to build a road and he has no fundamental right. In the latter case, every institution has an inborn human right and a constitutionally recognised and guaranteed fundamental right to establish and run a school by his own means which is not granted by any Government or politician.

23. Learned senior counsel for the petitioners stated that none of the schools forming part of the petitioner-association have been following any criteria of admission which may remotely be attracted or categorized as unfair, inequitable and unreasonable. They stated that schools are following fair, reasonable and just criteria for admission in terms of what was prescribed by the Ganguli Committee and permitted by the order dated 24th November, 2007 issued by the then Lieutenant Governor of Delhi.

24. Learned senior counsel for the petitioners contended that the respondents are deliberately misleading the public on the basis of a few unsubstantiated and unverified complaints by stating that discretionary management quota is the biggest education scandal. They stated that the excuse that action is not taken by the authorities because the child will be victimised by the School is a bogey inasmuch as the State has the power and authority to save the child from victimisation by the school. In any event, according to them, all unaided schools cannot be punished by way of deprivation of their individual fundamental right due to some alleged defaulters.

COURT'S REASONING

25. Having heard learned counsel for the parties, this Court is of the view that the issues raised by the petitioners as well as the respondents require a detailed hearing. The original files would have to be perused. The impleadment applications would also have to be decided after notice. Consequently, the writ petitions cannot be disposed of at the preliminary stage. In fact, this Court on 02nd February, 2016, while reserving the orders, clarified that it would dispose of only the interim applications at this stage.

PRELIMINARY OBJECTION OF THE RESPONDENTS IS UNTENABLE

26. This Court is prima facie not impressed with the respondents submission that the present writ petitions by a Committee and/or a Forum are not maintainable. In fact, there have been numerous cases in which the petitions filed by the Committee/Forum/Association have been entertained and decisions have been rendered by this Court as well as the Apex Court. In any event, the power under Article 226 of the Constitution of India is very wide and there is no limitation expressed or otherwise on the exercise thereof. Consequently, this Court is prima facie of the opinion that no technicalities can come in the way of granting relief under Article 226 of the Constitution.

IMPUGNED ORDER

27. Before proceeding with the matter any further, this Court would like to reproduce the impugned order 06th January, 2016 in its entirety : -

"Government of National Capital Territory of Delhi
Directorate of Education (Act-I) Branch
Old Secretariat, Delhi-54

No. F.DE.15/Act-1/4607/13/2015/5686-5696 Dated : 06-01-2016

ORDER

Directorate of Education vide its circular dated 8/12/2015 directed all the Private Unaided Recognized Schools to develop and adopt criteria for admissions for the 75% Open Seats to Entry Level Classes for session 2016-17 which shall be clear, well defined, equitable, non-discriminatory, unambiguous and transparent. All these criteria and their points were to be uploaded on the departmental website.

The adopted criteria uploaded by the schools was scrutinized and found that some of the schools have adopted criteria like Status of child, Non smoker parent, Special ground if candidate is having proficiency in music and sports/Social, Noble cause/Non-smoker parent/Oral Test/Date of Birth Certificate of Child from MCD/Affidavit/Vegetarianism/Joint Family/Non-alcoholic/Age/Certificate of last school attended/Language/economic condition/Business/Service/Attitude and Values/ID Proofs and Address of the documents of the parents/Special Quality/declaration regarding picking or drop of the students at school facility etc. which are contrary to the principles mentioned above.

Further, it has been observed that some private unaided recognized schools are reserving seats under Management Quota as well as in different categories like under Sibling, Alumni, Girl Child etc.

The issues of adopting unfair criteria by the Private Unaided Recognized Schools was raised in WPC 8533/2010 and other connected matters and Hon'ble High Court vide its judgment dated 19/02/2013 directed that Hon'ble Lt. Governor Delhi may amend the existing admission order 2007 exercising the power conferred upon him under section 3 read with rule 43 of DSEAR, 1973 to check any possible malpractices in 75% admission to the entry level classes.

Hon'ble High Court in its judgment dated 19/02/2013 held that Private Unaided Schools cannot be allowed to run as Teaching Shop. The operative part of the judgment is as under : -

"It is common knowledge that though there is obligation on the State to provide free and compulsory education to children and the corresponding responsibility of the institution to afford the same, educational institution cannot be allowed to run as 'Teaching Shops' as the same would be detrimental to equal opportunity to children. This 'reality must not be ignored by the State while considering the observations made in this judgment. Hence, we only observe that to avail the benefit of the Right to Education Act to a child seeking for

nursery school as well, necessary amendment should be considered by the State. We hope and trust that the Government may take the above observations in the right spirit and act accordingly".

Pursuant to the directions of the Hon'ble High Court, this Directorate issued Orders dated 18/12/2013 & 27/12/2013 prescribing uniform criteria and their point for admission to the Entry Level Classes for Open Seats in Private Unaided Recognized Schools.

The said orders when challenged were set aside by the Honble High Court vide order dated 28/11/2014 in WPC 177/2014 & 202/2014 with the observation that Private Unaided Schools have a fundamental right to devise the procedure to admit students but subject to the condition that the procedure is fair, reasonable and transparent.

Contrary to the directions of the Hon'ble High Court's Order dated 28/11/2014 in WPC 177/2014 & 202/2014, many Private Unaided Recognized Schools have come out with admission criteria which are unfair, unreasonable and nontransparent.

In view of the above, all the Private Unaided Schools concerned are directed to remove the admission criteria as mentioned below and replace them with the criteria which shall be fair, reasonable and transparent.

Sl. No.	*Criteria*	*Remarks of being unfair, unreasonable and non-transparent.*
01	*Special ground (parents with proficiency in music, sports, national awardee etc.)*	*This criterion is not just as it is discriminatory to the other children seeking admission.*
02	*Transferable jobs/state transfers/IST*	*This criterion is required for admission in upper classes to give better chances and continuation of studies of a child. It is not just to give weightage for admission at the entry level classes. Apart from it, an individual residing in particular locality for many years has a better right to get his ward admitted in the school in his locality rather than the individual who has shifted on transfer to that locality.*
03	*First Born*	*This criterion shall lead to discrimination for the parents desirous to seek admission of his ward that is not first born.*
04	*Parents education*	*India is a developing country and literacy rate is not 100%. Giving weightage to parents' education criteria is unjust*

		to the children whose parents do not have good educational background. It leads to the inequality also.
05	*School transport*	*One can't be forced to use school transport and it depends on the need of parents. Compulsion to use school transport shall also put an extra financial burden on the parents.*
06	*Parent working in sister-concern school,*	*The ward of Staff/Employees of any school concerned can have a right for admission to that school but extending the same benefits to the sister concern of that particular school will curtail the right of General Parents' wards.*
07	*Both parents are working.*	*There is no merit to give weightage on this criterion. Equal opportunities of admission should be given to non-working/single parent working/both parents working.*
08	*First cousin of the child (parental/maternal),*	*This will create a homogenous group in a class/school which is not conducive to the overall development of child.*
09	*School specific criteria*	*This criterion has a very wide interpretation. The school should have specified it in a just, reasonable and transparent manner.*
10	*Status of child*	*This is illogical criterion as one can't assign the status to the small children.*
11	*Special ground if candidate is having proficiency in music and sports,*	*It is inappropriate to assign points for proficiency in music and sport to a child at the age of 3 to 6 years.*
12	*Any other specific category*	*This is vague criterion. The school should have*

		specified it in a just, reasonable and transparent manner.
13	*Social/Noble cause.*	*There is no standard parameter to determine it and is likely to be misused.*
14	*Mother's qualification 12th Passed*	*There is no merit to give weightage on this criterion. Equal opportunities of admission should be given to children irrespective of their mother's qualification.*
15	*Non-smoker parent*	*Child cannot be punished for the any particular habit of the parents, so this is unjust.*
16	*Empirical achievements of the parent*	*Parents' achievements cannot be the criteria for admission as all the children have equal rights.*
17	*First time admission seekers,*	*There is no merit. Everyone is first time admission seekers to the entry level class.*
18	*First-come-first-get,*	*The admission schedule has been fixed by the Department prescribing the dates for submitting application, displaying the list of selected children. If no particular criteria is fixed for such admission, the school may collect applications up to the last date, if number of application are more than the seats, it may go for draw of lots and make admission as per announced schedule.*
19	*Oral Test*	*Screening/Interview at the entry level is not reasonable.*
20	*Interview*	*Interview at the entry level is not reasonable.*
21	*Professional field/expertise*	*Parents' professional field cannot be the criteria for admission as all the children have equal rights.*

22	Management Quota	Schools do not adopt standard procedure to admit students under this criterion. There are widespread allegations that this quota is misused by the schools by collecting capitation fee from the parents.
23	Date of Birth Certificate of Child from MCD/Affidavit	This cannot be the criteria for points. It is documentary proof for age.
24	Govt. employee	Parents' professional field cannot be the criteria for admission as all the children have equal rights.
25	Vegetarianism	Child cannot be punished or rewarded for any particular habit of the parents, so this is unjust.
26	Special cases	This criterion has a very wide interpretation. The school should have specified the criteria which may be just, reasonable and transparent.
27	Joint Family	This criterion is not practically determinable and as such, there is no basis of connecting it to the admission process.
28	Non-alcoholic	Child cannot be punished for any particular habit of the parents, so this is unjust.
29	Age	Age criterion has already been specified for Entry Level Classes by the department therefore points cannot be assigned to this.
30	Certificate of last school attended/Marks of previous class,	In the entry class admission, there is no certificate of last school attended and marks of previous class so it is illogical to give points to this criterion.
31	Proven track record of parents	Parents proven track cannot be the criteria for

	(international/national/state awardee)/Rural Development/Promotion of traditional art and craft/Sport etc.	*admission as all the children have equal rights.*
32	*Gender*	*This is discriminatory.*
33	*Attitudes and values*	*It is undefined and likely to be misused.*
34	*ID Proofs and Address of the documents of the parents*	*Department has already specified the list of documents as proofs. It cannot be a criteria for giving points.*
35	*Language (speak only 2 points, write only 2 points, read only 2 points)*	*This is illogical to give points to this criterion. Small children should be on equal footing in every respect as the entry level class is the starting level of learning.*
36	*Promotion/Reco gnition as specified in the school website and notice board*	*It is not clear.*
37	*Economic condition/BPL Family/Background - Poor Family.*	*The parents seeking admission in a particular school are aware of the fee structure of the school and willing to pay the same. Fee structure of the school is same for everyone in the school. So the economic condition should not matter.*
38	*Business/Service*	*It is not just and discriminatory. Parents' status does not matter at least in the education field.*
39	*Special equality*	*It is undefined and likely to be misused.*
40	*Declaration regarding picking or drop*	*It is illogical. It is the choice of the parents to opt for school transport or not as per their convenience.*
41	*Scholar students*	*It is illogical. No scholastic aptitude can be tested at the entry level classes.*
42	*Regularity in payment of school dues*	*It is illogical. Parents just seeking admission of their ward in the entry level*

		class cannot be judged on this criterion.
43	Terms and condition of school	It is not clear.
44	2 Photograph of child	It is not relevant criteria for assigning points.
45	Original Research/Recognition received in the area	It is illogical, undefined.
46	Child whose parents/grandparent is a significant non-financial/volunteer to the school.	It is undefined and discriminatory.
47	Contribution, physical or professional work (both pro-bono) through a registered NGO.	It is vague and undefined and likely to be misused.
48.	Father/Mother participates at state level in the field on sports, music and writing.	Parents' proficiency/expertise in any field cannot be the criteria for admission as all the children have equal rights.
49	Interview/GK	Interview at the entry level is not reasonable.
50	Management discretion	This criterion is not fair and likely to be misused.
51	Management reference	This criterion is not fair and likely to be misused.
52	No admission criteria	In case of no admission criteria, the school has to follow the admission schedule of the. department. If the number of applications are more than the seats available, then draw of lots may be conducted and admissions to be done as per schedule.
53	Oral Test/Communication Skill/Interaction	Oral Test/Communication Skill/Interaction at the entry level is not reasonable.
54	Parents reasons for approaching the school in terms of objective of the school	It is undefined and discriminatory.
55	Permanent resident of Delhi by birth	It is illegal and violation of fundamental right of the citizen.

56.	*School parameters/school specific parameters*	*It is undefined.*
57	*Similar cultural ethos*	*It is undefined.*
58	*SLC countersigned by EO*	*It is illogical as no SLC is required for admission in Entry Level Class.*
59	*Special permission for not completing elementary education.*	*It is not clear.*
60.	*Sports/Sports activity*	*It is discriminatory.*
61.	*Adopted Child/twins*	*It is unfair.*
62.	*Delhi University staff*	*It is illogical*

The list mentioned above is indicative and not exhaustive. The Private Unaided Recognized Schools are directed to remove all the criteria which are unfair, unreasonable and non-transparent.

Further, it is also observed that some of the schools have reserved a large number of seats under various quotas. Only 25% of the seats are reserved in Private Unaided Recognized Schools for EWS/DG admissions and rest of the 75% seats should be open seats where points based fair, reasonable and transparent criteria can be adopted for the admissions. In 75% of the open seats, there should not be any quota. However, if required, the children of the staff and the children of the members of the Management Committee can be given admission by making it a criterion and assigning points.

It is, accordingly, ordered that all Private Unaided Recognized Schools shall revise the admission criteria on the above lines in view of the directions of the Hon'ble High Court in its judgement dated 28/11/2014.

This order is issued with the approval of the Cabinet."

(emphasis supplied)

PRIMA FACIE, THE IMPUGNED ORDER HAS BEEN ISSUED WITHOUT ANY AUTHORITY AND IS IN DIRECT CONFLICT WITH THE ORDER OF 2007 ISSUED BY THE LIEUTENANT GOVERNOR

28. From the aforesaid impugned order, it is apparent that it does not indicate the Act and/or provision and Act under which it has been issued.

29. It is pertinent to mention that the order dated 24th November, 2007 under Section 3(1) of the Act, 1973 and Rule 43 of the Rules, 1973, permitted management quota upto twenty per cent. Clause 14(vi) of the Order dated 24th November, 2007 is reproduced hereinbelow : -

"14. The school shall develop and adopt criteria for admission which shall be clear, well defined, equitable, non-discriminatory and unambiguous. The school shall adopt those parameters which are in the best interests of children and are in line with its own philosophy, and these shall include the following : -

xxxx xxxx xxxx xxxx

(vi) Management Quota - School may have a management quota which shall not exceed twenty percent of the total seats available for admission in the class."

30. Consequently, this Court is prima facie of the view that the impugned order cannot supersede, amend or modify the order dated 24th November, 2007 which was specifically made under Section 3(1) of the Act, 1973 read with Rule 43 of the Rules, 1973 and has been occupying the field. Sections 2(a) and 3(1) of the Act, 1973 as well as Rule 43 of the Rules, 1973 are reproduced hereinbelow : -

(A) Section 2(a) of Act, 1973

(a) *"Administrator" means the Administrator of the Union Territory of Delhi appointed by the President under article 230 of the Constitution;*

(B) Section 3 of Act, 1973

"3. Power of Administrator to Regulate Education in Schools—(1) The Administrator may regulate education in all the schools in Delhi in accordance with the provisions of this Act and the rules made thereunder……."

(C) Rule 43 of Rules, 1973

"43. Power to issue Instructions—The Administrator may, if he is of opinion that in the interest of school education in Delhi it is necessary so to do, issue such instructions in relation to any matter, not covered by these rules, as he may deem fit."

31. This Court is also prima facie of the view that the 69th Amendment Act, the GNCT Act, 1991 and the Transaction and Allocation of Business Rules and the judgments of the Supreme Court in *A. Sanjeevi Naidu* (supra) and *R. Chitralekha* (supra), offer no assistance to the respondents. The present case does not pertain to any general executive action, but pertains to a specific Statute wherein the power has been given to the Administrator/Lieutenant Governor to issue Regulation in a particular manner. It is well settled that if a Statute requires a thing to be done in a particular manner, it should be done in that manner or not all. (See *Shiv Kumar Chadha* v. *Municipal Corporation of Delhi*, (1993) 3 SCC 161, *Taylor* v. *Taylor* (1875) 1 Ch D 426 and *Nazir Ahmad* v. *King-Emperor*, AIR 1936 PC 253 (2).

32. In fact, the Division Bench of this Court with regard to Act, 1973 and Rules, 1973, in *Social Jurist, A Civil Rights Group* v. *Govt. of NCT of Delhi*, 198 (2013) DLT 384 has held as under : -

"35. ……The Lieutenant Governor of Delhi in exercise of the powers conferred upon him by Section 3(1) of Delhi School Education Act and Rule 43 of Delhi School Education Rules, 1973 is competent to give such further directions or to make such modifications to the existing order as the Government may deem appropriate, to prevent any possible misuse or malpractice in making admission to pre-primary and pre-school classes by these private unaided schools……."

(emphasis supplied)

33. Consequently, this Court is prima facie of the view that the impugned order has been issued without any authority. This Court is also of the prima facie view that being in direct conflict with the Order of 2007, it is the impugned order which will have to give way.

34. Even if the respondents' submission is accepted, then also this Court is of the prima facie view that Article 239AA(3)(c) of the Constitution of India would be attracted to the present case. The relevant portion of Article 239AA of the Constitution of India reads as under : -

"239AA. Special provisions with respect to Delhi.—(1) As from the date of commencement of the Constitution (Sixty-ninth Amendment) Act, 1991, the Union territory of Delhi shall be called the National Capital Territory of Delhi (hereafter in this Part referred to as the National Capital Territory) and the administrator thereof appointed under Article 239 shall be designated as the Lieutenant Governor.

xxxx xxxx xxxx xxxx

(3) (a) Subject to the provisions of the Constitution, the Legislative Assembly shall have power to make laws for the whole or any part of the National Capital Territory with respect to any of the matters enumerated in the State of List or in the Concurrent List in so far as any such matter is applicable to Union territories except matters with respect to Entries 1, 2, and 18 of the State List and Entries 64, 65 and 66 of that List in so far as they relate to the said Entries 1, 2 and 18.

xxxx xxxx xxxx xxxx

(c) If any provision of a law made by the Legislative Assembly with respect to any matter is repugnant to any provision of a law made by Parliament with respect to that matter, whether passed before or after the law made by the Legislative Assembly, or of an earlier law, other than a law made by the Legislative Assembly, then, in either case, the law made by Parliament, or, as the case may be, such earlier law, shall prevail and the law made by the Legislative Assembly shall, to the extent of the repugnancy, be void:……"

(emphasis supplied)

BOTH PARTIES SWEAR BY THE SAME JUDGMENT, VIZ., FORUM FOR PROMOTION OF QUALITY EDUCATION FOR ALL *(SUPRA) IN WHICH IT HAS BEEN HELD THAT PRIVATE UNAIDED SCHOOL MANAGEMENTS HAVE A FUNDAMENTAL RIGHT UNDER ARTICLES 19 (1)(g) TO ESTABLISH, RUN AND ADMINISTER THEIR SCHOOLS, INCLUDING THE RIGHT TO ADMIT STUDENTS*

35. From the impugned order, it is apparent that this is one of the few cases where both the petitioners and the respondents 'swear by the same judgment'. While the respondents state that the impugned order has been issued in accordance with the observations made by this Court in *Forum for Promotion of Quality Education For All* (supra), the petitioners challenge it primarily on the basis of the said judgment.

36. It is pertinent to mention that this Court in *Forum for Promotion of Quality Education for All* (supra) after relying upon the observations in *T.M.A. Pai Foundation* (supra) has held that the private unaided school managements have a fundamental right under Articles 19(1)(g) to establish, run and administer their schools, including the right to admit students. The relevant portion of *T.M.A. Pai Foundation* (supra) quoted in the said judgment, is reproduced hereinbelow : -

"20. Article 19(1)(g) employs four expressions, viz., profession, occupation, trade and business. Their fields may overlap, but each of them does have a content of its own. Education is per se regarded as an activity that is charitable in nature [See The State of Bombay *v.* R.M.D. Chamarbaugwala. Education *has so far not been regarded as a trade or business where profit is the motive. Even if there is any doubt about whether education is a profession or not, it does appear that education will fall within the meaning of the expression "occupation"……..*

xxxx xxxx xxxx xxxx

25. The establishment and running of an educational institution where a large number of persons are employed as teachers or administrative staff, and an activity is carried on that results in the imparting of knowledge to the students, must necessarily be regarded as an occupation, even if there is no element of profit generation. It is difficult to comprehend that education, per se, will not fall under any of the four expressions in Article 19(1)(g).

xxxx xxxx xxxx xxxx

38. The scheme in Unni Krishnan's case *has the effect of nationalizing education in respect of important features, viz., the right of a private unaided institution to give admission and to fix the fee. By framing this scheme, which has led to the State Governments legislating in conformity with the scheme the private institutions are undistinguishable from the government institutions; curtailing all the essential features of the right of administration of a private unaided educational institution can neither be called fair or reasonable……..*

xxxx xxxx xxxx xxxx

40. Any system of student selection would be unreasonable if it deprives the private unaided institution of the right of rational selection, which it devised for itself, subject to the minimum qualification that may be prescribed and to some system of computing the equivalence between different kinds of qualifications, like

a common entrance test. Such a system of selection can involve both written and oral tests for selection, based on principle of fairness.

41. Surrendering the total process of selection to the state is unreasonable, as was sought to be done in the Unni Krishnan scheme……..

xxxx xxxx xxxx xxxx

Private unaided non-minority educational institutions

48. Private education is one of the most dynamic and fastest growing segments of post-secondary education at the turn of the twenty-first century……

xxxx xxxx xxxx xxxx

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

(a) to admit students:

(b) to set up a reasonable fee structure:

(c) to constitute a governing body;

(d) to appoint staff (teaching and non-teaching); and

(e) to take action if there is dereliction of duty on the part of any employees."

xxxx xxxx xxxx xxxx

55. ……..But the essence of a private educational institution is the autonomy that the institution must have in its management and administration. There, necessarily, has to be a difference in the administration of private unaided institutions and the government-aided institutions. Whereas in the latter case, the Government will have greater say in the administration, including admissions and fixing of fees, in the case of private unaided institutions, maximum autonomy in the day-to-day administration has to be with the private unaided institutions. Bureaucratic or governmental interference in the administration of such an institution will undermine its independence. While an educational institution is not a business, in order to examine the degree of independence that can be given to a recognized educational institution, like any private entity that does not seek aid or assistance from the Government, and that exists by virtue of the funds generated by it, including its loans or borrowings, it is important to note that the essential ingredients of the management of the private institution include the recruiting students and staff, and the quantum of fee that is to be charged.

xxxx xxxx xxxx xxxx

60. Education is taught at different levels, from primary to professional. It is, therefore, obvious that government regulations for all levels or types of educational institutions cannot be identical; so also, the extent of control or regulation could be greater vis-à-vis aided institutions.

61. In the case of unaided private schools, maximum autonomy has to be with the management with regard to administration, including the right of appointment, disciplinary powers, admission of students and the fees to be charged. At the school level, it is not possible to grant admissions on the basis of merit. It is no secret that the examination results at all levels of unaided private schools, notwithstanding the stringent regulations of the governmental authorities, are far superior to the results of the government-maintained schools. There is no compulsion on students to attend private schools. The rush for admission is occasioned by the standards maintained in such schools, and recognition of the fact that State-run schools do not provide the same standards of education. The State says that it has no funds to establish institutions at the same level of excellence as private schools. But by curtailing the income of such private schools, it disables those schools from affording the best facilities because of a lack of funds. If this lowering of standards from excellence to a level of mediocrity is to be avoided, the State has to provide

the difference which, therefore, brings us back in a vicious circle to the original problem viz. the lack of State funds. The solution would appear to lie in the States not using their scanty resources to prop up institutions that are able to otherwise maintain themselves out of the fees charged, but in improving the facilities and infrastructure of State-run schools and in subsidizing the fees payable by the students there. It is in the interest of the general public that more good quality schools are established; autonomy and non-regulation of the school administration in the right of appointment, admission of the students and the fee to be charged will ensure that more such institutions are established……

xxxx xxxx xxxx xxxx

65. ……..The private educational institutions have a personality of their own, and in order to maintain their atmosphere and traditions, it is but necessary that they must have the right to choose and select the students who can be admitted to their courses of studies. It is for this reason that in St. Stephen's College case this Court upheld the scheme whereby a cut-off percentage was fixed for admission, after which the students were interviewed and thereafter selected. While an educational institution cannot grant admission on its whims and fancies, and must follow some identifiable or reasonable methodology of admitting the students, any scheme, rule or regulation that does not give the institution the right to reject candidates who might otherwise be qualified according to, say, their performance in an entrance test, would be an unreasonable restriction under Article 19(6), though appropriate guidelines/modalities can be prescribed for holding the entrance test in a fair manner. Even when students are required to be selected on the basis of merit, the ultimate decision to grant admission to the students who have otherwise qualified for the grant of admission must be left with the educational institution concerned. However, when the institution rejects such students, such rejection must not be whimsical or for extraneous reasons."

(emphasis supplied)

37. Consequently, promoters of a school who make investment at their own personal risk are entitled to full autonomy in administration including the right to admit students.

AUTONOMY HAS ALSO BEEN RECOGNISED AND CONFERRED UPON SCHOOLS BY SECTION 16(3) OF ACT, 1973 AND RULE 145 OF RULES, 1973

38. This Court in *Forum for Promotion of Quality Education for All* (supra) pointed out that the concept of autonomy has also been recognized and conferred upon schools by the Act, 1973 and the Rules, 1973. Rule 145 of Rules, 1973 states that the head of every recognised unaided school shall regulate admissions in its school. Consequently, it was held that the private unaided schools have maximum autonomy in day-to-day administration including the right to admit students.

RESTRICTION UNDER ARTICLE 19(6) CAN ONLY BE BY WAY OF A LAW AND NOT BY WAY OF AN OFFICE ORDER WITHOUT ANY AUTHORITY OF LAW

39. This Court further held in *Forum for Promotion of Quality Education for All* (supra) that no citizen can be deprived of his fundamental right guaranteed under Article 19(1) of the Constitution in pursuance to an executive action without any authority of law. If any executive action operates to the prejudice of any person, it must be supported by legislative authority, i.e., a specific statutory provision or rule of law must authorise such an action. Executive instruction in the form of an administrative order unsupported by any statutory provision is not a justifiable restriction on fundamental rights.

40. However, the impugned order is once again an administrative order and not a law made by the Legislature. In fact, the impugned order has been issued without the mandatory advice of the Advisory Board under Section 22 of the Act, 1973 and is

contrary to Rule 145 of Rules, 1973.

IMPUGNED ORDER NOT BASED ON THE LEASE DEED

41. The submission on behalf of learned counsel for the intervener Mr. Khagesh B. Jha that the petitioners-schools have no discretion in admission because of a covenant in the lease deed cannot be examined at this stage as this is not one of the reasons stated in the impugned order and the petitioners have had no occasion to deal with the same. Consequently, this plea can only be considered at the stage of final hearing after the petitioners' have had notice of the present application.

PETITIONERS' CONFINE THEIR CHALLENGE TO ELEVEN CRITERIA WHICH IN THE PRIMA FACIE OPINION OF THIS COURT ARE NOT BASED ON WHIMS AND FANCIES.

42. To be fair, the learned senior counsel for the petitioners stated that they are confining their challenge at this stage to only eleven out of the sixty-two criteria, besides the management quota, which according to them was not a criterion. The statement made by learned senior counsel for petitioners that they are confining their challenge at this stage to only eleven out of sixty-two criteria excluding the management quota is accepted by this Court and the petitioners are held bound by the same.

43. This Court is prima facie of the view that there is nothing in the eleven criteria which would show that they are unreasonable or based on whims and fancies and/or they can lead to mal-administration. Taking into account the parentage of the child may be relevant in certain circumstances, for instance, if the father of the child was a recipient of a gallantry award or a sports award or had given valuable advice and service to the school like a Doctor, then giving preference to such a ward in admission would not constitute mal-administration. In all probability, such parents would contribute to the growth and evolution of the school as well as its students. It is pertinent to mention that even the EWS Category is based on parentage of the child itself.

44. The criteria which promote admission of a girl child and/or adopted children are not only in consonance with Constitutional norms, but also the need of the hour.

MANAGEMENT QUOTA

45. This Court finds that initially all private unaided schools being established by private means used to fill up hundred per cent of their seats on their own. A balancing act was done by the Ganguly Committee and the Government whereby discretion of private unaided schools was minimised, but not altogether abolished. It is pertinent to mention that management quota had been recommended by Expert Ganguly Committee formed by a Division Bench and accepted and approved by the GNCTD in its Order of 2007. The same has been implemented from 24th November, 2007 to 18th December, 2013. Even the Office Order dated 18th December, 2013 issued by the Lieutenant Governor seeking to delete management quota was quashed by judgment dated 28th November, 2014.

46. After the conclusion of hearing, this Court had summoned the file of LPA 781/2014 filed by Directorate of Education against judgment dated 28th November, 2014 in *Forum for Promotion of Quality Education for All* (supra) and found that it contains a number of grounds assailing the quashing of deletion of management quota. The Division Bench refused to grant stay of the quashing of the deletion of the management quota by way of a reasoned order dated 10th December, 2014. Consequently, at this prima facie stage, the deletion of management quota by way of an office order is impermissible in law.

47. This Court is also of the view that the management quota has been recognised by the Supreme Court to be permissible and legal in *P.A. Inamdar* (supra) and *Christian Medical College, Vellore* v. *Union of India* (2014) 2 SCC 305. The petitioners have also pointed out that in Guru Gobind Singh Indraprastha University, guidelines

permit management quota in institutes of higher technical/professional education, where admissions are solely based on merit. In the opinion of this Court, what applies to higher educational institutions applies with greater vigour to schools. [See : Paras 60 & 61 in *T.M.A. Pai Foundation* (supra)]

ALLEGATIONS OF MALPRACTICE SHOULD BE INVESTIGATED AND TAKEN TO THEIR LOGICAL CONCLUSION

48. However, any alleged malpractice in utilization of the management quota like sale of seats being actionable should be investigated and taken to its logical conclusion in accordance with law, but it cannot be a ground to abolish the quota itself. After all, vesting of discretion is not bad, but to misuse it, is illegal.

49. Consequently, till final disposal of the writ petitions, the impugned order dated 06th January, 2016 is stayed with respect to the eleven criteria (mentioned in para 2 hereinabove) and the management quota.

50. Accordingly, the applications stand disposed of.